THE

ALL INDIA REPORTER

1919

MADRAS SECTION

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF

THE MADRAS HIGH COURT

REPORTED IN

(1) I. L. R. 42 MADRAS
(2) 36 & 37 MADRAS LAW JOURNAL
(3) 25 & 26 MADRAS LAW TIMES
(4) 9 & 10 MADRAS LAW WEEKLY
(5) 1919 MADRAS WEEKLY NOTES
(6) 20 CRIMINAL LAW JOURNAL
(7) 49 TO 53 INDIAN CASES

CITATION —A. I. R. 1919 MADRAS

PRINTED BY D. G. RANADE AT THE ALL INDIA REPORTER PRESS, NAGPUR.

AND PUBLISHED BY

V. V. CHITALEY, B.A., LL.B.

AT THE ALL INDIA REPORTER OFFICE,

NAGPUR, C. P.

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MADRAS HIGH COURT

1919

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Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 42 Madras=All India Reporter.

ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.		
1	1919	*M*	752	121	1919	*M*	566	331	1919	*M*	477	540	1919	*M*	7	686	1919	*M*	241
7	"	"	1075	130	"	"	879	335	"	"	351	547	1920	"	862	690	1920	"	812
9	"	"	20	132	"	"	434	338	"	"	424	548	1919	"	654	692	1919	"	66
13	"	"	947	143	"	"	257	348	"	"	524	561	"	"	45	699	"	"	93
15	"	"	829	154	"	"	500	352	"	"	678	565	"	"	594	702	"	"	236
20	"	"	781	161	"	"	515	355	1918	*PC*	148	567	"	"	339	711	"	"	75
25	"	"	865	180	"	"	968	360	1919	*M*	384	576	"	"	445	737	"	"	1166
32	1918	"	18	185	"	"	641	400	1918	*PC*	182	578	"	"	876	753	"	"	269
33	1919	"	646	197	"	"	535	407	1919	*M*	1	581	1918	*PC*	156	761	1920	"	919
36	"	"	650	203	"	"	168	422	"	"	410	589	1919	"	1	776	"	"	911
41	"	"	833	219	"	"	871	425	"	"	779	603	1920	*M*	838	787	1919	"	52
52	"	"	709	228	"	"	275	431	"	"	531	615	1919	"	94	789	"	"	247
57	"	"	848	231	"	"	583	440	"	"	809	618	1920	"	880	791	1920	"	824
59	"	"	779	239	"	"	412	446	"	"	226	625	"	"	800	796	"	"	808
61	"	"	792	269	"	"	312	451	"	"	514	629	1919	"	444	802	1919	"	544
64	"	"	610	271	"	"	674	455	"	"	209	632	1920	"	852	805	"	*PC*	162
69	"	"	24	283	"	"	557	461	"	"	192	637	1919	"	317	813	"	"	150
76	"	"	510	292	"	"	573	465	"	"	231	644	"	"	222	821	1920	*M*	427
83	"	"	907	296	"	"	998	470	"	"	262	647	1920	"	937	844	"	"	804
90	"	"	100	302	"	"	432	475	"	"	397	654	1919	"	12	854	"	"	627
96	"	"	620	310	"	"	672	503	"	"	717	661	"	"	164	869	1919	"	28
103	"	"	540	315	"	"	927	507	"	"	887	668	"	"	159	873	1920	"	819
109	"	"	653	319	"	"	656	510	"	"	333	673	1920	"	885	880	1919	"	229
111	"	"	777	322	"	"	161	523	1918	*PC*	196	684	1919	"	167	885	1920	"	928
114	"	"	733	327	"	"	767												

TABLE No. II.

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1919 with corresponding references of the ALL INDIA REPORTER.

N.B.—Column No. 1 denotes pages of other JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

36 Madras Law Journal=All India Reporter

MLJ	A. I. R.			MLJ	A. I. R.			MLJ	A. I. R.			MLJ	A. I. R.			MLJ	A. I. R.		
1	1918	*PC*	129	122	1919	*M*	581	231	1919	*M*	257	352	1919	*M*	410	507	1919	*M*	464
18	"	"	121	124	"	"	412	242	"	"	500	355	"	"	570	511	1918	*PC*	192
27	1919	*M*	316	151	1918	*PC*	149	248	"	"	927	356	"	"	779	521	1919	"	12
28	"	"	312	157	1919	*M*	887	252	"	"	226	361	1920	"	880	526	"	"	9
29	"	"	641	159	"	"	482	257	1918	*PC*	182	367	1919	"	12	529	"	*M*	573
40	1918	*PC*	97	161	"	"	946	262	1919	*M*	515	372	"	"	477	532	"	"	266
49	"	"	173	164	1918	*PC*	156	279	1918	*PC*	148	376	"	"	424	538	1920	"	852
60	1920	*M*	218	169	1919	*M*	871	284	1919	*M*	594	385	"	"	1	543	1919	*PC*	1
62	1919	"	409	175	"	"	773	286	"	"	876	396	"	"	384	557	1918	"	151
64	"	"	968	180	"	"	467	288	"	"	231	429	1918	*PC*	146	565	1919	*M*	241
68	1918	*PC*	140	184	"	"	172	291	1920	"	800	435	1919	*M*	23	568	"	"	444
79	1919	*M*	674	188	"	"	104	295	1919	"	351	436	"	"	468	571	"	"	672
89	"	"	304	189	"	"	189	296*a*	"	"	524	437	1918	*PC*	188	575	"	"	809
92	"	"	864	190	"	"	333	296*c*	"	"	45	448	1919	*M*	7	580	"	*PC*	11
93	"	"	292	199	"	"	192	296*g*	1920	"	646	452	"	"	19	585	1918	"	169
95	"	"	583	201	"	"	654	298	1919	"	717	453	"	"	167	597	"	"	87
103	"	"	274	203	"	"	765	301	"	"	262	455	"	"	222	612	1919	*M*	531
104	"	"	656	207	"	"	767	306	"	"	557	456	"	"	164	618	"	"	528
106	"	"	16	210	1918	*PC*	180	313	"	"	168	461	"	"	632	624	"	"	233
109	"	"	535	215	"	"	159	320	"	"	397	463	"	"	293	630	"	"	250
114	"	"	432	222	1919	*M*	514	344	1918	*PC*	203	483	"	*PC*	6	641	1920	"	871
118	"	"	186	226	"	"	209	351	1919	*M*	678	493	1918	"	196	660	1919	*PC*	17
119	"	"	275																

37 Madras Law Journal=All India Reporter

MLJ	A. I. R.			MLJ	A. I. R.			MLJ	A. I. R.			MLJ	A. I. R.			MLJ	A. I. R.		
1	1919	*PC*	162	159	1920	*M*	936	284	1920	*M*	427	433	1919	*M*	103	596	1920	*M*	289
11	"	"	150	162	1919	"	244	303	1919	"	264	435	1920	"	355	599	"	"	640
17	1920	*M*	862	166	"	"	75	307	"	"	240	442	"	"	505	611	"	"	940
28	1919	"	339	188	"	*PC*	126	309	"	"	218	449	"	"	391	613	1919	"	462
36	"	*PC*	29	193	1920	*M*	819	313	1920	"	378	460	1919	*PC*	62	617	"	"	320
42	"	"	111	199	1919	*PC*	39	316	"	"	919	483	"	"	24	618	1920	"	417
47	1920	*M*	838	206	"	*M*	272	332	"	"	413	489	"	*M*	659	620	"	"	316
59	1919	"	844	209	1920	"	728	335	"	"	867	509	"	"	184	624	"	"	206
60	1920	"	824	213	1919	"	545	340	1919	"	269	513	"	*PC*	75	627	"	"	666
65	1919	"	429	216	1920	"	1034	346	1920	"	579	525	"	"	79	652	"	"	144
71	1920	"	885	220	1919	"	28	349	1919	"	242	536	1920	*M*	898	654	"	"	584
81	"	"	928	224	1920	"	808	353	"	"	838	539	"	"	271	656	"	"	151
92	1919	"	52	231	1919	"	571	356	1920	"	97	544	1919	"	191	659	"	"	374
93	1920	"	937	234	"	"	229	361	1919	"	193	547	1920	"	187	661	"	"	1013
98	1919	"	94	238	1920	"	854	367	"	"	534	554	"	"	246	663	"	"	344
100	"	"	150	244	"	"	219	369	"	"	370	562	1919	*PC*	100	693	1919	"	186
109	"	"	544	246	1919	"	36	375	1920	"	804	578	"	"	42	695	1920	"	99
110	1920	"	407	248	"	"	236	384	"	"	627	586	1920	*M*	422	693	"	"	155
113	1919	"	105	256	1920	"	793	399	"	"	713	588	"	"	352	706	"	"	292
125	"	"	1166	270	"	"	359	402	1919	"	538	589	1919	"	166	712	"	"	177
139	"	*PC*	31	271	"	"	567	405	1920	"	361	591	1920	*M*	387	724	1919	*PC*	52
157	"	*M*	247	274	"	"	911												

25 Madras Law Times=All India Reporter

MLT	A. I. R.			MLT	A. I. R.			MLT	A. I. R.			MLT	A. I. R.			MLT	A. I. R		
1	1918	*PC*	97	80	1918	*PC*	217	184	1919	*M*	871	253	1919	*M*	809	332	1919	*M*	1
8	"	"	85	83	1919	*M*	573	190	"	"	275	257	"	"	471	341	1918	*PC*	180
12	1919	*M*	467	85	"	"	274	191	"	"	104	258	1918	*PC*	146	345	1919	*M*	654
15	"	"	968	86	"	"	943	192	"	"	209	265	1919	*M*	333	347	"	"	528
18	"	"	896	88	1920	"	871	204	"	"	447	272	"	"	351	351	"	"	524
19	"	"	469	103	1918	*PC*	129	220	"	"	649	274	"	"	226	353	"	"	321
22	"	"	653	116	1919	*M*	479	221	"	"	411	278	1918	*PC*	159	356	"	"	45
23	"	"	641	121	"	"	412	223	"	"	266	286	1919	*M*	343	358	"	"	443
30	1918	*PC*	169	139	"	"	198	227	"	"	545	290	"	"	864	360	"	"	572
39	1919	*M*	674	140	"	"	30	229	"	"	432	291	"	"	887	361	"	"	233
46	"	"	20	141	"	"	515	232	"	"	765	292	"	"	678	365	"	"	733
47	"	"	257	153	"	"	949	235	1918	*PC*	149	293	"	"	779	371	"	"	816
55	1918	*PC*	249	154	"	"	562	242	1919	*M*	164	296	"	"	410	374	"	"	500
64	"	"	168	159	1918	*PC*	102	245	"	"	581	298	1918	*PC*	188	379	"	"	487
66	1919	*M*	212	175	1919	*M*	846	247	"	"	656	304	1919	*M*	384	395	"	"	332
71	"	"	777	177	"	"	551	248	"	"	535	331	"	"	946	397	1920	"	800
73	1918	*PC*	121	182	"	"	717									400	1918	*PC*	156

26 Madras Law Times=All India Reporter

MLT	A. I. R.			MLT	A. I. R.			MLT	A. I. R.			MLT	A. I. R.			MLT	A. I. R.		
1	1918	*PC*	182	96	1919	*M*	75	189	1919	*M*	241	270	1919	*M*	767	363	1920	*M*	579
5	"	"	196	114	"	"	273	192	1920	"	221	271	1920	"	505	364	"	"	246
16	1919	"	1	115	1920	"	728	195	"	"	919	276	"	"	819	370	1919	*PC*	20
24	"	*M*	287	119	1919	"	28	207	1918	*PC*	203	281	"	"	804	377	1920	"	640
32	1918	*PC*	148	122	1920	"	808	214	1920	*M*	252	287	"	"	867	385	"	"	1014
35	1919	"	162	127	1919	*PC*	150	219	"	"	567	291	1919	"	711	386	"	"	420
40	"	"	12	131	1918	"	151	221	"	"	219	295	"	"	445	389	"	"	1025
43	"	*M*	876	136	1920	*M*	407	223	"	"	427	297	"	"	269	391	"	"	324
45*a*	"	"	19	139*a*	"	"	890	238	1919	"	193	301	1920	"	627	408	1919	*PC*	31
45*b*	"	"	594	139*b*	1919	"	93	242	"	"	547	311	1919	"	293	419	1920	*M*	666
46	"	"	94	140	"	"	229	245*a*	"	"	224	327	1920	"	713	439	"	"	125
48	"	"	389	143	"	"	159	245*b*	1920	"	783	329	1919	"	272	440	"	"	374
55	"	*PC*	11	147	"	"	317	246	1919	"	1166	331	"	"	41	441	"	"	155
61	1920	*M*	987	151	1920	"	231	256	"	"	264	332	1920	"	834	447	"	"	344
64	"	"	824	153	1919	"	93	259	1920	"	137	339	"	"	391	459	"	"	1
68	"	"	862	154	1920	"	861	262	1919	"	333	348	"	"	884	479	1919	*PC*	62
76	1919	*PC*	17	175	1919	*PC*	111	265	1920	"	1013	350	"	"	489	489	"	"	39
82	"	*M*	66	178	"	"	9	266	"	"	584	354	1919	"	32	494	"	"	100
88	1920	"	984	180	"	*M*	363	268	"	"	417	359	"	"	191	504	1920	*M*	177
90	1919	"	167	186	"	"	242	269	1919	"	544	361	"	"	128	513	"	"	187
92	"	"	7									362	"	"	274				

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MLW	A. I. R.			MLW	A. I. R.			MLW	A. I. R.			MLW	A. I. R.			MLW	A. I. R.		
1	1919	*M*	943	98	1919	*M*	540	237	1919	*M*	620	343	1919	*M*	717	471	1919	*M*	560
5	"	"	469	104	"	"	434	243	1918	*PC*	97	349	"	"	45	474	"	"	468
8	"	"	581	113	"	"	851	251	1919	*M*	343	353	"	"	477	475	"	"	167
11	"	"	292	120	"	"	284	265	"	"	545	357	"	"	233	476	"	"	649
14	"	"	907	123	1918	*PC*	1	268	"	"	274	362	"	"	524	479	"	"	562
19	"	"	304	126	"	"	169	269	1918	*PC*	121	365	"	"	1	485	1918	*PC*	206
22	"	"	467	132	1919	*M*	500	276	1919	*M*	942	376	"	"	19	492	1919	*M*	384
26	"	"	510	138	"	"	257	278	"	"	432	377	"	"	809	513	"	"	14
32	"	"	840	148	1918	*PC*	102	282	"	"	266	379	"	"	887	518	1918	*PC*	11
36	"	"	566	164	1919	*M*	886	287	"	"	31	381	"	"	765	533	1920	*M*	898
43	"	"	95	166	"	"	479	289	"	"	412	385	"	"	447	535	"	"	934
52	1918	*PC*	87	171	1918	*PC*	129	311	"	"	844	411	1918	*PC*	148	538	"	"	221
60	"	"	112	180	1920	*M*	871	312	"	"	411	413	1919	*M*	351	541	1919	"	998
69	1919	*M*	20	198	1919	"	471	314	"	"	878					547	"	"	444
70	"	"	100	201	"	"	653	315	"	"	410	416	1918	*PC*	49	550	1918	*PC*	34
75	"	"	896	202	"	"	464	318	"	"	50	422	1919	*M*	7	552	"	"	92
78	"	"	864	208	"	"	674	322	"	"	678	427	"	"	462	558	"	"	4
79	"	"	30	216	"	"	864	323	"	"	779	431	"	"	12	565	1919	*M*	75
81	"	"	949	217	"	"	312	327	1918	*PC*	168	435	"	"	526	587	1920	"	885
82	"	"	332	218	"	"	535	329	1919	*M*	871	438	"	"	262	596	1919	*M*	358
84	"	"	212	224	"	"	809	335	1918	*PC*	140	443	"	"	424	598	"	"	94
90	"	"	312	229	"	"	641	345	1919	*M*	572	453	"	"	293	600	1920	*M*	937

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MLW	A. I. R.			MLW	A. I. R.			MLW	A. I. R.			MLW	A. I. R.			MLW	A. I. R.		
1	1919	*M*	711	153	1920	*M*	927	291	1920	*M*	231	400	1918	*PC*	182	554	1920	*M*	352
7	1920	"	854	155	1919	"	139	293	1919	*M*	242	405	1920	*M*	867	555	"	"	374
12	1919	"	542	156	1920	"	793	297	1920	"	378	410	1919	"	269	556	"	"	290
13	"	"	275	169	"	"	906	300	1919	"	272	416	1918	*PC*	151	559	"	"	227
15	"	"	209	170	"	"	900	303	1920	"	359	422	1919	*M*	215	564	1919	"	186
21	1918	*PC*	149	172	"	"	527	305	"	"	137	427	1920	"	834	566	"	"	197
25	1919	*M*	93	174	1919	"	218	310	1919	*PC*	29	436	1919	*PC*	126	568	1920	"	144
26	1918	*PC*	159	178	"	"	93	314	1920	*M*	252	438	"	*M*	154	570	"	"	344
31	1919	*M*	273	179	1920	"	416	322	1918	*PC*	156	445	1920	"	314	586	"	"	488
33	"	"	652	180	"	"	814	326	1920	*M*	567	447	1919	"	166	589	"	"	122
34	1918	*PC*	226	183	"	"	819	329	1919	"	534	449	1920	"	1035	592	"	"	379
39	1919	*M*	179	190	"	"	1034	331	1920	"	417	451	1919	*PC*	31	594	"	"	489
45	1920	"	862	193	1919	*PC*	162	333	1919	"	317	466	1920	*M*	352	599	1919	*PC*	181
57	1919	"	22	200	1920	*M*	783	339	1918	*PC*	192	471	"	"	713	605	1920	*M*	169
59	"	"	161	201	"	"	933	346	1919	*M*	52	474	1919	"	103	606	"	"	640
64	"	"	580	202	1919	"	32	347	"	*PC*	17	476	1920	"	270	616	"	"	551
66	"	"	256	204	1920	"	919	354	"	*M*	36	480	"	"	847	620	"	"	274
67	"	"	146	220	"	"	851	357	"	"	196	491	"	"	884	627	"	"	420
75	"	"	105	221	1919	"	145	359	1920	"	898	494	"	"	146	630	"	"	284
83	1918	*PC*	85	222	"	"	220	362	1919	*PC*	150	496	1919	"	191	633	1919	*PC*	111
87	1919	*M*	339	225	"	"	224	366	"	*M*	274	498	1920	"	20	637	1920	*M*	545
95	1920	"	838	226	1920	"	407	367	1920	"	584	511	1919	*PC*	6	640	"	"	219
105	1918	*PC*	196	229	1919	"	193	370	1919	"	192	518	1920	*M*	385	642	1919	*PC*	62
118	1919	*M*	28	235	"	"	229	372	1920	"	1013	521	"	"	94	656	1920	*M*	289
122	"	"	1166	239	"	"	487	374	1919	*PC*	9	525	"	"	688	659	"	"	230
135	"	"	225	261	1920	"	579	376	"	*M*	544	533	"	"	355	662	"	"	220
137	"	"	130	263	"	"	824	377	"	"	128	540	"	"	890	664	"	"	728
140	"	"	615	267	"	"	1014	379	"	"	222	544	1919	"	70	669	"	"	154
142	"	"	247	269	"	"	857	381	"	*PC*	1	550	1920	"	152	672	"	"	155
143	1918	*PC*	146	274	1918	*PC*	188	391	1920	*M*	804	551	1919	"	157	679	1919	*PC*	44
147	1920	*M*	808	281	1920	*M*	391	399	1919	"	41								

1919 Madras Weekly Notes=All India Reporter

MWN	A. I. R.			MWN	A. I. R.			MWN	A. I. R.			MWN	A. I. R.			MWN	A. I. R.		
1	1918	*PC*	1	52	1919	*M*	447	144	1919	*M*	464	199	1919	*M*	487	247	1919	*M*	351
3	1919	*M*	773	72	"	"	343	146	"	"	1139	216	"	"	233	248	"	"	424
7	1920	"	871	82	"	"	562	148	"	"	641	219	"	"	649	254	1918	*PC*	135
20	1919	*M*	320	87	"	"	711	155	1918	*PC*	87	221	1920	"	800	258	"	"	151
21	"	"	486	91	1918	*PC*	11	161	1919	*M*	397	223	1919	"	410	262	"	"	196
23	"	"	471	103	1919	*M*	174	180	"	"	50	225	"	"	779	271	1919	"	1
25	"	"	733	107	"	"	510	183	"	"	45	228*a*	"	"	274	278	1918	"	125
29	"	"	312	112	"	"	896	185	"	"	462	228*b*	"	"	515	284	1919	*M*	998
34	"	"	212	113	"	"	434	188	"	"	262	240	1920	"	880	287	"	"	743
39	"	"	257	120	"	"	412	191	"	"	765	244	1919	"	526	293	"	"	333
46	"	"	674	139	"	"	500	194	"	"	168	246	"	"	844				

1919 Madras Weekly Notes=All India Reporter—(*Concld.*)

MWN	A. I. R.	MWN	A. I. R.	MWN	A. I. R.	MWN	A. I. R.	MWN	A. I. R.
299	1919 *M* 524	433	1919 *M* 654	535	1919 *M* 615	636	1919 *M* 242	768	1919 *M* 236
301	" " 444	435	" " 809	536	1920 " 927	639	1920 " 1014	773	" " 186
302	" " 241	436*a*	" " 274	537	" " 814	640	" " 427	775	" *PC* 52
305	" " 339	436*b*	" " 1075	538	1919 " 28	653	" " 936	780	" *M* 179
310	1918 *PC* 146	437	" " 571	541	1918 *PC* 182	654	" " 854	784	1920 " 911
313	" " 192	440	1920 " 793	544	1919 *PC* 181	658	1919 " 32	792	" " 567
318	" " 180	448	1919 " 317	548	" *M* 130	662	1920 " 900	793	" " 359
321	" " 129	452	" " 226	550	" " 580	669	" " 928	794	1919 " 93
328	1919 *M* 531	455	" " 17	551	" *PC* 162	677	" " 900	795	1920 " 219
332	" " 429	458	" " 445	555	" " 31	678	" " 804	796	1919 " 128
336	" " 266	459	" " 7	565	1920 *M* 407	683	" " 867	797	1920 " 352
340	1920 " 862	463	1918 *PC* 169	568	" " 1034	687	1919 " 103	800	1919 " 154
347	1918 *PC* 159	467	1919 *M* 284	570	1919 " 139	688	" " 545	805	1920 " 822
350	1919 *M* 443	468	" " 432	571	" " 247	690	" " 535	807	1919 " 196
351	" " 846	471	1918 *PC* 102	572	1920 " 933	693	" " 942	808	1920 " 824
353	" " 338	484	1919 *M* 164	573	1919 " 218	695	" " 864	811	1919 *PC* 84
355	" " 94	487	1920 " 937	576	" " 36	696	1920 " 378	813	1920 *M* 94
356	" " 305	490*a*	1919 " 23	577	" " 229	698	1919 " 656	815	1919 " 191
365	" " 31	490*b*	1918 *PC* 118	580	1920 " 361	699	1920 " 391	817	" *PC* 39
366	" " 767	494	1919 " 11	598	1919 " 544	707*a*	1919 " 145	821	" " 24
368	" " 632	496	1918 " 148	599	" " 93	707*b*	1920 " 137	824	" " 126
369	" " 946	498	1919 " 12	600	1920 *M* 919	710	1919 " 184	826	1920 *M* 344
370	" " 384	500	" " 9	611	" " 231	712	" " 321	836	" " 518
393	" " 1	502	" " 150	612	1919 " 167	714	" " 560	850	1919 *PC* 62
401	1920 " 838	505	" " 29	613	" " 547	716	1920 " 627	860	" " 75
407	1919 " 717	507	1918 " 137	615	1920 " 728	724	1919 *PC* 44	866	" *M* 105
409	" " 75	511	" " 156	618	" " 808	728	1920 *M* 505	872	1920 " 847
425	" " 878	513	1919 " 6	622	" " 890	732	1919 " 269	878	" " 890
426	" " 809	518	1918 " 203	623	1919 " 66	736	1920 " 885	881	" " 324
429	" " 332	522	1919 *M* 159	628	1920 " 819	742	" " 834	897	" " 481
431	" " 411	525	" " 1166	632	1919 " 193	748	1919 *PC* 108	899	" " 42
432	" " 887	534	" " 32						

20 Cr. L. J. & 49 to 53 Indian Cases=All India Reporter.

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1919 Lahore.**

TABLE No. III

Showing seriatim the pages of ALL INDIA REPORTER, 1919 MADRAS, with corresponding references of other REPORTS, JOURNALS and PERIODICALS.

N. B.—Column 1 denotes pages of the ALL INDIA REPORTER, 1919 MADRAS.
Column 2 denotes corresponding references of other REPORTS and JOURNALS.

A. I. R. 1919 Madras=Other Journals.

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
1FB42	*Mad* 407	14	52 *I C* 540	23	50 *I C* 886	31 (2)52	*I C* 468
36	*M L J* 385	16	36 *M L J* 106	24	42 *Mad* 69	32 (1)10	*M L W* 202
9	*M L W* 365		52 *I C* 509		35 *M L J* 736		1919*M W N* 534
25	*M L T* 332	17	1919*M W N* 455		24 *M L T* 505		51 *I C* 252
50	*I C* 205		52 *I C* 625		1918*M W N* 856	32 (2)26	*M L T* 354
	1919*M W N* 293	19	36 *M L J* 452		49 *I C* 161		1919*M W N* 658
7FB42	*Mad* 540		26 *M L T* 45		20 *Cr L J* 129		53 *I C* 555
36	*M L J* 448		9 *M L W* 376	26	50 *I C* 892	36	37 *M L J* 246
26	*M L T* 92		50 *I C* 832	28	42 *Mad* 869		10 *M L W* 354
9	*M L W* 422		20 *Cr L J* 352		37 *M L J* 220		1919*M W N* 576
	1919*M W N* 459	20(1)	25 *M L T* 46		26 *M L T* 119		53 *I C* 642
	50 *I C* 824		9 *M L W* 69		10 *M L W* 118	37	50 *I C* 815
	20 *Cr L J* 844		49 *I C* 86		1919*M W N* 538	38	35 *M L J* 625
8	24 *M L T* 424	20 (2)42	*Mad* 9		53 *I C* 249		49 *I C* 156
	8 *M L W* 551		24 *M L T* 256	30 (1)25	*M L T* 140	41	26 *M L T* 331
	49 *I C* 89		8 *M L W* 350		9 *M L W* 79		10 *M L W* 399
	1918*M W N* 688		49 *I C* 167		1918*M W N* 929		53 *I C* 825
12	42 *Mad* 654		20 *Cr L J* 135		49 *I C* 139		20 *Cr L J* 825
	36 *M L J* 367	22	10 *M L W* 57	30 (2)52	*I C* 609	42	52 *I C* 614
	9 *M L W* 431		51 *I C* 58	31 (1)52	*I C* 637	43	24 *M L T* 502
	50 *I C* 898	23	36 *M L J* 485	31 (2)9	*M L W* 287		49 *I C* 41
14	9 *M L W* 518		1919*M W N* 490		1919*M W N* 365	45 (1)52	*I C* 484

A. I. R. 1919 Madras=Other Journals—(*Contd.*)

A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals	
45 (2)	42 *Mad*	561	103	10 *M L W*	474	167	26 *M L T*	90	212	1919 *M W N*	34
	36 *M L J*	296		1919 *M W N*	687		1919 *M W N*	612		9 *M L W*	84
	9 *M L W*	349		53 *I C*	926		52 *I C*	442		52 *I C*	258
	1919 *M W N*	183	104	36 *M L J*	188	168	42 *Mad*	203	215	10 *M L W*	422
	25 *M L T*	356		25 *M L T*	191	SB	36 *M L J*	313		53 *I C*	161
	50 *I C*	987		52 *I C*	477		1919 *M W N*	194	218	37 *M L J*	309
	20 *Cr L J*	379	105	37 *M L J*	113		51 *I C*	507		10 *M L W*	174
47	35 *M L J*	410		10 *M L W*	75	172	36 *M L J*	184		1919 *M W N*	573
	24 *M L T*	358		1919 *M W N*	866		51 *I C*	748		53 *I C*	239
	8 *M L W*	432		51 *I C*	57	174	1919 *M W N*	103	220	10 *M L W*	222
	1918 *M W N*	675	111	53 *I C*	44		51 *I C*	217		52 *I C*	765
	49 *I C*	130	112	52 *I C*	639	177	51 *I C*	439	222(1)	10 *M L W*	379
50	9 *M L W*	318	113	24 *M L T*	376	179	10 *M L W*	39		53 *I C*	694
	1919 *M W N*	180		8 *M L W*	599		1919 *M W N*	780		20 *Cr L J*	790
	50 *I C*	969		1918 *M W N*	643		52 *I C*	370	222(2)	42 *Mad*	644
52 (1)	42 *Mad*	787		49 *I C*	179	183(1)	8 *M L W*	622		36 *M L J*	455
	37 *M L J*	92	121	35 *M L J*	120		51 *I C*	386		51 *I C*	656
	10 *M L W*	346		8 *M L W*	100	183(2)	52 *I C*	641	223	24 *M L T*	254
	50 *I C*	1003		49 *I C*	147	184	37 *M L J*	509		1918 *M W N*	562
	20 *Cr L J*	395	123	1918 *M W N*	507		1919 *M W N*	710		51 *I C*	536
52 (2)	52 *I C*	749		49 *I C*	141		53 *I C*	873	224	10 *M L W*	225
59	41 *Mad*	1043	128	10 *M L W*	377	186(1)	36 *M L J*	118		26 *M L T*	245
	35 *M L J*	414		1919 *M W N*	796		52 *I C*	313		53 *I C*	14
	24 *M L T*	370		26 *M L T*	361	186(2)	37 *M L J*	693	225	10 *M L W*	135
	8 *M L W*	405		53 *I C*	828		10 *M L W*	564		51 *I C*	42
	1918 *M W N*	917		20 *Cr L J*	828		1919 *M W N*	773	226	42 *Mad*	446
	49 *I C*	123	129	52 *I C*	622		53 *I C*	756		36 *M L J*	252
63	49 *I C*	466	130	10 *M L W*	137	187	7 *M L W*	610		25 *M L T*	274
	1918 *M W N*	902		1919 *M W N*	548		51 *I C*	512		1919 *M W N*	452
66	42 *Mad*	692		52 *I C*	517	188	53 *I C*	620		51 *I C*	198
	26 *M L T*	82	132	52 *I C*	704		20 *Cr L J*	780		20 *Cr L J*	422
	1919 *M W N*	623	139	37 *M L J*	209	189	36 *M L J*	189	229(1)	51 *I C*	176
	50 *I C*	925		10 *M L W*	155		51 *I C*	236		20 *Cr L J*	416
70	10 *M L W*	544		1919 *M W N*	570	190	35 *M L J*	259	229(2)	42 *Mad*	880
	52 *I C*	1003		52 *I C*	989		51 *I C*	674		37 *M L J*	234
75	42 *Mad*	711	140	41 *Mad*	871		20 *Cr L J*	514		26 *M L T*	140
FB	37 *M L J*	166		35 *M L J*	35	191	37 *M L J*	544		10 *M L W*	235
	26 *M L T*	96		24 *M L T*	38		26 *M L T*	359		1919 *M W N*	577
	9 *M L W*	565		8 *M L W*	340		10 *M L W*	496		52 *I C*	782
	1919 *M W N*	409		49 *I C*	69		1919 *M W N*	815	231	42 *Mad*	465
	52 *I C*	525	145	10 *M L W*	221		53 *I C*	771		36 *M L J*	288
87	50 *I C*	959		1919 *M W N*	707	192	42 *Mad*	461		51 *I C*	67
91	52 *I C*	697		52 *I C*	992		36 *M L J*	199	233	36 *M L J*	624
93 (1)	42 *Mad*	699	146	10 *M L W*	67		10 *M L W*	370		25 *M L T*	361
	26 *M L T*	139		52 *I C*	456		51 *I C*	102		9 *M L W*	357
	10 *M L W*	25	150	37 *M L J*	100	193	37 *M L J*	361		1919 *M W N*	216
	1919 *M W N*	794		52 *I C*	569		26 *M L T*	238		51 *I C*	822
	52 *I C*	380	154	10 *M L W*	438		10 *M L W*	229	236	42 *Mad*	702
93 (2)	26 *M L T*	153	FB	1919 *M W N*	800		1919 *M W N*	632		37 *M L J*	248
	10 *M L W*	178		53 *I C*	590		52 *I C*	893		1919 *M W N*	768
	1919 *M W N*	599	157	10 *M L W*	551		20 *Cr L J*	733		53 *I C*	33
	52 *I C*	1001		53 *I C*	760	196	10 *M L W*	357	240	37 *M L J*	307
94	42 *Mad*	615	159	42 *Mad*	668		1919 *M W N*	807		53 *I C*	229
FB	37 *M L J*	98		1919 *M W N*	522		53 *I C*	201	241	42 *Mad*	686
	26 *M L T*	46		26 *M L T*	143	197	10 *M L W*	566		36 *M L J*	565
	1919 *M W N*	355		53 *I C*	605		53 *I C*	862		1919 *M W N*	302
	9 *M L W*	598	161	42 *Mad*	322	198(1)	25 *M L T*	139		26 *M L T*	189
	51 *I C*	111		10 *M L W*	59		51 *I C*	221		51 *I C*	326
95	35 *M L J*	698		52 *I C*	519	198(2)	35 *M L J*	252	242	37 *M L J*	349
	24 *M L T*	440	164	42 *Mad*	661		51 *I C*	411		26 *M L T*	186
	9 *M L W*	43		36 *M L J*	456	200	24 *M L T*	420		10 *M L W*	293
	1918 *M W N*	779		25 *M L T*	242		51 *I C*	295		1919 *M W N*	636
	49 *I C*	48		1919 *M W N*	484	202	41 *Mad*	1033		53 *I C*	463
100 (1)	51 *I C*	240		52 *I C*	505		51 *I C*	489	244	37 *M L J*	162
100 (2)	42 *Mad*	90	166	37 *M L J*	589	207	51 *I C*	734		53 *I C*	56
	35 *M L J*	639		10 *M L W*	447	209	42 *Mad*	455	247(1)	42 *Mad*	789
	24 *M L T*	473		20 *Cr L J*	773		36 *M L J*	226		37 *M L J*	157
	9 *M L W*	70		53 *I C*	613		25 *M L T*	192		10 *M L W*	142
	1918 *M W N*	898	167	42 *Mad*	684		10 *M L W*	15		1919 *M W N*	571
	49 *I C*	36		36 *M L J*	453		51 *I C*	692		52 *I C*	918
103	37 *M L J*	433		9 *M L W*	475	212	25 *M L T*	66	247(2)	53 *I C*	379

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A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
250	36	*M L J*	630	305	53	*I C*	354	363	53	*I C*	171	445	26	*M L T*	295
	51	*I C*	740	312 (1)	42	*Mad*	269	367	35	*M L J*	692		1919	*M W N*	458
255	1918	*M W N*	440		36	*M L J*	28		24	*M L T*	260		50	*I C*	410
	51	*I C*	529		1918	*M W N*	928		49	*I C*	313	446	24	*M L T*	214
256	51	*I C*	114		9	*M L W*	217	370	37	*M L J*	369		49	*I C*	202
	10	*M L W*	66		24	*M L T*	500		53	*I C*	878	447	25	*M L T*	204
257	42	*Mad*	143		49	*I C*	373	373	49	*I C*	191		9	*M L W*	385
	25	*M L T*	47	312 (2)	24	*M L T*	489	374	53	*I C*	283		1919	*M W N*	52
	1919	*M W N*	99		1919	*M W N*	29	379	49	*I C*	811		49	*I C*	929
	36	*M L J*	231		9	*M L W*	90		1918	*M W N*	772	462	37	*M L J*	613
	9	*M L W*	138		50	*I C*	185	384	42	*Mad*	360		9	*M L W*	427
	51	*I C*	714	316	36	*M L J*	27		36	*M L J*	396		1919	*M W N*	185
262	42	*Mad*	470		20	*Cr L J*	156		25	*M L T*	304		50	*I C*	87
	36	*M L J*	301		49	*I C*	348		9	*M L W*	492	464	36	*M L J*	507
	9	*M L W*	438	317	42	*Mad*	637		1919	*M W N*	370		9	*M L W*	202
	1919	*M W N*	188		10	*M L W*	333		50	*I C*	693		1919	*M W N*	144
	51	*I C*	300		26	*M L T*	147	396	49	*I C*	800		49	*I C*	527
264	37	*M L J*	303		1919	*M W N*	448	397	42	*Mad*	475	467	36	*M L J*	180
	26	*M L T*	256		50	*I C*	380	FB	36	*M L J*	320		25	*M L T*	12
	53	*I C*	408	320	37	*M L J*	617		1919	*M W N*	161		9	*M L W*	22
266	36	*M L J*	532		24	*M L T*	472		50	*I C*	616		50	*I C*	593
	25	*M L T*	223		1919	*M W N*	20	409	49	*I C*	626	468	36	*M L J*	436
	9	*M L W*	282		49	*I C*	312		36	*M L J*	62		9	*M L W*	474
	1919	*M W N*	336	321	25	*M L T*	353	410	42	*Mad*	422		50	*I C*	613
	51	*I C*	709		1919	*M W N*	712	FB	36	*M L J*	352	469	25	*M L T*	19
269	42	*Mad*	753		50	*I C*	247		9	*M L W*	315		9	*M L W*	5
FB	37	*M L J*	340	322	41	*Mad*	959		25	*M L T*	296		1918	*M W N*	853
	26	*M L T*	297		35	*M L J*	489		1919	*M W N*	223		49	*I C*	278
	10	*M L W*	410		24	*M L T*	315		50	*I C*	485	471	25	*M L T*	257
	1919	*M W N*	792		8	*M L W*	438		20	*Cr L J*	209		9	*M L W*	198
	53	*I C*	437		1918	*M W N*	811	411	25	*M L T*	221		1919	*M W N*	23
272	37	*M L J*	206		49	*I C*	291		9	*M L W*	312		49	*I C*	273
	26	*M L T*	329	332	9	*M L W*	82		1919	*M W N*	431	473	35	*M L J*	296
	10	*M L W*	800		25	*M L T*	395		50	*I C*	69		24	*M L T*	149
	52	*I C*	834		1919	*M W N*	429	412	42	*Mad*	239		8	*M L W*	281
273	10	*M L W*	31		52	*I C*	243	FB	36	*M L J*	124		1918	*M W N*	487
	26	*M L T*	114	333	42	*Mad*	510		25	*M L T*	121		49	*I C*	283
	52	*I C*	325		36	*M L J*	190		9	*M L W*	289	477	42	*Mad*	331
274 (1)	36	*M L J*	103		25	*M L T*	265		1919	*M W N*	120		36	*M L J*	372
	1919	*M W N*	228		1919	*M W N*	293		49	*I C*	673		9	*M L W*	353
	1919	*M W N*	436		49	*I C*	968	424	42	*Mad*	338		50	*I C*	809
	9	*M L W*	268	338	26	*M L T*	262		36	*M L J*	376	479	25	*M L T*	116
	25	*M L T*	85		1919	*M W N*	353		9	*M L W*	443		9	*M L W*	166
	49	*I C*	303		52	*I C*	239		1919	*M W N*	248		1918	*M W N*	888
274 (2)	10	*M L W*	366	339	42	*Mad*	567		50	*I C*	584		49	*I C*	268
	26	*M L T*	362		37	*M L J*	28	429	37	*M L J*	65	482	36	*M L J*	159
	53	*I C*	823		26	*M L T*	48		1919	*M W N*	332		50	*I C*	855
	20	*Cr L J*	823		10	*M L W*	87		50	*I C*	577	483	41	*Mad*	1060
275 (1)	42	*Mad*	228		1919	*M W N*	305	432	42	*Mad*	302		35	*M L J*	184
	36	*M L J*	119		50	*I C*	291		36	*M L J*	114		8	*M L W*	565
	10	*M L W*	13	343	25	*M L T*	286		25	*M L T*	229		49	*I C*	196
	25	*M L T*	190		9	*M L W*	251		9	*M L W*	278	486	1919	*M W N*	21
	49	*I C*	434		1919	*M W N*	72		1919	*M W N*	468		49	*I C*	364
275 (2)	50	*I C*	552		49	*I C*	758		49	*I C*	587	487	25	*M L T*	379
284	9	*M L W*	120	351	42	*Mad*	335	434	42	*Mad*	132		10	*M L W*	239
	1919	*M W N*	467		36	*M L J*	295		35	*M L J*	673		1919	*M W N*	199
	49	*I C*	416		25	*M L T*	272		24	*M L T*	461		50	*I C*	834
287	26	*M L T*	24		9	*M L W*	413		9	*M L W*	104		20	*Cr L J*	354
	53	*I C*	125		1919	*M W N*	247		1919	*M W N*	113	498	1918	*M W N*	655
292	36	*M L J*	93		50	*I C*	371		49	*I C*	630		49	*I C*	359
	9	*M L W*	11	353	8	*M L W*	225	439	50	*I C*	58	500	42	*Mad*	154
	49	*I C*	398		24	*M L T*	96	440	49	*I C*	263		36	*M L J*	242
293	36	*M L J*	463		1918	*M W N*	526	443	25	*M L T*	358		25	*M L T*	374
	9	*M L W*	453		49	*I C*	337		1919	*M W N*	350		1919	*M W N*	139
	26	*M L T*	811		20	*Cr L J*	145		50	*I C*	597		9	*M L W*	132
	52	*I C*	247	358	9	*M L W*	596	444	42	*Mad*	629		49	*I C*	666
304	36	*M L J*	89		50	*I C*	931		36	*M L J*	568	506	51	*I C*	899
	9	*M L W*	19	359	8	*M L W*	473		9	*M L W*	547	510	42	*Mad*	76
	1918	*M W N*	896		1918	*M W N*	580		1919	*M W N*	301		35	*M L J*	632
	49	*I C*	385		49	*I C*	369		50	*I C*	775		9	*M L W*	26
305	1919	*M W N*	356	363	26	*M L T*	180	445	42	*Mad*	576		1919	*M W N*	107

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A.I.R.	Other Journals		
510	49	*I C*	11
514	42	*Mad*	451
	36	*M L J*	222
	51	*I C*	46
515	42	*Mad*	161
	36	*M L J*	262
	25	*M L T*	141
	1919	*M W N*	223
	49	*I C*	821
524	42	*Mad*	348
FB	36	*M L J*	296
	9	*M L W*	362
	25	*M L T*	351
	1919	*M W N*	299
	50	*I C*	309
526	9	*M L W*	435
	1919	*M W N*	244
	51	*I C*	857
527	10	*M L W*	172
	53	*I C*	673
528	36	*M L J*	618
	25	*M L T*	347
	51	*I C*	963
531	42	*Mad*	431
	36	*M L J*	612
	1919	*M W N*	328
	52	*I C*	470
534	37	*M L J*	367
	10	*M L W*	329
	52	*I C*	950
535	42	*Mad*	197
	36	*M L J*	109
	9	*M L W*	218
	25	*M L T*	248
	1919	*M W N*	690
	49	*I C*	688
538	37	*M L J*	402
	53	*I C*	665
540	42	*Mad*	103
	35	*M L J*	657
	9	*M L W*	98
	1918	*M W N*	913
	49	*I C*	638
542 (1)	10	*M L W*	12
	20	*Cr L J*	559
	51	*I C*	847
542 (2)	16	*M L W*	678
	52	*I C*	842
544	42	*Mad*	802
	37	*M L J*	109
	1919	*M W N*	598
	10	*M L W*	376
	26	*M L T*	269
	52	*I C*	590
545	37	*M L J*	213
	25	*M L T*	227
	9	*M L W*	265
	1919	*M W N*	688
	49	*I C*	404
546	8	*M L W*	470
	24	*M L T*	356
	1918	*M W N*	746
	51	*I C*	540
547	26	*M L T*	242
	1919	*M W N*	613
	52	*I C*	879
549	52	*I C*	951
551	25	*M L T*	177
	8	*M L W*	614
	1918	*M W N*	849
	49	*I C*	250
554	52	*I C*	928
555	24	*M L T*	267
	51	*I C*	253
557	42	*Mad*	283
	36	*M L J*	306
	52	*I C*	94
560	9	*M L W*	471
	1919	*M W N*	714
	51	*I C*	908
561	49	*I C*	750
562	25	*M L T*	154
	9	*M L W*	479
	1919	*M W N*	82
	51	*I C*	724
566	42	*Mad*	121
	35	*M L J*	533
	24	*M L T*	455
	9	*M L W*	36
	49	*I C*	210
570	36	*M L J*	355
	51	*I C*	979
571	37	*M L J*	231
	1919	*M W N*	437
	52	*I C*	914
572	25	*M L T*	360
	9	*M L W*	345
	52	*I C*	465
573	42	*Mad*	292
	36	*M L J*	529
	25	*M L T*	83
	51	*I C*	10
575	1918	*M W N*	786
	48	*I C*	833
579	47	*I C*	594
580	10	*M L W*	64
	1919	*M W N*	550
	50	*I C*	916
581 (1)	41	*Mad*	467
	47	*I C*	628
581 (2)	36	*M L J*	122
	25	*M L T*	245
	9	*M L W*	8
	1918	*M W N*	886
	50	*I C*	518
583 (1)	41	*Mad*	533
	19	*Cr L J*	934
	47	*I C*	658
583 (2)	42	*Mad*	231
	36	*M L J*	95
	49	*I C*	659
587	41	*Mad*	465
	19	*Cr L J*	942
	47	*I C*	666
588	35	*M L J*	547
	51	*I C*	131
590	41	*Mad*	691
	34	*M L J*	446
	23	*M L T*	346
	8	*M L W*	12
	47	*I C*	301
594	42	*Mad*	565
	36	*M L J*	284
	26	*M L T*	45
	50	*I C*	261
595	24	*M L T*	106
	8	*M L W*	136
	1918	*M W N*	479
	47	*I C*	308
597	24	*M L T*	205
	8	*M L W*	206
	1918	*M W N*	567
597	48	*I C*	905
598	41	*Mad*	886
FB	35	*M L J*	196
	24	*M L T*	163
	8	*M L W*	301
	1918	*M W N*	569
	47	*I C*	341
607	41	*Mad*	1053
	35	*M L J*	355
	49	*I C*	20
610	42	*Mad*	64
	35	*M L J*	454
	24	*M L T*	396
	8	*M L W*	422
	1918	*M W N*	824
	48	*I C*	878
	20	*Cr L J*	78
612	7	*M L W*	407
	47	*I C*	834
614	35	*M L J*	405
	47	*I C*	945
615	10	*M L W*	140
	1919	*M W N*	535
	52	*I C*	619
616	41	*Mad*	815
	35	*M L J*	90
	24	*M L T*	51
	8	*M L W*	317
	49	*I C*	23
620	42	*Mad*	96
	35	*M L J*	686
	9	*M L W*	237
	1918	*M W N*	908
	48	*I C*	890
	20	*Cr L J*	90
623	34	*M L J*	479
	47	*I C*	758
626	41	*Mad*	943
FB	35	*M L J*	110
	24	*M L T*	155
	8	*M L W*	261
	1918	*M W N*	540
	49	*I C*	27
632	36	*M L J*	461
	1919	*M W N*	368
	52	*I C*	448
633	8	*M L W*	461
	1918	*M W N*	751
	47	*I C*	277
	19	*Cr L J*	905
641	49	*I C*	872
FB	25	*M L T*	23
	9	*M L W*	229
	26	*M L J*	29
	42	*Mad*	185
	1919	*M W N*	148
646	48	*I C*	903
	42	*Mad*	33
	35	*M L J*	256
	8	*M L W*	354
	24	*M L T*	246
647	47	*I C*	538
	41	*Mad*	616
	35	*M L J*	150
	1918	*M W N*	524
648	47	*I C*	298
	40	*Mad*	1173n
649	52	*I C*	410
	25	*M L*	220
	1919	*M W N*	219
	9	*M L W*	476
650	48	*I C*	856
	42	*Mad*	36
	35	*M L J*	652
652	52	*I C*	414
	10	*M L W*	33
653 (1)	48	*I C*	817
	35	*M L J*	665
	20	*Cr T J*	49
	25	*M L T*	22
	42	*Mad*	109
	9	*M L W*	201
653 (2)	47	*I C*	595
	8	*M L W*	152
654	50	*I C*	175
	36	*M L J*	201
	20	*Cr L J*	287
	25	*M L T*	345
	42	*Mad*	558
	1919	*M W N*	433
655	47	*I C*	981
	35	*M L J*	368
656	49	*I C*	625
	36	*M L J*	104
	25	*M L T*	247
	42	*Mad*	319
	1919	*M W N*	698
657	48	*I C*	844
659	47	*I C*	611
	37	*M L J*	489
669	49	*I C*	204
	35	*M L J*	541
	8	*M L W*	559
	24	*M L T*	351
	1918	*M W N*	742
672	52	*I C*	634
	42	*Mad*	310
	36	*M L J*	571
674	49	*I C*	533
FB	25	*M L T*	39
	36	*M L J*	79
	1919	*M W N*	46
	9	*M L W*	208
	42	*Mad*	271
677	48	*I C*	104
	35	*M L J*	509
	41	*Mad*	1075
	24	*M L T*	498
678	50	*I C*	14
FB	42	*Mad*	352
	9	*M L W*	322
	36	*M L J*	351
	25	*M L T*	292
679 (1)	47	*I C*	505
679 (2)	49	*I C*	471
	24	*M L T*	448
	35	*M L J*	565
	1918	*M W N*	761
682	47	*I C*	713
	34	*M L J*	473
685	48	*I C*	859
690	49	*I C*	220
	24	*M L T*	216
	35	*M L J*	473
	41	*Mad*	824
	8	*M L W*	620
	1918	*M W N*	721
698	47	*I C*	589
	35	*M L J*	372
700	48	*I C*	799
706	47	*I C*	578
	35	*M L J*	364

A. I. R. 1919 Madras=Other Journals—(*Contd.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
706	8	*M L W*	455	765	25	*M L T*	232	795	47	*I C*	862	838	37	*M L J*	353
	1918	*M W N*	739		9	*M L W*	381	796	35	*M L J*	251		48	*I C*	89
709	18	*I C*	298		1919	*M W N*	191		48	*I C*	128	839	35	*M L J*	401
	1918	*M W N*	792		50	*I C*	360	798 (1)	35	*M L J*	441		8	*M L W*	558
	35	*M L J*	552	767	42	*Mad*	327		24	*M L T*	477		19	*Cr L J*	973
	8	*M L W*	526		36	*M L J*	207		8	*M L W*	582		47	*I C*	873
	24	*M L T*	486		26	*M L T*	270		48	*I C*	123	840	24	*M L T*	495
	42	*Mad*	52		1919	*M W N*	366	798 (2)	41	*Mad*	749		9	*M L W*	32
711	26	*M L T*	291		49	*I C*	695		34	*M L J*	568		1918	*M W N*	874
	10	*M L W*	1	768	24	*M L T*	101		24	*M L T*	1		48	*I C*	109
	1919	*M W N*	87		8	*M L W*	140		8	*M L W*	382	843	1918	*M W N*	586
	49	*I C*	699		1918	*M W N*	503		47	*I C*	733		48	*I C*	191
714	8	*M L W*	436		47	*I C*	723	809 (1)	50	*I C*	353	844	37	*M L J*	59
	48	*I C*	139	769	41	*Mad*	1068		9	*M L W*	377		9	*M L W*	311
715	35	*M L J*	23		35	*M L J*	402		1919	*M W N*	435		1919	*M W N*	246
	48	*I C*	790		48	*I C*	198	809 (2)	42	*Mad*	440		50	*I C*	327
717	42	*Mad*	503	770	19	*Cr L J*	929		36	*M L J*	575	845	24	*M L T*	214
	25	*M L T*	182		47	*I C*	445		25	*M L T*	253		8	*M L W*	256
	9	*M L W*	347	772	35	*M L J*	96		9	*M L W*	224		47	*I C*	624
	1919	*M W N*	407		47	*I C*	778		1919	*M W N*	426	846	8	*M L W*	626
	49	*I C*	806	773	36	*M L J*	175		49	*I C*	742		20	*Cr L J*	108
	36	*M L J*	298		1919	*M W N*	3	812	47	*I C*	877		25	*M L T*	175
718	47	*I C*	563		48	*I C*	810		19	*Cr L J*	977		1919	*M W N*	351
728	35	*M L J*	180	776	35	*M L J*	451	813	24	*M L T*	416		48	*I C*	988
	24	*M L T*	227		47	*I C*	192		8	*M L W*	507	847 (1)	41	*Mad*	982
	8	*M L W*	192	777	42	*Mad*	111		1918	*M W N*	764		35	*M L J*	667
	1918	*M W N*	658	SB	35	*M L J*	650		48	*I C*	940		24	*M L T*	82
	47	*I C*	555		25	*M L T*	71	816	35	*M L J*	571		1918	*M W N*	486
731	8	*M L W*	357		8	*M L W*	621		25	*M L T*	371		19	*Cr L J*	945
	1918	*M W N*	595		1918	*M W N*	847		8	*M L W*	594		47	*I C*	669
	47	*I C*	548		48	*I C*	341		1918	*M W N*	877	847 (2	1918	*M W N*	672
733	42	*Mad*	114		19	*Cr L J*	1001		48	*I C*	179		47	*I C*	852
	35	*M L J*	443	778	24	*M L T*	453	818	35	*M L J*	467	848 (1)	42	*Mad*	57
	25	*M L T*	365		1918	*M W N*	717		24	*M L T*	133		35	*M L J*	442
	1919	*M W N*	25		48	*I C*	94		8	*M L W*	175		19	*Cr L J*	981
	48	*I C*	794	779 (1)	42	*Mad*	59		1918	*M W N*	505		48	*I C*	161
736	35	*M L J*	153		35	*M L J*	450		47	*I C*	882	848 (2)	41	*Mad*	731
	47	*I C*	533		24	*M L T*	454	819	48	*I C*	379		34	*M L J*	526
738	41	*Mad*	985		8	*M L W*	517		35	*M L J*	287		1918	*M W N*	768
FB	35	*M L J*	335		1918	*M W N*	718	823	35	*M L J*	407		46	*I C*	849
	24	*M L T*	197		47	*I C*	976		8	*M L W*	208	849	35	*M L J*	124
	1918	*M W N*	599	779 (2)	42	*Mad*	425		1918	*M W N*	842		8	*M L W*	142
	8	*M L W*	292	FB	36	*M L J*	356		47	*I C*	941		24	*M L T*	104
	48	*I C*	270		25	*M L T*	293	825	24	*M L T*	264		47	*I C*	924
743	1919	*M W N*	287		9	*M L W*	323		8	*M L W*	221	851	35	*M L J*	518
	52	*I C*	813		1919	*M W N*	225		1918	*M W N*	564		9	*M L W*	113
747	35	*M L J*	382		50	*I C*	43		47	*I C*	948		20	*Cr L J*	101
	48	*I C*	289	781	42	*Mad*	20	827	35	*M L J*	83		48	*I C*	981
751	35	*M L J*	127		35	*M L J*	740		24	*M L T*	83	854	41	*Mad*	1078
	19	*Cr L J*	901		24	*M L T*	748		1918	*M W N*	458	FB	35	*M L J*	317
	47	*IC*	273		8	*M L W*	543		8	*M L W*	271		24	*M L T*	183
752	42	*Mad*	1		1918	*M W N*	759		48	*I C*	1003		1918	*M W N*	625
	35	*M L J*	387		48	*I C*	370	829	42	*Mad*	15		8	*M L W*	480
	24	*M L T*	346	784	41	*Mad*	904		35	*M L J*	669		48	*I C*	50
	8	*M L W*	369	FB	35	*M L J*	236		24	*M L T*	392	864 (1)	36	*M L J*	92
	1918	*M W N*	606		24	*M L T*	137		8	*M L W*	503		9	*M L W*	78
	48	*I C*	232		8	*M L W*	240		1918	*M W N*	806		1918	*M W N*	887
755 (1)	41	*Mad*	980		1918	*M W N*	688		47	*I C*	958		48	*I C*	705
	24	*M L T*	181		48	*I C*	203	831	35	*M L J*	229	864 (2)	25	*M L T*	290
	19	*Cr L J*	960	792	42	*Mad*	61		1918	*M W N*	673		9	*M L W*	216
	47	*I C*	812		35	*M L J*	579		41	*Mad*	1071		1919	*M W N*	695
755 (2)	41	*Mad*	510		24	*M L T*	501		48	*I C*	76		20	*Cr L J*	208
	8	*M L W*	21		8	*M L W*	497	833	42	*Mad*	41		49	*I C*	656
	48	*I C*	840		1918	*M W N*	809		35	*M L J*	555	865	42	*Mad*	25
757	50	*I C*	678		48	*I C*	196		24	*M L T*	400		35	*M L J*	512
758 (1)	24	*M L T*	179	793	35	*M L J*	144		1918	*M W N*	719		8	*M L W*	512
	1918	*M W N*	520		8	*M L W*	335		8	*M L W*	522		1918	*M W N*	756
	47	*I C*	296		47	*I C*	702		48	*I C*	158		24	*M L T*	403
758 (2)	35	*M L J*	11	795	24	*M L T*	212	835	8	*M L W*	275		48	*I C*	147
	48	*I C*	615		8	*M L W*	219		1918	*M W N*	551	868 (1)	43	*I C*	458
765	36	*M L J*	203		1918	*M W N*	561		47	*I C*	914	868 (2)	34	*M L J*	210

A. I. R. 1919 Madras=Othar Journals—(*contd.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
868 (2)	23	*M L T*	159	893	48	*I C*	122	949	25	*M L T*	153	1004	6	*M L W*	456
	7	*M L W*	326	894	23	*M L T*	355		49	*I C*	629		1917	*M W N*	721
	46	*I C*	285		47	*I C*	630	950	41	*Mad*	939		19	*Cr L J*	56
869	35	*M L J*	604	896	25	*M L T*	18		35	*M L J*	87		43	*I C*	88
	24	*M L T*	482		9	*M L W*	75		8	*M L W*	583	1009	22	*M L T*	225
	8	*M L W*	592		1919	*M W N*	112		47	*I C*	640		43	*I C*	661
	1918	*M W N*	716		20	*Cr L J*	172	951	35	*M L J*	608	1014	41	*Mad*	474
	48	*I C*	38		49	*I C*	492		8	*M L W*	625		34	*M L J*	156
870	35	*M L J*	361	897	35	*M L J*	129		24	*M L T*	447		23	*M L T*	9
	48	*I C*	7		8	*M L W*	109		1918	*M W N*	715		1918	*M W N*	121
871	42	*Mad*	219		46	*I C*	62		48	*I C*	68		7	*M L W*	159
	36	*M L J*	169	902	35	*M L J*	219	952	6	*M L W*	790		43	*I C*	685
	25	*M L T*	184		1918	*M W N*	666		1918	*M W N*	42	1025	33	*M L J*	674
	9	*M L W*	329		48	*I C*	925		43	*I C*	20		1917	*M W N*	863
	49	*I C*	835	907	42	*Mad*	83	953	44	*I C*	971		44	*I C*	625
875	35	*M L J*	315		35	*M L J*	559		19	*Cr L J*	443	1026	7	*M L W*	614
	1917	*M W N*	789		9	*M L W*	14	954	44	*I C*	973		45	*I C*	959
	43	*I C*	28		1918	*M W N*	870		19	*Cr L J*	445	1029	34	*M L J*	71
876	42	*Mad*	578		19	*Cr L J*	997	955	22	*M L T*	541		23	*M L T*	89
	36	*M L J*	286		48	*I C*	337		44	*I C*	995		45	*I C*	763
	26	*M L T*	43	911	41	*Mad*	659	956	33	*M L J*	676	1034	41	*Mad*	861
	50	*I C*	758	FB	35	*M L J*	57		1917	*M W N*	790		35	*M L J*	272
877	24	*M L T*	102		24	*M L T*	115		43	*I C*	25		24	*M L T*	247
	8	*M L W*	171		8	*M L W*	62	957	41	*Mad*	923		8	*M L W*	91
	1918	*M W N*	477		1918	*M W N*	461		35	*M L J*	581		1918	*M W N*	614
	47	*I C*	597		46	*I C*	202		1918	*M W N*	796		45	*I C*	463
878	9	*M L W*	314	923	23	*M L T*	137		48	*I C*	756	1038	35	*M L J*	284
	1919	*M W N*	425		7	*M L W*	477	964	35	*M L J*	375		7	*M L W*	564
	50	*I C*	471		1918	*M W N*	346		48	*I C*	71		1918	*M W N*	830
879 (1)	42	*Mad*	130		44	*I C*	641	965	41	*Mad*	840		45	*I C*	729
	35	*M L J*	666	927	42	*Mad*	315	FB	35	*M L J*	159	1039	34	*M L J*	517
	48	*I C*	735		36	*M L J*	248		1918	*M W N*	662		23	*M L T*	341
79 (2)	41	*Mad*	685		50	*I C*	946		47	*I C*	606		7	*M L W*	604
	34	*M L J*	217	929	35	*M L J*	575	968	42	*Mad*	180		1918	*M W N*	454
	23	*M L T*	240		24	*M L T*	483		36	*M L J*	64		45	*I C*	803
	7	*M L W*	274		8	*M L W*	519		25	*M L T*	15	1043	24	*M L T*	95
	1918	*M W N*	493		1918	*M W N*	748		20	*Cr L J*	186		1918	*M W N*	378
	19	*Cr L J*	359		48	*I C*	226		1918	*M W N*	926		45	*I C*	779
	44	*I C*	583	931	34	*M L J*	145		49	*I C*	602	1044	41	*Mad*	743
883	35	*M L J*	189		46	*I C*	500	969	35	*M L J*	194	FB	34	*M L J*	590
	24	*M L T*	209	937	35	*M L J*	684		48	*I C*	732		23	*M L T*	372
	1918	*M W N*	521		49	*I C*	260	971 (1)	1918	*M W N*	198		8	*M L W*	103
	47	*I C*	708	938	35	*M L J*	507		44	*I C*	987		1918	*M W N*	514
885	44	*I C*	40		48	*I C*	185	971 (2)	44	*I C*	329		45	*I C*	774
	19	*Cr L J*	248	939	8	*M L W*	413		19	*Cr L J*	313	1046	41	*Mad*	531
886	35	*M L J*	647		1918	*M W N*	678	972	40	*Mad*	1040	FB	34	*M L J*	381
	24	*M L T*	469		48	*I C*	222	FB	33	*M L J*	320		23	*M L T*	266
	1918	*M W N*	846	941	34	*M L J*	551		22	*M L T*	236		7	*M L W*	454
	9	*M L W*	164		46	*I C*	973		6	*M L W*	464		1918	*M W N*	265
	48	*I C*	301	942	9	*M L W*	276		1917	*M W N*	609		45	*I C*	905
887	42	*Mad*	507		1919	*M W N*	693		43	*I C*	31	1053	41	*Mad*	709
	36	*M L J*	157		49	*I C*	734	988	8	*M L W*	400		23	*M L T*	320
	9	*M L W*	379	943	35	*M L J*	661		1918	*M W N*	680		1918	*M W N*	399
	25	*M L T*	291		9	*M L W*	1		47	*I C*	716		45	*I C*	942
	1919	*M W N*	432		25	*M L T*	86	990	41	*Mad*	109	1059	41	*Mad*	733
	49	*I C*	729		48	*I C*	740		34	*M L J*	139	FB	34	*M L J*	536
888	35	*M L J*	312	945	46	*I C*	47		6	*M L W*	412		8	*M L W*	37
	1918	*M W N*	143		19	*Cr L J*	687		1921	*M W N*	605		1918	*M W N*	409
	44	*I C*	4	946	36	*M L J*	161		43	*I C*	498		45	*I C*	595
889	41	*Mad*	644		25	*M L T*	331	993	22	*M L T*	380	1062	41	*Mad*	721
	34	*M L J*	253		1919	*M W N*	369		6	*M L W*	640		34	*M L J*	397
	7	*M L W*	528		49	*I C*	722		1917	*M W N*	744		45	*I C*	89
	19	*Cr L J*	301	947	42	*Mad*	13		43	*I C*	865	1063	1918	*M W N*	661
	44	*I C*	205		35	*M L J*	531	998	42	*Mad*	296		47	*I C*	764
892	35	*M L J*	157		48	*I C*	952		9	*M L W*	541	1064	34	*M L J*	425
	24	*M L T*	77	948 (1)	8	*M L W*	205		1919	*M W N*	284		23	*M L T*	337
	8	*M L W*	253		1918	*M W N*	547		51	*I C*	140		1918	*M W N*	276
	1918	*M W N*	484		46	*I C*	880	1001	7	*M L W*	16		45	*I C*	80
	19	*Cr L J*	965	948 (2)	35	*M L J*	605		1918	*M W N*	214				
	47	*I C*	865		48	*I C*	693		43	*I C*	155	1067	23	*M L T*	312
893	1918	*M W N*	844	949	9	*M L W*	81	1004	22	*M L T*	323		7	*M L W*	415

A. I. R. 1919 Madras=Other Journals—(*Concld.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
1067	45	*I C*	556	1097	1918	*M W N*	334	1140	1918	*M W N*	285	1166	42	*Mad*	737
1070	45	*I C*	659		45	*I C*	975	FB	45	*I C*	18	FB	37	*M L J*	125
1071	24	*M L T*	34	1102	34	*M L J*	177	1143	24	*M L T*	20		10	*M L W*	122
	7	*M L W*	563		23	*M L T*	280		8	*M L W*	100		1919	*M W N*	525
	1918	*M W N*	333		45	*I C*	949		1918	*M W N*	794		26	*M L T*	246
	45	*I C*	689	1106	41	*Mad*	629		45	*I C*	423		53	*I C*	274
1071	41	*Mad*	701		7	*M L W*	291	1144	41	*Mad*	813	1172	52	*I C*	829
	35	*M L J*	27		23	*M L T*	178		34	*M L J*	470	1173	41	*Mad*	582
	24	*M L T*	46		34	*M L J*	170		7	*M L W*	612	FB	34	*M L J*	412
	8	*M L W*	145		1918	*M W N*	200		24	*M L T*	18		23	*M L T*	302
	1918	*M W N*	497		45	*I C*	743		1918	*M W N*	502		7	*M L W*	517
	46	*I C*	265	1110	35	*M L J*	51		45	*I C*	30		1918	*M W N*	318
1075	24	*M L T*	180		24	*M L T*	28	1145	45	*I C*	786		45	*I C*	46
	8	*M L W*	581		8	*M L W*	154	1152	34	*M L J*	223	1175	41	*Mad*	136
	19	*Cr L J*	948		45	*I C*	489		23	*M L T*	235		33	*M L J*	519
	47	*I C*	672	1113	34	*M L J*	184		7	*M L W*	1		22	*M L T*	334
	42	*Mad*	7		45	*I C*	813		43	*I C*	113		6	*M L W*	649
	1919	*M W N*	436	1117	7	*M L W*	86	1156	33	*M L J*	746		1918	*M W N*	55
1076	47	*I C*	749		1918	*M W N*	146		22	*M L T*	508		43	*I C*	225
1077	41	*Mad*	604		43	*I C*	871		1918	*M W N*	136	1182	41	*Mad*	357
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	1918	*M W N*	208		45	*I C*	16	1159	41	*Mad*	577		22	*M L T*	454
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	6	*M L W*	300		1918	*M W N*	280	1163	24	*M L T*	182		43	*I C*	210
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	34	*M L J*	419	1139	1919	*M W N*	146	1164	41	*Mad*	259		1918	*M W N*	75
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THE
ALL INDIA REPORTER
1919
MADRAS HIGH COURT

* A. I. R. 1919 Madras 1
Full Bench

WALLIS, C. J., OLDFIELD AND SESHAGIRI AIYAR, JJ.

Muthuvelu Mudaliar—Plaintiff—Appellant.

v.

Vythilinga Mudaliar — Defendant—Respondent.

Second Appeal No. 881 of 1917, Decided on 13th February 1919, against decree of Addl. Temporary Sub-Judge, Tanjore, in Appeal Suit No. 45 of 1917.

***(a) Transfer of Property Act (1882), S. 58—Land sold absolutely but with right of repurchase to be exercised before certain date—Transaction is not necessarily mortgage by conditional sale.**

Where in one and the same transaction land is sold absolutely but with a right of re-purchase to be exercised before a certain date, the transaction does not necessarily become, by virtue of S. 58, a mortgage by conditional sale, without reference to the intention of the parties: *A. I. R.* 1914 *Mad.* 37, **Overruled.** [P 5 C 1,2]

Per *Wallis, C. J.*—There is nothing in the definition contained in S. 58 (c) which favours the view that, wherever a sale-deed and an agreement to recovery form one transaction, it must necessarily be a mortgage and not a sale. [P 5 C 2]

Per *Sheshagiri Aiyar, J.*—To determine whether a particular transaction is a sale or a mortgage, the intention of the parties and the surrounding circumstances are the proper guides, and not the fact that the documents were of the same date or were expressed in any particular from. The Court cannot lay down any inflexible rule from the bare fact that the documents were of even date or were interdependent upon a single settlement. [P 6 C 1,2]

(b) Transfer of Property Act (1882), S. 58 (c)—Words "the mortgagor ostensibly selling the mortgaged property" imply mortgage in reality.

The words "the mortgagor ostensibly selling the mortgaged property" in S. 58 (c) imply that there must, in reality, be a mortgage and that the sale must be merely a cloak. [P 6 C 2]

(c) Deed — Construction — Party wishing document to be understood as being different from what words suggest—It must have shown that the form in which language is clothed does not express real intention of parties.

A party, who wishes a document to be understood as being different from what the words suggest, should show that the form in which the language is clothed does not express the real intention of the parties and that, in substance, the parties intended that there should be transaction different from what the language imports. In other words, there must be evidence to show that the parties intended a mortgage, although they used expressions which prima facie connote a sale [P 6 C 2, P 7 C 1]

S. Muthiah Mudaliar—for Appellant.

A. Krishnaswami Aiyar for *B. Sitarama Row*—for Respondent.

Order of Reference

Sadasiva Aiyar, J.—The transaction in question in this case was effected after the Transfer of Property Act came into force and the two documents making up the transaction not only came into existence on the same day but each refers to the other. There can be no question therefore in this case that they form the same and a single transaction: see *Palaniappan* v. *Subbaraya Gounden* (1) and *Second Appeal No.* 540 *of* 1916 where I have tried to collect the Indian cases bearing on the question, under what circumstances two documents formed a single transaction and when they must be deemed to indicate two separate transactions. In this case therefore we have not got the difficulties which arise from (a) the dates of the two documents being different or (b) from the second document reciting that out of pure grace and favour, etc.: see

(1) A. I. R. 1914 Mad. 37=22 I. C. 4.

Jhanda Singh v. *Wahiduddin* (2) the transferee of the first document agrees to reconvey, or (c) from the document or or documents being dated before *Thumlusawmi Moodely* v. *Hossain Rowthen* (3) or *Pattabhiramier* v. *Vencatarow Naicken* (4) or before the Transfer of Property Act came into force. In *Palaniappan* v. *Subbaraya Gounden* (1), where the execution of the two documents was divided by an interval of two days (the registration having been however on the same day) and where the second deed styled itself expressly as the counterpart of the first deed, I held that the two documents constituted a single transaction of mortgage by conditional sale. In *Jhanda Singh* v. *Wahiduddin* (5), Richards, J., says at pp. 599 and 600 of (*I. L. R.* 33 *All.*).

"It seems to me that if we held that at the time of the execution of the first deed the parties intended that the second deed also should be executed, we ought to hold that the two deeds constituted a mortgage by conditional sale and that the plaintiff has a right to redeem. On the other hand, if at the time of the execution of the sale deed, there was no intention of executing the second deed, the defendants are entitled to have the latter construed strictly and quite independent of the provisions of the Transfer of Property Act and the law of mortgages."

In that case the documents were of the years 1852 and 1853 respectively):

"There can in my opinion be no doubt that if the two deeds were of even date, an almost irresistible presumption would arise in favour of the transaction being a mortgage."

In that case no doubt on the particular facts (including the fact that the documents were separated by the interval of a year from each other) it was held that they did not costitute a single transaction of mortgage by conditional sale. As regards the contention that there must be the previous existence of the relation of creditor and debtor in order to constitute a transaction which is an ostensible sale (with a covenant for repurchase or covenant of rescission of the sale on repayment of a certain amount) a mortgage by conditional sale, I see no sufficient reason to change the view expressed in *Palaniappan* v. *Subbaraya Gounden* (1) that such considerations cannot be imported into India where we have got the plain words of S. 58, T. P. Act to guide us as to what the nature of a transaction is which should be a regarded as mortgage by conditional sale. Coming to S. 58, T. P. Act itself I need not say that I have given respectful and anxious consideration to the views of my learned brother (as reported in the case of *Maruthai Goundan* v. *Dasappa Goundan* (6) as also in the judgment to be just now pronounced by him as to the intention of the legislature in using the words "mortgagor," "mortgage money" and "mortgagee" in the definition of mortgage by conditional sale in Cl. (c), S. 58, T. P. Act. I regret that I am still of opinion that the legislature used those short words merely to avoid involved phraseology. No doubt, it would have been meticulously accurate if the language of the clause were as follows:

"Where the transferor in a transfer transaction ostensibly sells the property, the subject of transfer, on condition that on default of payment of the consideration money for the transfer on a certain date, the sale shall become absolute, etc."

A mortgage by conditional sale is ostensibly a sale

"Mortgages going under various names all over the country assume this from; in fact it is exceedingly doubtful if there are many genuine cases of sales with conditions of repurchase at all"

where the documents are of the same date or where there is only a single document of sale and agreement to reconvey. The legislature evidently knew this and, therefore in the Transfer of Property Act, they introduced the provision that such transactions must be prima facie regarded as mortgages and:

"as more likely to effectuate the intention of the parties than the rule to the contrary."

In *Madhavrao Keshavrao* v. *Sahebrao Ganpatrao* (7) the facts were exactly similar to those of the present case, there being a simultaneous execution of a sale-deed and an agreement to reconvey. Beaman, J., says at p. 123 (*I. L. R.* 39 *Bom.*):

"I have no doubt but that the contemporaneous documents of 1892 do constitute what is known in this country as a mortgage by conditional sale. Neither have I the least doubt that that was the intention of the parties executing them. Such mortgages are legislatively recognized and I have only to observe that in no true mortgage of this class will any debt be apparent. It is idle, therefore to criticise mortgages by conditional sale by reference to the essential conditions of a mortgage in the English sense of that word. It only needs to peruse the judgments

(2) A. I. R. 1916 P. C. 49=38 All. 570=36 I. C. 38=43 I. A. 284 (P.C.).
(3) [1876-78] 1 Mad. 1=2 I. A. 241 (P.C.).
(4) [1869-70] 13 M. I. A. 560 (P.C.).
(5) [1911] 33 All. 585=9 I. C. 1013
(6) [1916] 36 I. C. 393.
(7) A. I. R. 1914 Bom. 177=26 I. C. 751=39 Bom. 119.

of the Courts relating to these mortgages to observe how necessary it is to bear this in mind when the question is whether upon an interpretation of documents alone, the result is a mortgage by conditional sale or an out-and-out sale."

I am awere that in *Narayan Ramkrishna* v. *Vigneshwar* (8) a document of conveyance containing an agreement to reconvey was construed differently by Batchelor and Shah, JJ., through Batchelor, J., was a party to the case of *Kasturchand Lakhmaji* v. *Jakhia Padia Patil* (9) in which a sale-deed and a contemporaneous deed of agreement to reconvey were treated as a mortgage by conditional sale. Doubtless there were certain other circumstances relied on in *Narayan Ramkrishna* v. *Vigneshwar* (8) but, in my opinion, whenever there is a single transaction (whether contained in one or more documents) and where that transaction is an ostensible sale with a covenant to reconvey in case the consideration money for the transfer is repaid, it directly comes within the definition of mortgage by conditional sale in S. 58 (c), T. P. Act; and in such cases it is wholly unnecessary and even irrelevant to consider other circumstances for arriving at a decision on the legal nature of the transaction. [I might add that the case of *Narayan Ramkrishna* v. *Vigneshwar* (8) does not refer to the earlier decision in *Madhavrao Keshavrao* v. *Sahebrao Ganpatrao* (7).] In Second Appeal No. 540 of 1916, Phillips, J., and myself had to decide the question arising on the following facts:—There were two documents Exs. A and I, of the same date (27th October 1883), one being a sale-deed and the other an agreement by the vendee that he would enjoy the lands for a fixed period of 10 years and that after that period the vendor could get back the lands by repayment of the purchase-money before the commencement of the cultivation season in any year. We held that the two documents ought to be read together and that they were intended to be a mortgage by conditional sale. In that case the lower Courts had taken into consideration several facts, which happened both at the time and after the execution of the documents, in arriving at the intention of the parties and decided as a question of fact that the parties intended a mortgage by conditional sale.

(8) [1916] 40 Bom. 378=34 I. C. 414.
(9) A. I. R. 1915 Bom. 229=31 I. C. 388=40 Bom. 74.

Hence it was thought unnecessary to decide the neat and simple question whether solely on the definition of "mortgage by conditional sale" found in the Transfer of Property Act, the documents constituted in the eye of law a mortgage transaction. I therefore said at the end of my judgment in Second Appeal 540 of 1916:

"I do not wish to enter into the question whether particular forms of expression used in a document (or set of documents to be read together) necessarily imply and have the legal effect of creating a mortgage by conditional sale or of only creating an absolute right in the transferee with an obligation on his part to reconvey. On that question again there is a conflict of authority both in this Court and in the Bombay High Court and it is not absolutely necessary to decide that point for disposing of this second appeal;"

and then, I said that the question might have to be referred to a Full Bench when it directly arises.

As regards the decision in Second Appeal No. 2180 of 1915 there were indications in the documents themselves in that case that the agreement to re sell was merely an act of generosity on the vendee's part and that the option to repurchase was a personal favour granted to the vendor alone and was not intended to extend to strangers deriving title from him. In the result I agree in making the order of reference to a Full Bench as proposed by my learned borther.

Napier, J.—This second appeal raises the question whether certain documents constitute a mortgage by conditional sale or a sale with a right of re-purchase. The saledeed Ex. B was executed on 4th October 1883. The consideration recited is Rs. 455, which is arrived at by taking the amounts due on three hypothecation bonds of earliar dates amounting to Rs. 510 and a small amount of Rs. 20 due on a Small Cause Court decree making a total of Rs. 530. Of this amount Rs. 75 is to be received from a third party, leaving a balance of Rs. 455. The deed contains the usual words for an absolute sale, but it is to be subject to an agreement executed and given to the vendor on the same day. It continues:

"After the lapse of the term of three years mentioned in the agreement in respect of the lands of this sale deed, I shall get the miras entered in your name."

Ex. A, the agreement, is of the same date. It recites the purchase of the land and provides that:

"If you pay me in cash the sum of Rs. 455 in the Ani season of any year within the third year

from this day, I shall receive and deliver possession of the said land to you on that date .... Besides I shall execute and give you a release deed in respect of that land on the stamp you will give me. If you delay to pay money and receive the sale deed and the release deed till after the date above mentioned this agreement shall stand cancelled."

It is contended before us that the sale and the re-purchase are obviously part of the same transaction, and I agree that this is so.

It is then contended that where the transaction is all one, it amounts to a mortgage, whatever was the intention of the parties ascertainable from evidence properly admissible. This is a proposition I am unable to accept. If the Transfer of Property Act makes such a document a mortgage, then certainly the intention of the parties is immaterial. I have discussed this point in the case reported as *Maruthai Goundan* v. *Dasappa Goundan* (6) and have there expressed the view, which had Bakewell, J.'s concurrence, that the legislature in S. 58, T. P. Act, did not intend to make transactions mortgages against the will of the parties, but only to provide that where the parties intended to make a mortgage the transaction was nonetheless a mortgage because it was put in the form of an outright sale and an agreement for repurchase. The opposite contention would necessarily go as far as this, that even if the agreement recited a refusal to grant a further loan the transaction would still be a mortgage. As I have pointed out, this view requires the substitution of the words—"transferor" for "mortgagor", "transferee" for "mortgagee" and "consideration" for "mortgage money" in Cl. (c), S. 58. I am aware that my learned brother takes a diametrically opposite view and that there is other authority to which he has referred which supports his contention, but with deference to his opinion, I do not think the language of the section supports this view. I quite agree that the Act in several places uses the word "vendor" in relation to contracts prior to sale. But I do not think that this affects the question. To my mind the word "mortgagor means a person intending to create a mortgage by the transaction just as "vendor" sometimes means a person who has made a contract intended to be followed by a sale. I know of no provision in the Code under which a person is called "vendor" who did not intend eventually to make a sale. If the object of the legislature had been to make such a drastic alteration in the existing law as to make documents inter partes operate both against their form and against the intention of the parties so that all such transactions become mortgages, it seems to me that it could have found words more apt for the purpose than these which we have here. And further, I can see no reason why we should attribute to the Legislature an intention to do something with regard to conditional mortgages which it is not doing to other forms of mortgages, namely, to create a mortgage against the will of the parties. S. 58 begins by defining a mortgage and says that (in the circumstances set out) the transferor is called a mortgagor and the transferee a mortgagee and the money of which payment is secured the mortgage money. It then proceeds to enumerate four forms which a mortgage can take, namely, simple mortgage, mortgage by conditional sale, usufructuary mortgage and English mortgage; and I do not think that it intended to do anything more then enumerate This is my view on the language of the section, but if it is permissible to go to the law prior to the Act, as I must assume that it is in view of the fact that Courts have differed on the construction of the Act, there can be little doubt what the law was. In a recent case decided by the Privy Council reported as *Jhanda Singh* v. *Wahidudin* (2), where the sale and agreement to re-purchase were prior to the Transfer of Property Act, there Lordships expressly state that it was not disputed that the test in such cases was the iutention of the parties to the instruments. But that intention must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances. Their Lordships refer with approval to the judgment of Lord Cranworth in *Alderson* v. *White* (10) which is as follows:

"That prima facie an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an actual conveyance and become a mortgage, merely because the vendor stipulates that he shall have a right to a repurchase."

(10) [1858] 2 De. G. & I. 97.

In the *Manchester Sheffield* and *Lincolnshire Railway Company* v. *North Central Waggon Company* (11) Lord Macnaghten says on page 568: "In all these cases the question is what was the real intention of the parties" and quotes with approval the decision in *Alderson* v. *White* (10). For the present I do not think it necessary to decide what the intention of the parties was, as I think we should get a ruling from the Full Bench on the broad question on which my learned brother and I differ. I would, therefore refer to a Full Bench the question whether, where in one and the same transaction land is sold absolutely but with a right of re-purchase to be exercised before a certain date, the transaction necessarily becomes by virtue of S. 58 T. P. Act, a mortgage by conditional sale, whatever the intention of the parties might have been.

Opinion

Wallis, C. J.—It is in my opinion, not open to us to answer the question referred to us in the affirmative consistently with the decisions of the Privy Council in *Patabhiramier* v. *Venkatarow Naicken* (4), *Thumbuswami Moodelly* v. *Hossain Rowthen* (3), *Situl Purshad* v. *Luchmi Purshad* (11) *Bhogwan Sahai* v. *Bhagwan Din* (12), *Balkishen Dass* v. *W. F. Legge* (13), and *Jhanda Singh* v. *Wahid-ud-din* (2). All these decisions lay down that in cases in India not governed by Bengal Regulation 16 of 1806 instruments of this kind are to take effect according to their tenor, unless it appears from the terms of the instrument or the surrounding circumstances, excluding oral evidence of intention as inadmissible, that the intention was to effect a mortgage. In *Thumbuswami Moodelly* v. *Hossain Routhen* (3), the Privy Council refused to disturb a decision of this Court which took a different view, because it considered that the parties might have been misled by a course of decision in this Court which their Lordships held to be erroneous, but they also indicated with sufficient clearness that there was no room for any such misconception in future.

In *Balkishen Dass* v. *W. F. Legge* (13) there were held to be sufficient indications that the transaction was intended to be a mortgage, and this decision was explained as proceeding on this ground in the subsequent decision in *Jhanda Singh* v. *Wahid-ud-din* (2). It is true that all these cases dealt with transactions before the passing of the Transfer of Property Act, but I do not think that Act made any difference in the law on this subject in this part of India. In *Balkishen Dass* v. *W. F. Legge* (13), their Lordships observed that it might be assumed that the framers of the Transfer of Property Act intended in S. 58 to state the existing law and practice in India. The section begins with a definition of the terms "mortgage," "mortgagor" and "mortgagee" and proceeds, as pointed out by Napier, J., to describe or define the different sorts of mortgages which are met with in India. Sub-S. (c) deals with mortgages by conditional sale, in which the transaction is ostensibly a sale or transfer of ownership in exchange for a price, (S. 54,) but is really intended to be a mortgage or transfer of an interest in specific immovable property for the purpose of securing the payment of money S. 55 (a). As the transaction is really a mortgage and only ostensibly a sale, sub-S. (c) refers to the transferor as the mortgagor, and speaks of the ostensible sale of the mortgaged property subject to certain conditions as to the payment of the mortgage money. Whether a particular transaction is really a sale, or ostensibly a sale and really a mortgage must still be decided in accordance with the decisions of the Privy Council in the cases already cited. There is, in my opinion, nothing in the definition in S, 58 (c) which favours the view that wherever the sale-deed and the agreement to reconvey form one transaction, it must necessarily be a mortgage and not a sale. On the other hand, both in *Situl Purshad* v. *Luchmi Purshad* (11) and *Bhagwan Sahai* v. *Bhagwan Din* (12) there was clearly only one transaction, and it was nonetheless held by the Privy Council to be a sale and not a mortgage. For these reasons I am of opinion that the decision in *Palaniappa* v. *Subbaraya Goundan* (1) should be overruled and the question answered in the negative.

Oldfield, J.—I agree.

Seshagiri Aiyar, J.—I entirely agree with the learned Chief Justice. But out of deference to the opinion of Sadasiva Aiyar, J., from whom we are differing, I

(11) [1884] 10 Cal. 30=10 I. A 129 (P. C.)
(12) [1890] 12 All 387=17 I. A 98 (P. C.)
(13) [1900] 22 All. 149=27 I. A. 58 (P. C.)

wish to say a few words. In *Pattabhiramier* v. *Venkatarao Naicken* (4) the Judicial Committee laid down that a contract between the parties should be interpreted according to its tenor and that the practice of reading into it preconceived legal principles should be discouraged. All the subsequent judgments of the Privy Council seem to me to emphasise this cardinal principle. In *Thumbuswami Mudali* v. *Hussin Rowthen* (3) the Judicial Committee construed the document in that case as a mortgage because they held that the parties to that contract must be deemed to have contracted with reference to the wrong view of law enunciated by the Sudder Court at Madras before *Pattabhiramier* v. *Venkatarao Naicken* (4) was decided. They further said that the Legislature should intervene to correct the impression which the decisions of the Sudder Court had left in the minds of the litigant public. In *Situl Purshad* v. *Luchmi Purshad* (11), which related to a contract before the passing of the Transfer of Property Act, although the documents were of the same date, the Privy Council held that the transaction was a sale and not a mortgage.

They stated that evidence can be looked into to ascertain the intention of the parties. In *Bhagwan Sahai* v. *Bhagwan Din* (12), where also the documents were of the same date, the transaction was construed as a sale. In *Balkishen Das* v. *W. F. Legge* (13) it was held that the transaction amounted to a mortgage. But it was pointed out that in the documents themselves there were "indications that the parties intended to effect a mortgage by conditional sale." It was further said that the Transfer of Property Act was framed in accordance with the existing law and practice regarding mortgages. The next case before the Board was *Jhanda Singh* v. *Wahiduddin* (5). Here again their Lordships held that the transaction was an out and out sale. Their Lordships said that the intention of the parties, which was the test in such cases, must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances. This is a distinct direction to Courts in India that in such matters the intention of the parties and the surrounding circumstances are the proper guide, and not the fact that the documents were of the same date or that they were expressed in any particular form. After this statement of the law it is not open to Courts in India to lay down any inflexible rule from the bare fact that the documents were of even date or were interdependent upon a single settlement. Mr. Muthiah Mudaliar referred in support of the view taken by Sadasiva Aiyar, J., to the use of the expression "one transaction" in p. 288 (of 43 *I.A.*) of this judgment. Their Lordships said:

> "If no such agreement was made before the deed of sale was executed and the latter deed was an afterthought, only suggesting itself after the sale deed had been executed and delivered it would not suffice. The execution of the deed of sale and of the contract of repurchase would then form two separate and independent transactions, not two connected and interdependent parts of one and the same "transaction."

I do not understand their Lordships to lay down that if there was a single settlement and two documents are connected and are interdependent, it must necessarily lead to the inference that there was a mortgage and not a sale. All that was said was that an essential requisite for construing such documents as a mortgage is that they should be dependent upon a single arrangement, and not that such a test is a conclusive criterion of the transaction being a mortgage. I do not propose to consider the decisions of the various High Courts In Madras, after *Thumbuswami Moodelly* v. *Hossain Rowthen* (3), there have been some cases which are not quite reconcilable with each other. But these cases do not help us much. It is in *Palaniappan* v. *Subbaraya Gounden* (1) that Sadasiva Aiyar, J., enunciated the proposition which has led to this reference. If I may say so with respect, the learned Judge does not attach sufficient importance to the language of S. 58, Cl. (c) T. P. Act. I agree with Napier, J., that the use of the word mortgage is not per incuriam. Cl. (c) speaks of a "mortgagor ostensibly selling the mortgaged property." That language implies that there must be in reality a mortgage and that the sale must be merely a cloak. A party who wishes the document to be understood as being different from what the words suggest should show that the form in which the language is clothed does not express the real intention of the parties and that in substance the parties intended that there should be a trans-

action different from what the language imports. In other words there must be evidence to show that the parties intended a mortgage although they used expressions which prima facie connote a sale. I am therefore of opinion that the question referred to us must be answered in the negative.

S.N./R.K. *Answered in the negative.*

** A. I. R. 1919 Madras 7
Full Bench

WALLIS, C. J., AYLING AND KUMARASWAMI SASTRI, JJ.

Govinda Iyer—Petitioner.

v.

Emperor—Opposite Party.

Civil Revn. Petn. No. 130 of 1918, Decided on 26th February 1919, against order of Dist. Munsif, Karur, D/- 12th February 1918.

****(a) Criminal P. C. (1898), Ss. 476 and—195—Expression "any offence referred to in S. 195" incorporates conditions laid down in S. 195— The words refer only to offences within scope of S. 195.**

The words "any offence referred to in S. 195', used in S. 476, incorporate the conditions laid down in S. 195 for taking cognizance of the offence by a Court. [P 7 C 1]

The words "any offence referred to in S. 195" refer to offences within the scope of S. 195, and not to all offences against sections of the Penal Code enumerated in S. 195, whether or not they are within the scope of that section: 15 *Mad.* 224 2,*Foll.*; 22 *Cal.* 1004, *not Appr.*

(b) Interpretation of Statutes — Section repealed and enacted in slightly different form— Presumption is against implied alteration.

Per *Wallis, C. J.* — Where sections are repealed and re-enacted in slightly different form, there is a presumption against implied, as contrasted with express, alterations in the scope of the section. [P 8 C 1]

S. Swaminathan—for Petitioner.

Public Prosecutor—for the Crown.

Opinion

Wallis, C. J.—I am of opinion on the construction of the section that the words "any offence referred to in S. 195" refer to offences within the scope of S. 195, and not to all offences against sections of the Indian Penal Code enumerated in S. 195 whether or not they are within the scope of that section. The preponderance of authority is in favour of this view, beginning with *Abdul Khadar* v. *Meera Saheb* (1). Parker and Shephard, JJ., gave no reasons for their decision in that case, but they were no doubt familiar with the history of the section, and knew that the words "committed before or brought under its notice in the course of a judicial proceeding" were first introduced into the section in the Code of 1882 as a further limitation on its operation, and that the corresponding sections of the Codes of 1861 and 1872 were clearly limited to cases coming within the operation of the sections corresponding to S. 195 of the present Code. In the Code of 1872, S 471 (now S. 476) was immediately preceded by Ss. 467, 468 and 469, which in 1882 were consolidated and transferred as S. 195 to an earlier part of the Code. S. 471 began thus:

"When any Court, Civil or Criminal, is of opinion that there is sufficient ground for inquiry into any charge mentioned in Ss, 467, 468 and 469, the Court, after making such preliminary inquiry, etc."

The marginal note "procedure in cases mentioned in Ss. 467, 468 and 469," meaning, of course, procedure in cases mentioned in those sections where such proceedings were taken by a Civil or Criminal Court, in my opinion, correctly represents the effect of the section. There appears to me to be no sufficient reason for holding that S. 471 of the Code of 1872 or the corresponding section of the Code of 1861 intended to give all Courts, Civil or Criminal, an unlimited power of originating prosecutions under all the sections of the Indian Penal Code mentioned in the sections referred to, or that the substitution of the words "any offence referred to in S. 195" for "any charge mentioned in Ss. 467, 468 and 469" had that effect. On the contrary the power conferred on the Court by S. 471 of the Code of 1872, even as restricted with reference to the preceding sections, was apparently considered too wide, and was further limited in 1882 by imposing the restriction that the offence must have been "committed before it or brought under its notice in the course of a judicial proceeding." The attention of the learned Judges who decided *Akhil Chandra Sen* v. *Queen-Empress* (2) and of the referring Judges in this case was not called to the fact that Ss. 195 and 476 of the present Code were not enacted for the first time in their present form, in which case they might have been expressed differently and other cases, such as the present, included or to the fact that the awkwardness or tautology to

(1) [1892] 15 Mad. 224.

(2) [1895] 22 Cal. 1004.

which they refer was the result of introducing a further limitation into the section by the words added in 1882. In some cases covered by S. 195, the new restriction was, no doubt, unnecessary, as pointed out by the referring Judges, but as a matter of drafting it was the easiest course to make the new restriction in general terms even at some risk of tautology. I may add that, where sections are repealed and re-enacted in a slightly different form, there is a presumption against implied, as contrasted with express, alterations in the scope of the section. I would answer the question in the affirmative.

Ayling, J.—I agree.

Kumaraswami Sastri, J.—I agree.

S.N./R.K. *Answered in the affirmative.*

A. I. R. 1919 Madras 8

WALLIS, C. J. AND SPENCER, J.

M. Kuppaswamy Chetty and *others*—Defendants—Appellants.

v.

Kusala Ramiah and *others*—Plaintiffs—Respondents.

Original Side Appeal No. 2 of 1917, Decided on 18th March 1918, from judgment and decree of Coutts-Trotter, J., D/- 14th November 1916.

(a) Limitation Act (1908), Art. 142—Receiver cannot claim to be in adverse enjoyment of properties put in his possession by Court as against parties to suit—Adverse possession.

A receiver appointed by a Court in a suit or proceeding cannot claim to be in adverse enjoyment of the properties put in his possession by the Court as against the parties to the suit, as the possession of the receiver is, in a sense, the possession of the Court and it is also the possession of all the parties to the suit according to their titles. [P 10 C 1, 2]

(b) Limitation Act (1908), Art. 142—Owner ceasing to issue bills for rents of properties does not constitute discontinuance of possession.

The fact that a person having title to a property ceases to issue bills for its rents will not amount to discontinuance of possession within the meaning of Art. 142. In order to constitute discontinuance of possession it would be necessary to show that some other person came into possession of the property. [P 10 C 1, 2]

(c) Limitation Act (1908), Art. 142—Distinction between dispossession and discontinuance of possession explained.

The difference between dispossession and discontinuance of possession is this: dispossession occurs where a person comes in and drives out the others from possession; discontinuance of possession occurs where the person in possession goes out and is followed into possession by other persons. [P 10 C 2]

(d) Hindu Law—Partition — Arbitrators appointed to effect partition effecting only partial partition; if accepted same is binding on parties.

Where members of a joint Hindu family appoint arbitrators to effect a partition of their family properties and the latter only effect a partial partition, the same, if accepted, will be binding on the parties. [P 9 C 1]

(e) Civil P. C. (1908), S. 11—Arbitrators appointed to effect partition — Suit by one party to complete arbitration proceedings dismissed for default—Fresh suit for recovery of specific property allotted by award is not barred.

The dismissal for default of a suit brought by one of the parties to the reference to complete the arbitration and for a decree in terms of any award that may be passed by the arbitrators will not operate as res judicata in a subsequent suit for possession of the specific properties awarded under the partial partition [P 9 C 2]

T. R. Ramchandra Ayyar, K. Srinivasa Ayyangar, C. Narasimha Chariar and *K. Rajah Ayyar*—for Appellants.

C. P. Ramawamy Ayyar, A. Duraiswamy Ayyar and *M. Subbaraya Ayyar*—for Respondents.

Wallis, C. J.—This is an appeal from the judgment of Coutts-Trotter, J., in a suit brought by the purchaser, from the Official Assignee, of the right, title and interest of the insolvent, one Rathnavelu Chetty (defendant 1, in the suit properties. The insolvent was adjudicated in October 1903 and in the course of 1904 there was some correspondence between the Official Assignee and the insolvent's brother Kuppuswamy Chetty, defendant 3 in this case. The then Official Assignee did not press his claim to the property but subsequently in 1910 his successor, Mr. Branson, took a different view and sold the property by public auction to the plaintiff. Now in the appeal which was argued before us the right of the plaintiff to stand in the shoes of the insolvent, Rathnavelu Chetty, by virtue of his purchase from the Official Assignee has not been contested. Three points were taken, two of which do not appear to have been pressed before the learned Judge.

The facts as regards this case are that in 1896 and 1897 two muchilikas, one, Ex. A, and the second, a more formal one Ex. B, were entered into by the members of defendant 1's family referring their disputes to an arbitration and empowering the arbitrators to divide all the properties among the members of the family. The arbitrators divided the im-

movable properties, allotting two shares to defendant 3, Kuppuswamy Chetty, and one share to each of the other brothers and reserving certain other properties for the maintenance of the female members; and all the members of the family in Ex. C signified their assent to this. The first objection raised by Mr. K. Srinivasa Ayyangar was that as the partition was never completed according to the muchilikas, this was not a final partition even of these items of immovable property. We think there is really no foundation for that contention, for, as was pointed out, it was been held frequently that the parties to an arbitration of this kind are quite at liberty, if they like, to accept a partial partition and that a partition is binding on them.

The next objection taken by Mr. K. Shrinivasa Ayyangar was that the suit was res judicata in defendant 3's favour. As I have said the full partition contemplated by the muchilikas was never carried out and defendant 1, who appears from the evidence to have been a man of unbalanced mind, a conclusion which is also supported by the interpretation of the learned vakil for the respondent in this case, was induced to question the partition and instituted a suit, Original Suit No, 30 of 1900, the plaint in which is Ex. E, really for a fresh partition. He was allowed to withdraw that suit with liberty to bring a fresh suit and he brought a fresh suit, Civil Suit No. 6 of 1901. If the plaint in that case be carefully examined it will be found that he did not sue, as the present plaintiff claiming under him sues, to recover these specific items of property. What he alleged against defendant 2 in that suit and defendant 3 in this was that that defendant denied his (the plaintiff's) right to a partition of the suit properties as joint family property (see para. 10). and not that he was denying the plaintiff's right to these specific properties which the present defendant 3 had specifically admitted in his written statement in the previous case; and what he asked for was a fresh partition. He also asked:

"Should this Honourable Court hold that there is still a legally subsisting reference, then effect may be given to the muchilika dated 8th January 1897 and one or more arbitrators appointed by this Honourable Court and a decree passed in terms of the award that may be made."

It really comes to this: that he asked for a fresh award by fresh arbitrators, but did not ask in that suit for the possession of these specific items of immovable properties. Therefore the subject-matter of the suit was not the same and it cannot be said that the question in this suit is res judicata as that suit was dismissed for default without leave to bring a fresh suit. That disposes of two of the objections urged by Mr. K. Srinivasa Ayyangar and leaves us to deal with the main question in the case. whether the suit was barred by limitation on the date when it was instituted.

For the purpose of deciding this question of limitation the learned Judge found upon the correspondence and the evidence that defendant 3 was not entitled to rely on his possession as adverse to the plaintiff before 22nd October 1904, the date of the letter Ex. T. Mr. C. P. Ramaswami Ayyar, who argued the case for the respondent, also relied upon the fact that defendant 3 was appointed receiver of the suit properties in the suit of 1900 and that therefore time never ran in his favour at all. I think that that argument is a sound one, and I propose to deal with it in the first place.

Now, if we examine the written statement in the suit of 1900, Exs. F and F 1, we find that the present defendant 3 whilst disputing the plaintiff's right to a partition as a member of the joint family did not dispute his right to the properties which had been awarded under the muchilikas. On the other hand he expressly alleged that the plaintiff was in possession of these properties. Para. 13 says that

"the immovable property that fell to the share of each member was actually taken possession of by him and was separately enjoyed by him from that time forward," and para. 17 says that "the plaintiff had been himself issuing bills for the rent due from his properties and recovering the dues,"

though the rents had been collected through the family bill collector and had been deposited with defendant 3. Para. 25 says that

"the plaintiff has after January 1900 ceased to issue bills or draw money from this defendant with the sinster object of making it appear that there was no division or separate enjoyment."

In his evidence in this case the present defendant 3 said that his brother

Rathnavelu Chetty had never done anything else to disclaim his possession. The mere fact that he ceased to issue was not sufficient to put him out of possession. In the same written statement we have this heading in the schedule:

"Immoveable properties that fell to the share and are in the possession of M. Rathnavelu Chetty (the plaintiff)."

In the affidavit for the appointment of a receiver which was put in that suit (Ex. A) the present defendant 3 says:

"I crave leave that my written statement may be treated as part and parcel of this my affidavit,"

and thereby reiterates the statement that the properties were in the possession of the insolvent. And in para 7 he says that:

"the allegation in para. 8 of the plaintiff's affidavit is, to say the least, incorrect for, as I have stated in my written statement, I am not in possession of all the family properties but the plaintiff and defendant 3 and others are also in possession of the family properties and enjoy the rents and profits. The plaintiff herein, who has been receiving the rents and profits from his share of the family properties, has deliberately not received them from February this year with the object of making it appear that there was no division."

In the face of these statements of the present defendant 3 in his written statement, and in his affidavit coupled with his oral evidence, it is absolutely impossible, in my opinion, to hold that he was in possession adversely to the insolvent at the date of the suit or at the date when he was appointed receiver. If he was in possession at all at the time he was appointed receiver his possession was that of his brother, the present insolvent. The possession of the receiver in one sense is said to be the possession of the Court, but as observed in Kerr on Receivers, the possession of the receiver is the possession of all the parties to the suit according to their titles. Now, it is not contested thst, at the time the receiver was appointed, the person who was entitled to the suit properties was the insolvent, and further, as I have already held, he was in possession when the receiver was appointed. The possession of the Court through the receiver was therefore the possession of the insolvent. The receiver defendant 3 in this case, has never yet been discharged; and even if he had been discharged, that would make no difference. He would still hold the property on behalf of the rightful owner, as observed in the Note in Kerr on Receivers, at p. 151,* Edn. 4, citing *Horlock* v. *Smith* (1). The contention that defendant 3, who got himself appointed receiver on the footing that the suit property was in the rightful possession and ownership of the insolvent, could afterwards, during the receivership, turn round and set up an adverse title is, in my opinion, absolutely untenable and really obnoxious to the forcible observations contained in the judgment of Lord Macnaghten in *Corea* v. *Appuhamy* (2). This ground is quite sufficient to dispose of the suit. But we also agree with the conclusion at which the learned Judge has arrived upon the correspondence that, assuming Art. 142, Lim. Act, to be applicable, the insolvent was not dispossessed nor did he discontinue to be in possession within 12 years of the institution of the suit. What amounts to discontinuance of possession is explained by Fry, J., in *Rains* v. *Buxton* (3):

"In my view the difference between dispossession and the discontinuance of possession might be expressed in this way: the one is where a person comes in and drives out the others from possession; the other case is where the person in possession goes out and is followed into possession by other persons."

As I have already pointed out, with reference to this case there is no satisfactory evidence that the insolvent ever went out of possession. All that is shown is, and what is stated in his written statement and in his affidavit is, that during the receivership defendant 3 was in possession. Assuming that by ceasing to issue bills the insolvent went out—defendant 3 admits that he did nothing else—assuming that this amounts to going out of possession, to make it discontinuance of possession it would be necessary to show that defendant 3 came into possession. On the evidence I agree with the learned Judge that he never purported to take possession of the property until the date of the letter Ex. T. We have seen in the written statement in the first suit and in the affidavit for the appointment of a receiver that he stated that the insolvent was in possession, which apparently was the truth. In the written statement in the second suit, which is Ex. K, while he set up that all the properties were

* See 6th Edition, p. 179.—*Ed.*

(1) [1842] 11 L.J.Ch. 157.
(2) [1912] A.C. 230.
(3) [1880] 14 Ch.D. 537.

the self-acquisitions of himself and his father, he did not deny that the insolvent had acquired a title to the items that are now sued for by virtue of the muchilikas. In para. 18 he merely said that the plaintiff was not entitled to insist on the completion of the arbitration. On the contrary, in para. 11 there is the allegation that "the plaintiff," i. e., the insolvent, "himself took possession of the properties that fell to his share."

The next thing was the insolvency of the present defendant 1 in October 1913. Following what is unfortunately not at all an uncommon practice with insolvents, he returned his immovable property as nil in his schedule with a view to prevent his creditors from getting at it. The matter however engaged the attention of Mr. Read, who recently had succeeded to the office of the Official Assignee, in the latter part of 1914 and he wrote Ex. O to the present defendant 3, Kuppuswamy Chetty, asking for an inspection of the award and received the answer Ex. P, in which defendant 3 told him that he had not got the award with him, but referred to the fact that the properties were then divided. Then in Ex. Q the Official Assignee wrote—and this is important for the understanding of the answer:

"I understand that the immovable properties of the family were divided in 1897: that, since then, the following properties have been in the separate enjoyment of the insolvent."

and he proceeded to set out the properties in suit now. There is no denial either of the properties having fallen to the insolvent's share or of their being in his enjoyment. In the answer Ex. R, which defendant 3 wrote on 12th October 1904, he merely says that the title-deeds are in his possession and that

"not a single title-deed of the said properties stands in the name of the insolvent. As regards the collections of rents, dues, etc., of such of the properties that yield income they are being collected by me under the circumstances mentioned in para. 17 and 25 of my written statements filed in Civil Suit No. 30 of 1900 and under the receivership in the above suit on 19th July 1900 as also to the facts stated in para. 15 of the written statement filed by me in Civil Suit No. 6 of 1901."

As I have already stated, in my opinion, having regard to the fact that he got possession under the receivership, what he now said was of absolutely no consequence. Further he acknowledges that he was in possession under the receivership and a reference to para, 17. of his written statement in the first statement does not show that he claimed in any way at that time to be in possession on his own behalf. Similarly with regard to para. 25. As I have already pointed out, para. 25 does not amount to an allegation even of discontinuance of possession on the part of the insolvent, and then para. 15 of the written statement in the second suit merely says;

"plaintiff having thus put an end to the arbitration is not entitled to ask for the completion of it."

But he in no way questioned the insolvent's title to or his possession of the properties now in suit. It was not until the Official Assignee wrote Ex. S asking for the delivery of the properties that defendant 3 purported, in his letter dated 22nd October 1904, to set up an adverse claim and claimed to be in possession on his own account. I have already said that a receiver is not competent to take up such an attitude and even if he was competent to do so, this suit was filed within 12 years of that time and so I agree with the learned Judge that up to that time his possession must be held to be on behalf of the insolvent. The conclusion is supported by a good deal of oral evidence in the case. The insolvent's own evidence is that for a long time defendant 3 was supporting him by grants of Rs. 30 or 40 a month, and there are some receipts which were taken by defendant 3 in respect of these properties and in which the insolvent's name is entered: and there must have been other receipts taken during this time which defendant 3 has not produced and which, if produced, would probably show that he was in possession on behalf of the insolvent. At first he was no doubt merely assisting his brother in the endeavour to defeat the Official Assignee and his creditors and to keep the properties out of their reach. At a later stage he appears to have conceived the design of claiming to have held the property on his own account and has raised that plea in the present suit. For the reasons I have already given that plea has entirely failed and I agree in the conclusions of the learned Judge and dismiss the appeal with costs.

Spencer, J.—I entirely agree.

S.N./R.K. *Appeal dismissed.*

** A. I. R. 1919 Madras 12

WALLIS, C. J., NAPIER AND KUMARASWAMI SASTRI, JJ.

Krishna Shetti and *another* — Plaintiffs — Appellants.

v.

Gilbert Pinto and *others*—Defendants —Respondents.

Letters Patent Appeal No. 103 of 1917, Decided on 6th January 1919, against judgment of Sadasiva Aiyar and Bakewell, JJ., D/- 24th July 1917, in S. A. No. 92 of 1916.

**** (a) Contract Act (1872), S. 74—Mulgeni lease — Provision for forfeiture or re-entry on breach of covenant against alienation is not stipulation by way of penalty—Court cannot relieve against provision — Landlord and Tenant, Forfeiture.**

A Court has no power to relieve against a provision in a mulgeni lease for forfeiture or re-entry on breach, by the lessee, of a covenant against alienations. [P 12 C 2]

Such a covenant cannot be regarded as a stipulation by way of penalty and it does not fall within the provisions of S. 74 as amended. [P 13 C 1]

(b) Transfer of Property Act (1882), Ss. 105 to 116—(Per *Wallis, C. J.*)—Principles of Act may be applied to agricultural leases in absence of special reasons to contrary (*Napier, J*, dissenting).

Although agricultural leases are excepted from the operation of Ss. 105 to 116, the principles of the Act may, as embodying rules of equity, justice and good conscience, be applied to them in the absence of special reasons for not doing so. [P 13 C 2]

*** (c) Transfer of Property Act (1882)—Applicability—Provisions cannot be resorted to as guides in matters expressly excluded from purview of Act — Guidance may be sought from English Law.**

Per *Napier. J.*—The provisions of the Transfer of Property Act cannot be resorted to as guides in dealing with matters that have been excluded from the purview of the Act by express words. There is however no statutory bar to seeking for guidance in such cases from the English Law. [P 14 C 1]

B. Sitarama Rao—for Appellants.

K. P. Lakshmana Rao—for Respondents.

Wallis, C.J.—This is a Letters Patent appeal from the decision of Sadasiva Aiyar, J., who held, (Bakewell, J., dissenting) that the Court has power to relieve against a provision in a mulgeni or permanent lease, a form of agricultural lease in use in South Kanara, for re-entry by the landlord on breach of a covenant or condition against any alienation by the lessee of his mulgeni right except in the manner therein provided. The lease, which is inartistically drawn, provides in substance that, if the lessee or his representatives have to sell or mortgage their mulgeni right, they are first to give a written notice to the lessor or his heirs, and, if they fail to act on it or to reply thereto, the lessor is to be free to make the alienation but that alienations in contravention of these provisions are to be void, and the lessor is to be at liberty to re-enter and enjoy the land inclusive of improvements. This we read as meaning that the lessee is to give notice to the lessor of the terms of any transaction which he proposes to effect by way of sale or mortgage of his mulgeni right, and that the lessor is then entitled to become himself the purchaser or mortgagee on those terms, and as in fact conferring a right of pre-emption.

Two questions arise in the case, whether the Court has any general jurisdiction to relieve in a case of this kind, and if not, whether such jurisdiction has been conferred upon it by the amendment to S. 74, Contract Act. As regards the first question, it is well settled that a Court of equity could not relieve against a right of re-entry or forfeiture under any provision or stipulation in a lease for a breach of any covenant in the lease except the covenant for payment of rent. The history of this question is most lucidly explained by Kay, L. J., in *Barrow* v. *Isaacs* (1):

"Court of equity" he says: "assumed jurisdiction to relieve against forfeitures and penalties where the only object was to secure payment of a definite sum of money even though there was no fraud, accident, surprise or mistake. On this principle it relieved against payment of the whole penalty on a money bond before the Statutes 4 and 5 Anne, Ch. 16, Ss. 12 and 13 and 8 and 9, Wm. 3, C. 11, which enabled the Courts of Law to give the same relief. Also against forfeiture for non-payment of rent; and by Statute 4, Geo. 2, Ch. 28, its powers in this respect were somewhat restricted by limiting the time for their exercise to six months after execution in ejectment At first there seems to have been some hesitation whether this relief might not be extended to other cases of forfeiture for breach of covenants such as to repair, to insure, and the like where compensation could be made, but it was soon recognized that there would be great difficulty in estimating the proper amount of compensation and since the decision of Lord Eldon in *Hill* v. *Barclay* (2) it has always been held that equity would not relieve, merely on the ground that it could give compensation, upon breach of of any covenant in a lease except the covenant for payment of rent But, of course this left unaffected the undoubted jnrisdiction to relieve

(1) [1891] 1 Q. B. 417.
(2) [1811] 18 Ves. (Jun.) 56.

in the case of breach occasioned by fraud, accident surprise or mistake. "

The law, as here laid down, has been reproduced in the Transfer of Property Act, which provides expressly in S. 111 that a lease in immovable property determines

" (g) by forfeiture ; that is to say (1) in case the lessee breaks an express condition which provides that, on breach thereof the lessor may re-enter, or the lease shall become void ; "

and only gives power to relieve against such determination by forfeiture for non-payment of rent (S. 114). It is noteworthy that the Indian Legislature preferred to adhere to the old law in this respect and did not adopt the provisions of S. 14, Conveyancing Act of 1881, which was followed in several other sections. S. 14 of that Act imposes restrictions on, and confers powers of relief against, forfeitures of leases generally and not merely as regards forfeitures for non-payment of rent, but leaves the law as it was before with regard to cases such as the present, because it provides in sub-S. (6) that the section does not extend to a covenant or condition against the assigning, underletting, parting with the possession or disposing of the land leased or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest. This section gives the English Courts power to relieve against stipulations which were not regarded by Courts of equity as stipulations by way of penalty because they were not intended to secure the repayment of money ; but it did not interefere with provisions such as the present, designed to prevent transfer of the land to third parties against the landlord's will. As observed by Lord Eldon in *Hill* v. *Barclay* (2) as regards a covenant of this kind :

" It is sufficient that the lessor insists upon his covenant ; and no one has a right to put him in a different situation, "

a view to which the legislature has adhered in sub-S. 6, S. 14, Conveyancing Act. Such a covenant in my opinion, cannot properly be regarded as a stipulation by way of penalty, and it is therefore unnecessary to decide whether provisions in leases for re-entry for breaches of other covenants in the lease can be regarded as coming within S. 74, Contract Act, as amended. S. 74 in its present form provides that

" when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved, to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. "

This amendment and the decisions which give rise to it, have been very fully discussed in *Natesa Iyer* v. *Appavu Padayachi* (3), where it is pointed out that the word " penalty " was first inserted in the Contract Act in 1899 by this amendment and is not defined in the Act. Equity, as we have seen, only considered stipulations in contracts penal which were intended to secure the payment of money, and it may be questioned whether the term has a more extended meaning in this section, which was designed to abolish, so far as India is concerned, the distinction between stipulations for liquidated damages and stipulations for pecuniary payments by way of penalty and which speaks of the party complaining of the breach receiving reasonable compensation not exceeding the amount named or the penalty stipulated for, and whether it can be construed as affecting the express provisions of S. 111, T. P. Act which makes leases determinable by virtue of provisions for re-entry on breach of covenant.

The fact that agricultural leases such as this one are excepted from the operation of Ss. 105 to 116, T. P. Act does not, in my opinion affect the present question. The Act was framed by eminent English lawyers to reproduce the rules of English law in so far as they are of general application and rest on principle as well as authority, and its provisions are in my opinion binding on us as rules of justice, equi y and good conscience, when we have to deal with agricultural leases in the absence of any special reason for not applying them. The legislature wisely in my opinion if I may say so, has refrained from making these sections applicable proprio vigore to agricultural leases for fear of unnecessarily interfering with settled usages which it is undesirable to disturb. But in the absence of special reasons, there is no ground for applying a different rule in the cases of agricultural leases and there are many decisions to that effect.

(3) [1909] 33 Mad. 375=3 I. C. 941.

For these reasons I would allow the appeal and modify the decree of the District Judge by giving the plaintiff possession in addition to the reliefs already granted with costs throughout. Four months for removal of superstructure, etc.

Napier, J.—I agree with the learned Chief Justice that S. 74, Contract Act, does not apply to the terms of the contract in this case. I cannot agree with Sadasiva Aiyar, J., that we can apply the principle on which the amendment to that section is based, as I think that we should be very careful in applying statutory provisions that are not in pari materia. For the same reason I would not seek the assistance of the Transfer of Property Act as a guide when we are applying equitable reliefs, especially as in this case we are dealing with material that has been excluded from the purview of the Act by express words: vide S. 117. The provisions as to forfeiture in the Transfer of Property Act do not coincide with those enacted in the Conveyancing Act, which does not apply to agricultural leases. There is however no statutory bar to our seeking guidance from English law and I entirely agree with the learned Chief Justice that Courts of Equity would not grant relief in the present case. For these reasons I agree that the appeal should be allowed.

Kumaraswami Sastri, J.—I agree with the judgment of my Lord and I have nothing to add.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 14

AYLING AND KRISHNAN, JJ.

Pamireddi Sambayya and *others*—Petitioners—Appellants.

v.

Nimmagadda Nagayya and *others*—Counter-petitioners—Respondents.

Appeal No. 228 of 1917 and Civil Revn. Petn. No. 533 of 1917, Decided on 2nd October 1918, against order of Sub-Judge, Bezwada, in Civil Misc. Petn. No. 1790 of 1916.

Civil P. C. (1908), Ss. 115 and 151—Dismissal of appeal without notice to appellant is irregularity—High Court can exercise inherent powers and also powers of revision.

Where a Court dismisses an appeal, of the hearing of which the appellant has no notice whatever, the Court, though in ignorance of the true facts, must be held to have acted with material irregularity and in such a way as to induce a miscarriage of justice, and the High Court would be justified in using not only its inherent powers referred to in S. 151, but also its powers under S. 115, to set aside the order of dismissal. [P 15 C 2]

P. Narayanamurthi—for Appellants.

V. Ramadoss—for Respondents.

Ayling, J.—The circumstances of the case out of which these petitions arise are somewhat extraordinary, and as the course we propose to take is one which we should be sorry to see misquoted as a precedent, I deem it best to set them out in detail. The appellants in Appeal Against Order No. 228 of 1917 and petitioners in Civil Revision Petition No. 553 of 1917 (whom we shall henceforward refer to as appellants) were appellants in Appeal Suit No. 11 of 1903 on the file of the Subordinate Judge of Masulipatam. They succeeded, the decree of the original Court being reversed. The other side preferred a second appeal to this Court (Second Appeal No. 1983 of 1913). This Court set aside the decree of the Sub-Court and remanded the appeal to the Subordinate Judge of Masulipatam for disposal according to law. This was on 5th January 1916. Meantime certain changes had taken place in the Courts of the Kistna District. The Sub-Court of Masulipatam, which had disposed of this appeal, was directed to hold its sittings at Bezwada and its designation altered to the Sub-Court of Bezwada. A new Court has been constituted under the title of the Temporary Sub-Court of Masulipatam and was working at Masulipatam when the order of this Court in second appeal was passed.

It is beyond dispute that the effect of this Court's order was to direct restoration of the appeal to the file of the Court sitting at Bezwada which was identical with the Court which originally heard it, although its designation and place of sitting had been altered. The parties however fell into the not unnatural error of thinking that the appeal would be heard by the Court of Masulipatam. As far as appellants are concerned, this error is testified to in the affidavits filed which have been accepted by the lower appellate Court, and which we accept as true in this respect. How natural the error was may be gauged by the fact that it was shared by the office of this Court which sent the records in the first instance to the Temporary Sub-Court of Masulipatam. The latter Court trans-

mitted them to the Bezwada Court. The Bezwada Court, on receipt of the records, posted the appeal for having on 6th March 1916. No notice was sent to the parties, but under R. 16, Civil Rules of Practice, notice of the hearing was affixed on the Court notice board. On 6th March 1916 neither party appeared. The Court took time till 14th March 1916; and then dismissed the appeal for default of appellants' appearance under O. 41, R. 17 (1).

The lower appellate Court says:

"There can be no doubt that neither party knew anything about the appeal having been sent to this Court for disposal."

In this I entirely agree, though it is only the appellants whose ignorance is material. On 28th November 1916 the appellants, having somehow come to know of this order of dismissal, filed a petition to set it aside. The petition was put in under O. 47, R. 1, as a review petition since a petition under O. 41, R. 19, would have been time barred. There is no reason to suppose that the appellants were guilty of undue delay in preferring this application after they came to know of what had happened. At the time this petition was filed, Mr. Jivaji Rao, the Sub-Judge who dismissed the appeal for default, was still in charge of the Court. He however passed no orders upon it up to the time of his departure on transfer in the following month. The petition therefore came for disposal before his successor, Mr. Raghava Ayyangar. The latter, while finding the facts above set forth in appellants' favour, felt himself constrained to dismiss the petition on the ground that under O. 47, R. 2, he had no power to review his predecessor's order, the latter not having directed notice to issue to the other side. It is against this order of Mr. Raghava Ayyangar that appellants invoke our aid both in appeal and revision; and Mr. Ramadoss, who appears for respondents to oppose them, does so on the ground that, however inequitably things may have worked out, the order of Mr. Raghava Ayyangar is absolutely correct from a legal point of view and that we have no power to interfere.

It is unnecessary to discuss this because, in my opinion, the error goes further back, and has resulted in such a flagrant denial of justice that we are not only justified, but called upon to use the inherent powers referred to in S. 151, Civil P. C. The result of the orders passed subsequent to the remand of the appeal by this Court has been that appellants, though for no fault of their own, have been practically deprived of the right of appeal which they possessed. Their appeal has been dismissed without their having any opportunity of arguing it. The affixing of notice of hearing on the board of the Bezwada Court might be sufficient notice where the parties were aware of the pendency of the appeal in that Court, and might be expected to watch the board either by themselves or by their pleaders. It could not be in the present case, where, through a natural error (as shown above), they expected the appeal to be heard in another Court, 50 miles away. It is impossible to conceive that, in these circumstances, Mr. Jivaji Rao would have declined to re-admit the appeal, if the true facts had been brought to his notice in time by a petition under O. 41, R 19. That this was not done was also due simply to appellants' ignorance of what was going on. The same officer's failure to pass orders on the review petition before his departure may be explicable on the ground of pressure of work, or inadvertence, but is much to be regretted. In my opinion the case comes within the spirit of the remarks of their Lordships of the Privy Council in *Debi Bakhsh Singh* v. *Habib Shah* (1). In dismissing an appeal, of the hearing of which the appellants had no notice whatever the Sub-Court, though in ignorance of the true facts, must be held to have acted with material irregularity and in such a way as to induce miscarriage of justice; and, under Ss. 115 and 151, Civil P. C., I would set aside the order of dismissal and direct the Sub-Judge of Bezwada to restore Appeal No. 11 of 1913 to his file and to dispose of it according to law. Costs in these proceedings should be costs in the cause.

Krishnan, J.—The Subordinate Judge is clearly right in holding that the appellants' application, viewed as one under O. 41, R. 19, Civil P. C., is barred by limitation under Art. 168, and as one for review of judgment, it could not be granted by him as notice had not been ordered by the Judge who originally passed the order of dismissal. But I agree

(1) [1912] 35 All. 331=19 I. C. 526=16 O. C. 194=40 I. A. 150 (P.C.)

with my learned brother that in the special circumstances of this case described by him the Subordinate Judge should have acted under S. 151, Civil P. C., and used his inherent powers to set aside the order. There can be no doubt that, if the order is allowed to stand, the appellants' right of appeal in the main suit will be taken away from them for no default committed by them. It was therefore clearly necessary for the ends of justice and to prevent abuse of process of Court to set it aside. I agree with my learned brother that the principle of the decision of the Privy Council in *Debi Bakhsh Singh* v. *Habib Shah* (1) applies to this case, though the facts of that case were somewhat different.

It was contended that S. 151 could not be used for extending periods of limitation and overruling legislative provisions, and reliance was placed on the observations in *Vannisami Thevar* v. *Periyaswami Thevar* (2) and *Kanai Lal Ghose* v. *Jatindra Nath Chandra* (3). That, of course, is so; for no inherent power will exist against an express provision of law. But in this case there does not seem to be any such provision against applying S. 151. O. 41, Rr. 17 and 19, Civil P.C., do not properly apply to a case like the present, where the Court in which the appeal was to be heard was changed without the parties being informed or knowing anything about it. Though the appellants could have applied under R. 19 if they had known of the dismissal in time, they were not bound to do so and it cannot be said that that was their only remedy. As for the review filed by them, it is doubtful if that was a proper remedy at all. If it was, the appellants did apply and their failure to get relief was not due to their fault at all. But they were clearly not bound to apply for review. It cannot therefore be said that there was any rule of law requiring the appellants to adopt any particular procedure such as that under R. 19 or that by way of review. I think that it was open to them to ask the Court to use its inherent powers and that, I think, was their proper remedy in the circumstances. That being so it is open to us under S. 115, Civil P. C., to revise the order of the Sub-Judge, as he failed to exercise the jurisdiction vested in him under S. 151, Civil P. C., as he might have done. I agree to the order proposed by my learned brother.

S.N./R.K. *Order set aside.*

(2) [1916] 33 I. C. 996.
(3) [1918] 45 Cal. 519=42 I. C. 711.

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SADASIVA AIYAR AND SPENCER, JJ.

Bachu Soorayya and *another*—Defendants—Appellants.

v.

Toomuloori Chinna Anjaneyalu and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 2118 of 1917, Decided on 8th October 1918, against decree of Sub-Judge, Cocanada, in Appeal Suit No. 73 of 1916.

Civil P. C. (5 of 1908), S. 2—Legal representative—Decree against person in possession of estate of deceased—Execution proceedings bind real heir.

Where a creditor in good faith obtains a decree against a person in possession of his debtor's property whom he believes to be, but who is not in fact, the legal heir of the debtor, execution proceedings taken in pursuance of that decree will bind the real heir: 31 *I. C.* 920, *Expl.*

Such a case must however be treated as an exception to the general rule that proceedings in execution of a decree do not bind the interest of any person who is not brought on the record as a party to the proceedings in the suit.

[P 17 C 1]

A. Krishnaswami Aiyar—for Appellants.

P. Narayanamurthi and *M. Patanjali Sastri*—for Respondents.

Sadasiva Aiyar, J.—Defendants 3 and 4 are the appellants in this second appeal. Defendant 4 is the purchaser in Court auction sale of the plaint property which belonged to the plaintiff's father, who died before 1913. The decree in execution of which the sale took place, was a small cause decree passed in a suit of 1913 brought against the plaintiff's father's brother as defendant 2 he being impleaded as the legal representative of the plaintiff's father Seethayya, who was then dead. Defendant 2 was divided from plaintiff's father and he was not the real legal representative of plaintiff's father, the minor plaintiff being such representative. The question is whether the Court auction sale is binding on the plaintiff.

In para. 6 of the plaint it is alleged that defendant 2 was not only not the heir of the plaintiff's father, but that the plaint property was never in the possession of defendant 2 after the plain-

tiff's father's death. These allegations in the plaint were not expressly denied in the appellant's written statements. The learned vakil for the appellants relied, among other decisions, on the decision of Napier, J., and myself in *Gnanambal Ammal* v. *Veerasami Chetty* (1). There a decree had been passed against a person in possession of the property of the deceased debtor, though that person was not the heir of the debtor. We held that if the plaintiff in good faith obtained a decree against a person who was in possession of his debtor's property and whom the plaintiff believed to be the legal heir, execution proceedings taken in pursuance of that decree will bind the real heir.

We held that the cases in *General Manager of the Raj Durbhanga* v. *Maharajah Coomar Ramaput Singh* (2) and *Ramasawmi Chettiar* v. *Oppilamani Chetti* (3) supported our view as also the new definition of "legal representative" found in S. 2, Cl. 11, Civil P. C. (5 of 1908). I might also refer to *Bissessur Lall Sahoo* v. *Luchmessur Singh* (4) and *Ishan Chunder Mitter* v. *Buksh Ali Soudagur* (5). The case of a decree passed in a suit brought against a person in possession but who is not the heir of the deceased debtor's estate, must of course be treated as an exception to the general rule that proceedings in execution of a decree do not bind the interest of any person who was never brought on the record as a party to the proceedings in the suit: see *Kishen Chunder Ghose* v. *Mt. Ashoorun* (6) as regards the general rule. The decisions dealing with suits which had been instituted against a debtor before his death but were continued after his death till decree or after the decree in execution proceedings with the wrong person on record as legal representative are irrelevant for the consideration of the plaint before us, as pointed out by their Lordships of the Privy Council in *Khairajmal* v. *Daim* (7). In the present case defendants 3 and 4 contested the plaintiff's claim, not on the ground that defendant 2 was in possession of the plaint property and hence might be taken as the plaintiff's father's legal representative in some sense but on the ground that the decree was passed for a debt of the plaintiff's father and hence is binding on the plaintiff, the question who was sued as plaintiff's father's legal representative or against whom the decree was obtained as such being immaterial according to the contention put forward by the appellants. I think such a contention cannot be supported, having regard to the decision in *Khairajmal* v. *Daim* (7) see also *Madhayarayudu* v. *Subbamma* (8).

I would therefore dismiss the second appeal with plaintiff's costs.

Spencer, J.—I agree.

S.N./R.K. *Appeal dismissed.*

(1) [1915] 31 I. C. 920.
(2) [1870-72] 14 M. I. A. 605=2 Suth. 575=3 Sar. 117 (P. C.).
(3) [1909] 33 Mad. 6=4 I.C. 1059.
(4) [1878-79] 6 I. A. 233 (P. C.).
(5) Marsh. 614.
(6) Marsh. 647.
(7) [1905] 32 Cal. 296=32 I. A. 23=8 Sar. 734 (P. C.).
(8) [1916] 35 I. C. 124.

A. I. R. 1919 Madras 17

OLDFIELD AND PHILLIPS, JJ.

Gaddam Paramasivudu — Plaintiff—Appellant.

v.

Mulakala Subbanna and *others*—Defendants—Respondents.

Second Appeal No. 1813 of 1917, Decided on 25th October 1918, against decree of Temporary Sub-Judge, Cocanada, in Appeal Suit No. 27 of 1917.

(a) Civil P. C. (1908), O. 41, R. 27—Admission of fresh evidence—Admissibility of, in second appeal—Sufficient cause depends on particular case.

There is no objection on grounds of principle or convenience to the admission in second appeal of a document such as the judgment of a High Court, which could not be produced earlier because it was not in existence, and which requires no further evidence to explain it. No general rule however can be laid down and each case must be dealt with with reference to its own merits, and the existence of the sufficient cause referred to in O. 41, R. 27. [P 18 C 2]

(b) Civil P. C. (1908), S. 11—Doctrine of res judicata applies equally to second appeal.

Section 11 is not confined in its application to suits and first appeals. Its provisions apply equally to a second appeal the hearing of which is a trial within the meaning of that section. [P 18 C 2]

B. Narasimha Row—for Appellant.

P. Somasundaram—for Respondents.

Judgment.—The plaintiff, here appellant, sued in ejectment alleging that defendants 1 and 2 had attorned to him as tenants by paying him rent for one year, defendant 3 being their subtenant, and that they had subsequently set up

the title of defendant 4. Plaintiff set up his own title as by purchase from Sattemma, who claimed under the will of Rajasekharadu. Defendants denied the title of both the last mentioned and contended that the decisions in Original Suits Nos. 212 of 1905 and 133 of 1915 were res judicata in their favour. The District Munsif accepted this contention. The lower appellate Court confirmed his decision relying solely on the judgment in Original Suit No. 212 as the judgment in Original Suit No. 133 was the subject of a pending second appeal in this Court. It has since been confirmed here in Second Appeal No. 1057 of 1917.

Plaintiff argues first that even if this Court's judgment can be looked at, it will be decisive only as between himself and defendant 4 who were parties to it, not in favour of defendants 1, 2 and 3, who were not and of whom defendants 1 and 2 have paid rent to him for one year and are therefore (together with defendant 3, who holds under them, estopped from denying his title or pleading, as they did, the title of defendant 4. But although this estoppel is mentioned in the plaint it has apparently been relied on only at the hearing before us, not in the grounds of second appeal or in either of the lower Courts, for although the payment of rent on which the estoppel depended was denied no issue was framed regarding it. Plaintiff having impleaded defendant 4 clearly sought a decision against his permanent title and against the claims of the other defendants only as based on it. In the circumstances he must be taken to have waived his plea of estoppel against defendants 1, 2 and 3 and thus the only objection to the character of this Court's judgment as res judicata therefore fails.

Plaintiff argues next that the judgment cannot be looked at because it is not on the record, and we cannot admit it or any other evidence in second appeal. This argument is answered by reference to O. 41, R. 27, and O. 42, R. 1. For there is no reason for holding that the former provision is not applied by the latter to second appeals; and the substantial cause referred to in O. 41, R. 27 (1) (b), is available in the possibility that, if this Court's decision is not considered the result may be two conflicting decrees between the same parties. Plaintiff relies on *Ramachandra* v. *Krishnaji* (1) and the judgment of Sadasiva Aiyar, J., in *Raman Menon* v. *Mammali* (2), the suggestion in both cases being that the proper course is not to ask the Court to accept newly discovered evidence in second appeal, but to apply to the trial Court for a review in order to its consideration. But there is nothing in the wording of the rule above referred to to warrant a distinction between newly discovered and other fresh evidence, and we have not been shown that the practice of this Court to refuse to deal with the former is as clearly established as it is apparently in Bombay or was supposed to be by Sadasiva Aiyar, J., here. We see no objection, on grounds of principle or convenience, to the admission in second appeal of a document such as this Court's judgment which could not have been produced earlier because it was not in existence, and which requires no further evidence to explain it. There is no resemblance between these circumstances and those dealt with in the cases relied on, since the evidence offered in them related to a question of fact, and the sole ground on which Spencer, J., concurred in Sadasiva Aiyar J's decision in the Madras case was that it would have been inconvenient to receive it. The conclusion must be that no general rule as to the party's right to have newly discovered evidence taken in second appeal can be laid down, but that each claim must be dealt with on its merits with reference to the existence of the sufficient cause referred to in O. 41, R. 27, and that such cause has been shown in the present case.

Plaintiff's remaining objection is that S. 11, Civil P. C., prohibits the trial of an issue, in which the matter in issue has been in issue in a former suit between the same parties, and as this Court is not holding a trial it is not affected by the prohibition. The question raised in effect is whether the hearing of a second appeal is not a trial. We have been referred to no authoritative definition of a trial and plaintiff's proposal to apply the term only to proceedings in which evidence is or can be taken and questions of fact can be decided, that is, to proceedings before Courts of first instance and first appeal, cannot be accepted. For, apart from the anomaly involved in treating a decision reached on the pleadings as a trial, when

(1) [1904] 28 Bom. 4.

(2) [1917] 39 I. C. 954.

it is reached by the Courts last specified, but as other than a trial when, although it would have been reached earlier, it is actually reached on the same materials only in second appeal, the distinction is not maintained in the two cases on which plaintiff relies. For in them the proceedings of a Court of first appeal were in question. In *Abdul Majid* v. *Jew Narain Mahto* (3) the High Court no doubt held that the appellate Court "was not holding a trial and, therefore S. 13 of the Code then in force" could not apply and that Court's decision founded on res judicata could not be sustained; and this decision was approved by a Full Bench of this Court in *Panchananda Velan* v. *Vaithinatha Sastrial* (4). But the contrary view is implied in *Balkishan* v. *Kishan Lal* (5), which was approved in this Court in *Venkata Narasimha Appa Row* v. *Sobhanadri Appa Row* (6), and in Calcutta in *Midnapore Zemindary Co., Ltd.* v. *Nitya Kali Dasi* (7), in which dissent from *Abdul Majid* v. *Jew Narain Mahto* (3) in that decision is unconnected with the preceding statement of the reason for it, that "the doctrine of res judicata did not apply" when, as in the case before the Court, the very object of the appeal in substance if not in form, was to get rid of the adjudication which was said to render the question which the appellate Court was asked to decide res judicata. That observation is, it may be respectfully suggested, intelligible with reference to the case before the Court and to the case in *Abdul Majid* v. *Jew Narain Mahto* (3), because res judicata was pleaded in both in respect of a decision in another suit decided on the same evidence as that with which the appeal was connected.

Here that is not the case; and it is therefore unnecessary for us to treat *Panchananda Velan* v. *Vaithinatha Sastrial* (4) as conclusive or the reference in it to *Abdul Majid* v. *Jew Narain Mahto* (3) as an endorsement of all the dicta contained therein or of that on which plaintiff relies. In accordance with the other decisions above referred to, which include one of this Court, plaintiff's objection to the consideration of this Court's judgment in Second Appeal No. 1057 of 1917 must be disallowed. The foregoing exhausts plaintiff's arguments. The result is that the second appeal fails and is dismissed with costs

S.N./R.K. *Appeal dismissed.*

(3) [1889] 16 Cal. 233.
(4) [1906] 29 Mad. 333.
(5) [1889] 11 All. 148.
(6) [1903] 13 M. L. J. 134.
(7) A. I. R. 1914 Cal. 693=24 I. C. 243.

A. I. R. 1919 Madras 19

SADASIVA AIYAR AND NAPIER, JJ.

Kambala Narayana In re.

Criminal Ref. No. 4 of 1919, Decided on 24th February 1919, made by the Sess. Judge, Godavari, in Case No. 2 of 1919.

Criminal P. C. (1898), Ss. 309, 269 (3) and 307—Sessions Judge must give judgment after recording opinion of assessors.

Under S. 309, the Sessions Judge must give judgment after recording the opinion of the assessors. The mere fact that the accused is charged in the same trial with another offence triable by Jury and that the Judge disagrees with the verdict of the Jury on that charge and desires to make a reference to the High Court, does not absolve the Sessions Judge from his duty to give judgment on the charge tried by him with the aid of assessors. [P 19 C 2]

Public Prosecutor—for the Crown.

Judgment.—It does not appear that the Sessions Judge has followed the directions contained in S. 309, Criminal P. C., which require him to give judgment after recording the opinion of the assessors, to convict if he finds the accused guilty and to pass sentence according to law. The circumstances that in this case the accused is charged in the same trial with another offence triable by Jury S. 269, Cl. (3), Criminal P. C., that the Judge disagrees with the verdict of the Jury on that charge and desires to make a raference under S. 307, Criminal P. C., do not in our opinion, absolve the Sessions Judge from complying with the requirements of S. 309, as regards the offence tried by him with assessors. The reference is therefore premature and we shall send back the case to the learned Sessions Judge to rectify the irregularity and then act according to law.

S.N./R.K. *Records sent back.*

A. I. R. 1919 Madras 20 (1)

OLDFIELD AND SADASIVA AIYAR, JJ.

Narahari Aiyar and *others*—Defendants—Appellants.

v.

Vaithinatha Aiyar — Plaintiff—Respondent.

Appeal No. 161 of 1917, Decided on 27th February 1918, against order of Sub-Judge, Tanjore, in I. A. No. 234 of 1916.

(a) Civil P. C. (1908), S. 95—Order refusing compensation is appealable.

An appeal lies against an order refusing relief under S. 95, 34 *I. C.* 588, *Appl.* [P 20 C 1]

(b) Civil P. C. (1908), S. 95 and O. 33, R. 5 (3)—S. 95 does not exclude attachments under O. 33, R. 5 (3).

S. 95, does not exclude attachment under O. 38, R. 5 (3), from its operation. [P 20 C 2]

(c) Civil P. C. (1908), O. 33, R. 5—Applicability.

The fact that the defendant in a suit is in straitened circumstances or has suffered coercive and revenue processes on several occasions or has made one alienation are not sufficient to attract the operation of O. 38, R. 5. [P 20 C 1]

C. V. Ananthakrishna Aiyar—for Appellants.

T. R. Venkatrama Sastri—for Respondent.

Judgment.—A preliminary objection has been taken that the appeal does not lie the order appealed against being one refusing relief under S. 95, Civil P. C. The principle applied to a similar contention in *Ottapurakkal Thazath Suppi* v. *Alabi Mashur Koyanna Koya Kunhi Koya* (1) is applicable to the present case and negatives the objection. On the merits the lower Court's finding amounts at most to this, that the petitioners were in straitened circumstances, had suffered coercive revenue and civil processes on several occasions and, a little before the attachment complained of, had made one alienation. We do not consider their plea that in fact only defendant 1, who is not a petitioner, was responsible for all this, because in our opinion what was proved was in any case insufficient. For it was not proof of what O. 38, R. 5 (1), requires that, when the attachment was made, petitioners were actually about to dispose of their property. In the circumstances we cannot sustain the lower Court's order. An attempt has been made to support it on the ground that S. 95 authorizes the grant of compensation only for attachments improperly ordered pending trial, not for temporary attachments, such as that here in question, which was apparently made under O. 38, R. 5 (3). We find nothing in the language of S. 95, which excludes attachments of the latter class from its operation. Then as to the amount of damages to be awarded, we have considered petitioners' circumstances already referred to and also the facts that the attachment was cancelled after about two months and that no special damage is alleged. We think that petitioners will be compensated sufficiently by an award of Rs. 20. We therefore allow that amount. As they claimed Rs. 1,000, we direct them to pay half respondent's costs in this Court. The lower Court's order disallowing costs to both parties before it will stand.

S.N./R.K. *Appeal allowed.*

(1) [1916] 39 Mad. 907=34 I. C. 588.

A. I. R. 1919 Madras 20 (2)

SADASIVA AIYAR AND NAPIER, JJ.

Pydi Ramanna In re.

Criminal Revn. No. 209 of 1918, (taken up No. 16 of 1918) Decided on 22nd July 1918, against order of Dist. Magistrate, Vizagapatam.

(a) Criminal P. C. (1898), S. 517—Proceedings under preventive sections fall within "inquiry" or "trial."

Proceedings under the preventive sections fall within the meaning of the expression "inquiry" or "trial" in S. 517 of the Code. [P 21 C 2]

(b) Criminal P. C. (1898), Ss. 109 and 110—Proceedings under—Court has jurisdiction to confiscate property produced before it even in absence of proof that offence was committed with respect to that property—Criminal P. C., S. 517.

A Court dealing with an accused person under Ss. 109 and 110 of the Code has jurisdiction, for sufficient cause, to confiscate property produced before it or in its custody even in the absence of proof that any offence was committed with respect to that property or that it was used for the commission of an offence. [P 22 C 1]

Public Prosecutor—for the Crown.

Sadasiva Aiyar, J.—This is a case taken up in revision by Ayling, J., on a perusal of the calendar. These persons were put up by the police before the Joint Magistrate of Vizianagaram in order that the Magistrate might take proceedings against them under S. 109, Criminal P. C., requiring them to execute bonds with sureties for their good behaviour. Now under S. 109 security can be required either on the ground that a person is taking precautions to conceal his presence and is taking such precau-

tions with a view to committing an offence, or on the ground that a person has no ostensible means of subsistence, or cannot give a satisfactory account of himself. Then S. 110 provides that certain specially qualified Magistrates may require the execution of a similar bond with sureties for good behaviour if a person is by habit a robber, house-braker or thief or a receiver of stolen property by habit and so on. Now the Joint Magistrate has passed his order not under S. 110, but under S. 109 on the ground that these six persons had no ostensible means of subsistence and could not give a satisfactory account of themselves; that is, under Cl. (b), S. 109. Then he further passed an order confiscating Rs. 211 found with accused 3 the word "accused" being used in a loose sense so as to include persons called upon to furnish security, Rs. 260 found with accused 4 and Rs. 213 found with accused 6 besides keys, ornaments and cloths found with accused 4 and 5. (The Joint Magistrate does not mention the provision of law under which he passed the order of confiscation).

As S. 118, Criminal P. C., under which orders are passed in proceedings taken under Ss. 107 to 110, is preceded by S. 117 which provides for an inquiry into the truth of the information on which an order is to be passed, I take it that the order of confiscation was passed under S. 517, Cl. (1). That section is as follows :

> "When an inquiry or trial in any criminal Court is concluded, the Court may make such order as it thinks fit for the disposal of any property or document produced before it or in its custody or regarding which any offence appears to have been committed or which has been used for the commission of any offence."

There can be no doubt that the property with reference to which the confiscation order was passed was property produced before a criminal Court (that is the Joint Magistrate) that an inquiry in the said criminal Court under S. 117, Criminal P. C., and that the Joint Magistrate had therefore jurisdiction to pass the order for the disposal of the property because it was produced before him, though there may be no proof that any offence had been committed with reference to that property even if the word "property" by the explanation to the same section included other property which had been converted into the property produced before the Court. In this connexion I might refer to the case in *Govindaraja Padayachi, In re* (1), in which a Bench of this Court (Abdur Rahim and Ayling, JJ.) held that under S. 517, Cl. (1), the criminal Court has power to pass confiscation orders only in respect of property regarding which an offence appears to have been committed and that the Court cannot pass such orders on the mere fact that the property had been produced before the Court in an inquiry. No doubt under the corresponding S. 517 of the Act of 1882 the words "regarding which any offence appears to have been committed" qualify the words "produced before it", but the words "or in its custody" and the word "or" have again been introduced in the later Code of 1898 before the word "regarding" and as pointed out in *Russul Bibee* v. *Ahmed Moosajee* (2) this alteration clearly extended the powers of the criminal Court to make orders about the disposal of all property produced before it in an inquiry even without an expression of opinion on the part of the Court that any offence appeared to have been committed regarding it. I therefore respectfully dissent from the decision in *Govindaraja Padayachi, In re* (1).

Napier, J.—This case taken up by the High Court arises out of proceedings taken by the Joint Magistrate of Vizianagaram under S. 109, Criminal P. C. He made an order under that section against certain persons to execute bonds with sureties for good behaviour and also made an order for confiscation of cash and pieces of broken jewellery and cloths found in their possession. The persons against whom the order was made appealed to the District Magistrate who upheld both the orders, and they themselves have not applied to us in revision, but the propriety or correctness of the order as to confiscation was doubted by a Judge of this Court and has been put before us for disposal. The order must have been, I think, made under S. 517. I had at first doubts whether proceedings under the preventive sections of the Code come within what is an inquiry or trial in the section. But as has been pointed out by my learned brother, such proceedings are called an

(1) [1915] 31 I. C. 827.
(2) [1907] 34 Cal. 347.

inquiry in those sections, and therefore the section cannot be limited to preliminary inquiries before Magistrates. I would therefore hold that orders can be made in inquiries under the preventive sections.

The next question is whether S. 517 covers property which has come before the Court in the circumstances of this case. It has been held by a Bench of this Court in Criminal Revision Case No. 570 of 1915 that orders can be passed in an inquiry under the preventive sections, but that the order cannot be passed unless it has been shown that the property with regard to which the order is made is such that an offence appears to have been committed with respect to it or that it has been used for the commission of an offence. With respect to the learned Judges who decided that case, I think that they had overlooked the language of the present Code. The same view was taken in the case of *Surendra Nath Sarma* v. *Rai Mohan Das* (3) and that case was relied on in a subsequent case, *Russul Bibee* v. *Ahmad Moosajee* (2). The learned Judges in the latter case pointed out that the Bench which decided *Surendra Nath Sarma* v. *Rai Mohan Das* (3) had overlooked the amendment of the Code; and with great respect this is what the learned Judges who decided the case above referred to in our Court seem to me to have done. The language of the old Code was, as pointed out by my learned brother, limited to property in respect of which an offence appears to have been committed or which has been used for the commission of an offence, whereas the language of the present Code is quite clear and extends the mischief of the section to any property produced before the Court or in its custody. Differing therefore with the decision in Criminal Revision Case No. 570 of 1915, *Govindaraja Padayachi, In re* (1). I am of opinion that there is power in Courts acting under the preventive sections to make an order with regard to a property which has been produced before it.

S.N./R.K. *Order accordinly*

(3) [1903] 30 Cal. 690.

A. I. R. 1919 Madras 22

KUMARASWAMI SASTRI, J.

Rethamali Servai and *another*—Plaintiffs—Petitioners.

v.

Ramasami Servai and *another*—Defendants—Opposite Parties.

Civil Revn. No. 81 of 1918, Decided on 3rd February 1919, from decree of Sub-Judge, Ramnad, in Small Cause Suit No. 198 of 1917.

(a) Civil P. C. (1908), Sch. 2, Para 20—Award directing payment of money and dissolution of marriage cannot be filed by Small Cause Court.

A Small Cause Court has no jurisdiction to file an award under para. 20, which, though it directs payment of money within the pecuniary limits of its jurisdiction, goes on to declare the dissolution of marriage between the parties. [P 23 C 1]

(b) Civil P. C. (1908), Sch. 2, Para. 20—Jurisdiction to file award depends on entire award—Jurisdiction cannot be conferred by only asking those reliefs that are within Court's competence if others are not so.

The jurisdiction of a Court to file an award depends on the reliefs awarded by the award. It is not open to a party to confer jurisdiction on a Court by asking for only one relief granted by the award and getting the award filed under para. 20, where the other reliefs granted are beyond the competence of the Court: *A. I. R.* 1914 *Cal.* 683 and 19 *I. C.* 882, *Expl.* [P 23 C 1]

(c) Civil P. C. (5 of 1908), Sch. 2, Para. 20—"Subject-matter" in para. 20 refers to entire awards and not portion of it.

The expression "subject-matter of the award" in the paragraph means the whole matter dealt with and decreed by the award, and not any particular portion which affects any particular party. [P 23 C 1 2]

(d) Civil P. C. (5 of 1908), Sch. 2, Paras. 15 and 20—Waiver by parties of irregularities must be with knowledge of them.

Irregularities in the procedure adopted by an arbitrator may be waived by the parties, provided they know of the irregularities and waive them with such knowledge. [P 27 C 1,2]

K. Bashyam Iyangar—for Petitioners.

K. A. Rajah Aiyyar—for Opposite Parties.

Judgment.—It is clear from the plaint that the suit is to file the award under S. 20, Sch. 2, Civil P. C,, and to direct payment of the money decided by the arbitrators as payable to the plaintiff by the defendants. The Subordinate Judge has in his judgment refused to file the award. The award, after directing the defendants to pay plaintiffs Rupees 427-1-7 with interest at 6 per cent. per annum, declares the dissolution of the marriage between plaintiff 2 and defendant 2. The arbitrators decide that

the marriage between the parties has been dissolved pursuant to the custom in vogue amongst the members of the caste and state that

"henceforth there shall be no manner of connexion between plaintiff 2 and defendant 2".

and that

"as sanctioned by the custom of the caste each party shall be at liberty to marry according to his or her pleasure."

I do not think that the Small Cause Court has jurisdiction to file an award which, though it directs payment of money within the pecuniary limits of its jurisdiction, goes on to declare the dissolution of marriage between the parties. S. 20, Sch. 2, Civil P. C., directs the filing of the award in any Court "having jurisdiction over the subject-matter of the award." By "subject-matter of the award" I think is meant the whole matter dealt with and decreed by the award and not any particular portion which affects any particular party. The jurisdiction of the Court will depend upon the reliefs awarded by the award. *Mohesh Chandra Kundu* v. *Amar Chandra Kundu* (1) and *Raghavendra Ayyaji Desai* v. *Gururao Raghavendra Desai* (2) referred to by the Subordinate Judge do not decide that it is open to a party to confer jurisdiction on a Court by asking for only one relief granted by the award and getting the award filed under S. 20, though the other reliefs granted are beyond the competence of the Court. If the suit was simply a suit for a decree in respect of the amount decided by the arbitrators without any prayer to file the award under S. 20 the jurisdiction of the Court will no doubt depend on the amount awarded without reference to the subject-matter of the original dispute but when it is sought to file the whole award under S. 20 the reliefs granted by the arbitrators must govern jurisdiction.

On the merits the Subordinate Judge has failed to note that it was open to the parties to waive any error in the procedure adopted by the arbitrators and to see how far the fact that the parties supplied the stamp paper for the award (see Ex. C), and did not object to evidence recorded by one arbitrator in the absence of others being referred to by them, would cure the defect noted by the Judge. That irregularities might be waived is clear from *Manindra Nath Mandal* v. *Mohanunda Roy* (3) and *Moseley* v. *Simpson* (4); it must of course be shown that the parties knew of the irregularities and waived them with such knowledge.

I direct that the application to file the award be returned by the lower Court to be presented to the proper Court. I make no order as to costs.

S.N./R.K. *Order accordingly.*

(1) A. I. R. 1914 Cal. 683=22 I. C. 793.
(2) [1913] 37 Bom. 442=19 I. C. 882.
(3) [1910] 13 I. C. 161.
(4) [1873] 16 Eq. 226.

A. I. R. 1919 Madras 23

OLDFIELD AND SESHAGIRI AIYAR, JJ.

Arumugam Asari — Plaintiff — Petitioner.

v.

Gurunatha Asari — Defendant—Respondent.

Civil Revn. Petn. No. 62 of 1919, originally A. A. O. No. 230 of 1918, Decided on 10th February 1919, from judgment and decree of Small Cause Court Judge, Trichinopoly, in Small Cause Suit No. 5110 of 1917.

(a) Civil P. C. (1908), Ss. 95 and 104 (g)—Order by Small Cause Court—No appeal.

No appeal lies against an order passed by a Small Cause Court 26 *I. C.* 59, *Diss. from.* [P 23 C 2]

(b) Civil P. C. (1908), S. 115—Interference.

The High Court will not ordinarily deal with the matter in revision, where the decision of the lower Court is correct. [P 23 C 2]

T. R. Vaidyanatha Aiyar—for Petitioner.

A. Ramaswami Aiyar — for Respondent.

Judgment.—The appeal is filed against an order passed by the Judge of a Court of Small Causes under S. 95, Civil P. C. We have not been shown any reason for departing from the general principle that no appeal lies against an order passed on the small cause side, and we dissent from the decision to the contrary effect in *Karumuru Venkateswami* v. *Lanka Tripuriah* (1).

We have been asked, if no appeal lies to deal with the matter in the exercise of our revisional powers. But the lower Court's decision is in our opinion correct. The civil revision petition is dismissed with costs.

S.N./R.K. *Petition dismissed.*

(1) [1915] 26 I. C. 359.

A. I. R. 1919 Madras 24

SADASIVA AIYAR AND NAPIER, JJ.

Kandasamy Pillai, In re.

Criminal Revn. No. 815 of 1917, and Criminal Revn. Petn. No. 660 of 1917, Decided on 3rd August 1918, against judgment of S.-Judge, Madura, in Criminal Appeal No. 31 of 1917.

(a) Defence of India Act (1915), S. 1 (3)—"Rest of Act" refers to subsequent sections of Act and not to rules to be framed under S 2.

The words "the rest of the Act" in S. 1, sub-S. (3), refer to the subsequent sections of the Act, and not to the rules to be framed under S. 2, which are to have effect at once and as if enacted in the Act. The rules should not be read as forming an additional section to the Act, but as part of the section itself. [P 25 C 1]

(b) Defence of India Act (1915), S. 2—Rules under—Offences created by, are triable by ordinary tribunals in provinces to which Ss. 3 to 11 are not extended—Criminal P. C. (1898), S. 29.

Offences created by the rules framed under S. 2, in provinces to which Ss. 3 to 11 of the Act are not extended, are triable by the ordinary tribunals indicated by S. 29, Criminal P. C. [P 25 C 1, 2]

(c) Defence of India Act (1915), S. 2—Rules under R. 20—After words "District Magistrate" must be read words "acting District Magistrate or Magistrate executing functions of District Magistrate."

The words of R. 20, Defence of India Act, must be read as if they contained after the words "District Magistrate" the words "Acting District Magistrate or Magistrate executing the functions of a District Magistrate." [P 26 C 1]

(d) Interpretation of Statutes—Rules under section should be read as part of it.

The rules framed under a power conferred by a section should be read as part of the section. [P 25 C 1]

A. Subbarama Aiyar and *Guruswami Aiyar*—for Petitioners.

S. Srinivasa Aiyangar and *Public Prosecutor*—for the Crown.

Order.—In this petition we are asked to revise the judgment of the Sessions Judge of Madura upholding the conviction of the accused for an offence under R. 29 of the rules framed under the Defence of India Act of 1915 for having dissuaded one Ramu Pillai from entering into military service. It was contended by Mr. A. Subbarama Aiyar, in the course of his able argument, first, that there was no such offence in the Madras Presidency, and secondly, that if it was an offence the Court of the Subdivisional Magistrate of Melur had no jurisdiction to try the charge in that (1) the ordinary Courts of the country have no jurisdiction, (2) there was no previous consent of the District Magistrate as required by the Act. After hearing the Advocate-General in reply we had no doubt that the petition must be dismissed, but thought it advisable to give our reasons in a written judgment in view of the importance of the questions raised.

The first argument is based on the peculiar arrangement of the Act. Under S. 1, sub-S. (3), it is provided that Ss. 1 and 2 shall come into operation at once, and that as for the rest of the Act it shall only come into operation in any province on notification by the Governor-General in Council in the Gazette of India. S. 2 empowers the Governor-General in Council to make rules for various general purposes and in particular for certain specified purposes, one of which is to prevent any attempt to dissuade persons from entering into the military or police services of His Majesty (Cl. h). Sub.S. 2 of the same section says that rules made under this section may provide that any contravention thereof should be punished with imprisonment up to a term of seven years or with fine, etc. Sub-S. 3 provides that all rules made under this section shall be published in the Gazette of India and shall thereupon have effect as if enacted in this Act. The whole of these rules were admittedly published in the Gazette of India. It is argued before us that the words "enacted in this Act" must be read to mean that the rules became an additional section to the Act and that as only Ss. 1 and 2 came into operation at once, the rules, being treated as the rest of the Act, can only come into operation after notification as provided in S. 1, sub-S. (3). This argument will, of course, reduce the Act to an absurdity. The scheme of the Act is to provide for the creation of rules and offences to apply at once to the whole of India and also to create in certain special conditions tribunals for the purpose of ousting the jurisdiction of the ordinary criminal Courts in any province or part thereof to which the Governor-General by notification has made the remaining provisions of the Act applicable. To give effect to the contention would be to render the whole Act nugatory in spite of S. 1, sub-S. (3), which provides that Ss. 1 and 2 shall come into operation at once. It is of course our duty to con-

strue an act in such a manner as to give effect to its provisions if it is possible to do so, and this can be done by reading the rules as part of the section under which they are framed, and not as part of the rest of the Act. It is quite clear that where S. 1, sub-S. (3), was speaking of the rest of the Act coming into operation, it was referring to the subsequent sections, and not to the rules which are to be framed under S. 2 and to have effect as if enacted in this Act.

An argument was addressed on the construction of S. 22, General Clauses Act (10 of 1897), which provides that where by any Act, which is not to come into force immediately on the passing thereof a power is conferred to make rules, such rules shall not take effect till the commencement of the Act; and it was sought to introduce into the section words which would make it read, "where by any Act a part of which is not to come into force immediately on the passing thereof, a power is conferred to make any rules, etc., such rules shall not take effect until the whole of the Act shall come into force."

It is not permissible to make any such addition to the section which would have the effect of negativing the purpose of the section, which is simply to provide power to make the rules although the Act has not come into force, but to reserve their application. In addition to this there is direct authority of the House of Lords against the contention. It is to be found in the case of *Chartered Institute of Patent Agents* v. *Lockwood* (1). In that case Lord Herschell clearly laid down that, where the section gives power to make rules, the rules are to be read as part of the section, his language being (para 358):

"Every rule which is intra vires at all events . . . . is to be read into the section, and have just the same effect as if it had been contained in the Act itself."

For these reasons we are satisfied that the rules came into force directly they were published in the Gazette and therefore, that the offence is created.

The argument that such offence can only be tried by a Special Tribunal fails entirely, unless it is shown that sub-Ss. 3 to 11 have been applied to the Madras Presidency. At it has been conceded that they have not been so applied, and the whole of the first argument has been based on that assumption, there is no foundation for this contention. We prefer therefore to leave the consideration of the effect of Ss. 3 and 4 of the Act until such a time as these sections are so applied, or to the Courts of the Provinces where they are in force. S. 4, Cl. (a), Criminal P.C., defines "offence" as "any act or omission made punishable by any law for the time being in force", and S. 29 provides that any offence under any other law (which means any law other than the Indian Penal Code) shall, when no Court is mentioned in this behalf in such law, be tried by the High Court or by any Court constituted under this Code by which such offence is shown in Cl. 8 Sch. 2, to be triable. Ss. 3 to 11 of the Special Act not being in force in this Presidency, there is no Court mentioned in this behalf. The Second Schedule provides under the heading "Offences against other laws" for the trial of an offence punishable as this is by a Court of Session, Presidency Magistrate or Magistrate of the First Class. There can therefore be no doubt that the trying Court had jurisdiction if the case was put before it in a proper manner.

The point is taken however that there was no previous consent by a District Magistrate as required by R. 30. It was somewhat faintly argued that as neither the Defence of India Act nor the General Clauses Act define the words "District Magistrate," there was nothing to show what was meant by those words. We are clear however that where the procedure for the trial of an offence is that under the Criminal Procedure Code, we must look to the provisions of that Code for the meaning of the words used. District Magistrates were created by the Codes of Criminal Procedure, and S. 10 of the Code provides that in every district outside the Presidency town the Local Government shall appoint a Magistrate of the First Class who shall be called the District Magistrate. The point really pressed on us was that Mr. Reilly who gave the consent was not the actual District Magistrate. It appears however from the Gazette of the Government of Madras of 25th April 1916 that he was appointed to act as District Magistrate from 1st June 1916. Then S. 17, Cl. (1), General Clauses Act, provides that in any Act it shall be sufficient for the purpose of indicating the

(1) [1894] A. C. 347.

application of the law to every person for the time being executing the functions of an office to mention the official title of the officer at present executing the functions. The result of this provision is that the words of R. 20 of the Defence of India Act must be read as if they contained after the words "District Magistrate" the words "Acting District Magistrate or Magistrate executing the functions of a District Magistrate." There can be no doubt therefore that Mr. Reilly was competent as Acting District Magistrate to give the consent, and this point therefore fails. In the result the petition is dismissed.

S.N./R.K. *Petition dismissed.*

A. I. R. 1919 Madras 26

PHILLIPS AND KUMARASWAMI SASTRI, JJ.

Rajah of Ramnad—Plaintiff—Appellant.

v.

Meerasa Marakkayar and *others*—Defendants—Respondents.

Second Appeals Nos. 571 to 579 and 773 to 776 of 1916, and 169 and 170 of 1917, Decided on 10th September 1918, against decrees of Dist. Judge, Ramnad, in Appl. Suits Nos. 173 to 178, 180 to 182, 355 to 358, 283 and 284 of 1915 respectively.

(a) Madras Estates Land Act (1908), S. 13 (3)—Temporary wells by which crops are grown are improvements—Improvement can be temporary.

Temporary wells by which crops are grown are improvements within the meaning of S. 13 (3) and a charge for vanpayir is legally leviable in respect thereof. The expression "improvement" in the section is not restricted to permanent, improvements but also includes temporary improvements which materially enhance the value of the holding for the period during which they are in existence. [P 28 C 1]

(b) Landlord and Tenant—Rent—Custom not to charge for dry waste lands unless left waste by wilful default—Landlord should prove default.

Where a custom exists in a holding whereby waste dry lands are not chargeable unless left waste by wilful default, the onus is on the landlord to prove the default on which he relies to make the waste land chargeable. [P 26 C 2]

Judgment.—The series of decisions in the District Court and High Court relied on by the District Judge do not altogether establish a custom that waste is not chargeable even if it be due to the raiyats' wilful neglect: vide *Arunachallam Chettiar* v. *Mangalam* (1) and *Udayal* v. *Arunachala Chettiar* (2); and *Ramasami Servaigaran* v. *Athivaraha Chariar* (3) recently decided. The custom upheld in those cases was that waste dry lands were not chargeable unless left waste by wilful neglect. The District Judge is therefore directed to reconsider his finding and decide whether the custom found by him is supported by the evidence or whether the custom is as found in the cases referred to above. In the latter case, he must further decide whether plaintiff has proved that any of the waste in these suits was due to defendants' wilful neglect. The finding should be submitted within six weeks from this date and ten days will be allowed for filing objections.

Finding.—I have been directed to submit a finding on the following issue:

"Whether the custom found by the District Judge is supported by the evidence or whether the custom is as found in the cases referred to above, and in the latter case, whether plaintiff has proved that any of the waste in these suits was due to the defendants' neglect."

My predecessor observed that

"the evidence in the case is that certain portions of holdings were left uncultivated in suit Faslis, that this was not due to default on the part of the raiyats, that rent has never been charged on waste but that the question has been raised and contested, but not settled, between the landlord and raiyats since Fasli 1318."

He also relied on certain decisions in support of the view that rent was not chargeable on waste. As regards the decisions relied on by my predecesssor, their Lordships observe that they

"do not altogether establish a custom that waste is not chargeable even if it be due to the raiyats' wilful neglect"

and that the custom upheld in the reported cases was:

"that waste dry lands were not chargeable unless left waste by wilful neglect."

Now to come to the oral evidence on record, I find that the only matter that has been satisfactorily proved is that no charge used to be made for waste till Fasli 1317 and that from Fasli 1318 the matter has been under litigation. The witnesses examined on both sides swear generally that it is not customary to charge for waste. But the question does not appear to have been put to them specifically whether the custom they referred to is an absolute custom, irrespective of default on the part of the raiyats. I am not therefore prepared to find upon the strength of these loose statements

(1) [1916] 40 Mad. 640=35 I. C. 329.

(2) [1915] 27 I. C. 872.

(3) [1918] 44 I. C. 663.

that such an absolute custom has been established. The mere omission or failure to collect rent for waste lands until Fasli 1317 is not sufficient to establish a custom that such lands could never be charged even if they were left waste through the wilful neglect of the tenants. I may also add that such a custom, even if established by the evidence, must be rejected as unreasonable. The following observations of Sadasiva Aiyar, J., in *Ramasami Servarigaran* v. *Athivaraha Chariar* (3) appear to me to be pertinent: "I do not think that a custom to let lands lie waste (without regard to reasonable area and without regard to good or bad seasons and existence or absence of facilities for irrigation) for indefinite periods at the tenants' sweet will and pleasure with absolute feedom from liability to payment of any rent is a reasonable custom which can be recognised by Courts: *Ramasami Servaigaran* v. *Athivaraha Chariar* (3):

I find on the first part of the issue that the evidence is not sufficient to establish an absolute cuatom which appears to have been found by my predecessor. I find that the custom is as found in the cases referred to in the order of remand.

The next question I am to consider is whether plaintiff has proved that any of the waste in these suits was due to the defendants' wilful neglect. No question appears to have been put about this matter during the examination of P. W. 1. P. W. 2 swears that land No. 170 is cultivable though sandy, that land No. 317 is quite fit for cultivation, that land No. 1186 is cultivable land, that land No. 163 may be cultivated once in 3 or 4 years and with trouble taken by the raiyat and that if there is heavy rain land No. 392 may be cultivated with horse-gram, that about 2 kulis of land No. 330 are cultivable in parts and that on the rest of the lands horse-gram may be grown when there is heavy rain. He states further that 1½ or 2 kulis of land No. 571 is covered with a tope and that the remainder of the land is cultivable, that land No. 214 is a little high but is cultivable and that No. 289 is not saline but quite fit for cultivation. In fact the evidence of P. W. 2 shows that the lands which are said to be uncultivable could be cultivated.

D. W. 1 swears that in Faslis 1321 and 1322 lands Nos. 602, 681, 607, 424, 1354 and 1355 were cultivated, that lands Nos. 163, 325, 326 aud 330 were waste being sandy and high level and that lands No. 1353, 1354 and 1355 are kollais in village-site. He admits in re-examination that all the waste lands may become cultivable when there is timely rain, though he adds that there was no sufficient rain in the suit faslis. D. W. 2 swears that except 10 kurukkams in land No. 317 the rest is cultivable and that 6 kurukkams out of the said 10 kurukkams form a watercourse. D. W. 3 swears that some of the lands were cultivated in the suit faslis and that other lands were left waste. But he admits that they could also be cultivated if there was sufficient rain. I have no doubt upoh the oral evidence of the witnesses examined in the case that the lands are capable of cultivation provided there is sufficient rain. The next question for consideration is whether during the suit faslis there was or was not sufficient rain for the cultivation of the lands in dispute. There is nothing in the evidence of plaintiff's witnesses about this matter, but the witnesses examined for the defendants swear that there was not sufficient rain. But they are all interested witnesses and I am not prepared to act upon their evidence. The decision turns therefore on the question as to whether the burden of proof lies on the plaintiff or on the defendants. In the case referred to above, Sadasiva Aiyar, J., observes that it would lie on the raiyats to prove that the lands were left waste not through any default on their part. If that view should be upheld, my finding will be that the raiyats have not proved to my satisfaction that they had not sufficient facilities for cultivating the lands in question during the suit faslis. I find however that the issue as remitted in the order of remand directs me to find whether plaintiff has proved that any of the waste in these suits was due to defendants' wilful neglect. If their Lordships intended to throw the burden on the plaintiff, I must find that he has not made out wilful neglect on the part of the tenants. After the return of the finding upon the issue referred the Court delivered the following

Judgment.—We accept the finding that the custom is that waste dry lands are not chargeable unless left waste by wilful default. This was the custom referred to in the order of remand and we cannot go behind that order now. On this finding we think that the burden

of proving wilful default is on the landlord. The finding is that no charge has ever been made for waste dry lands, and under the law as varied by the custom the contract between the parties is that waste lands are not to be charged unless left waste by the wilful default of the tenant. In this view it is undoubtedly incumbent on the landlord to prove the default on which he relies to make the waste land chargeable. The District Judge finds that he has not discharged this burden and we accept this finding. As regards the charge for vanpayir, the Judge finds in Second Appeal No. 169 of 1917 that the temporary wells, by aid of which the crops were grown, are improvements within the meaning of S. 13 (3), Estates Land Act. We accept this finding and would apply it also in the other cases in which no such finding is given, for we can see no reason to restrict the meaning of improvement to a permanent improvement, for temporary improvements can materially enhance the value of the holding for the period during which they are in existence.

On another ground plaintiff's claim to cropwar rents must be disallowed. The tenants admitted only a rate of 5½ fanams per kurukkam, and the District Judge finds that plaintiff has failed to prove any other rates to be payable. The second appeals are accordingly dismissed with costs.

S.N./R.K. *Appeals dismissed.*

A. I. R. 1919 Madras 28

BAKEWELL AND PHILLIPS, JJ.

Imbichi Beevi Uma—Defendant—Appellant.

v.

Eranhippuratha Raman Nair and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1034 of 1918, Decided on 6th March 1919, against decree of Temporary Sub-Judge, Palghat, in Appeal Suit No. 333 of 1917.

Malabar Law—Tavazi—Woman can have two exclusive branches of tavazis formed of children by two husbands.

The tavazhi of a woman may consist of two branches, one branch made up of children by one husband and the other branch of children by another husband, and each branch might own separate properties acquired from their respective fathers. In other words a separate branch of a tavazhi can be established consisting of a woman and her children by one husband to the exclusion of the children by another husband. [P 29 C 1]

C. V. Ananthakrishna Aiyar and *K. P. Ramakrishna Aiyar*—for Appellants.

K. P. M. Menon—for Respondents.

Judgment.—Plaintiff sues as Karnavan of Eranhipurath Tarwad to recover the plaint properties from defendant 8. The plaint property was acquired in the names of Ooli Amma and Kelu Nair, who is her eldest son by her second husband. Ooli Amma married twice and had some children by her first husband Rarappan Nair, who divorced her. She afterwards married Raman Nair, by whom she had a son Kelu Nair and other children.

The real question for decision is whether the plaint property belonged to Ooli Amma and all her children by both the husbands, or whether it belonged to her and her children by the second husband alone. The main contention for the respondents is that there could be no separate tavazhi consisting of the children by one husband alone. The facts as found are as follows: The plaint property was acquired in the names of Ooli Amma and Kelu Nair, the son of Raman Nair. The learned Subordinate Judge does not believe plaintiff's evidence that the property was given to Ooli Amma by her first husband Rarappan Nair, and he also finds that it is not proved that it was given to her children by her second husband Raman Nair. It is however admitted that Raman Nair did give certain properties to his wife and his children by her as is evidenced by Exs. 16 and 17, but the plaint property is not included in those documents. We therefore see that Ooli Amma had some properties which she got from her husband Raman Nair for herself and his children, as it does not appear that she had any other friends. The presumption would be that any additional property which she obtained was acquired out of the proceeds of the property she so held. The Subordinate Judge merely says that Rarappan Nair might have given something to Ooli Amma. This cannot be treated as a finding, but on the finding that the plaint property is not proved to have been given by Rarappan Nair, we are thrown back on the presumption that the property was acquired with the funds already in Ooli Amma's lands.

There remains the real question for consideration, and that is whether a separate branch of a tavazhi can be esta-

blished consisting of a woman and her children by one husband to the exclusion of the children by another husband. Where property is given to his family by a father, it is held with all the incidents of Tarwad tenure, *Kunhacha Umma* v. *Kutti Mammi Hajee* (1), and this view is based on the presumed intention of the father to benefit his own children. If therefore the second husband gives property to his wife and his own children, it is difficult to presume that he intended also to benefit the children by the former husband or even children by a subsequent husband, in the absence of any expression of such intention. No doubt the word "tavazhi" may be as suggested by Sankaran Nair, J., derived from tayor (mother) and vazhi (way), and would naturally include all the descendants of that woman. But even though that is the real meaning of tavazhi, it has been held that branches of a Tarwad consisting of persons who have acquired separate property from their father are constituted as tavazhi by virtue of the possession of that property. If therefore the property was intended for that man's children alone, there is no reason for adding to the branch which is to enjoy that property the children by another husband.

The very fact that these tavazhis are very frequently called puthravakkasam tavazhis leads to the inference that they are not merely descendants of one female but also branches of the family which are benefited by a gift from their father and are thereby constituted as tavazhis. In this view there is no real difficulty in supposing that the tavazhi of a woman could consist of two branches, one branch made up of children by one husband and the other of children by another husband, and each branch might own separate properties obtained from their respective fathers. This has been recognized by Sadasiva Aiyar, J., in *Chakkara Kannan* v. *Kunhi Pokker* (2) and apparently is the view taken in Travancore. No doubt Sankaran Nair, J., in the same case at (p. 324 *of* 39 *Mad.*) suggests that children born by another husband, would benefit in the gift made by the first husband, and he proceeds on the assumption that a tavazhi must consist of a woman and all her children by whomsoever begotten. Srinivasa Ayengar, J., also assumes that a tavazhi must consist of a woman and all her children by the various husbands, but he goes on to say that

"it is certainly difficult to presume an intention in the first husband to grant the property to his wife's children by another husband. Such cases are likely to occur very rarely."

Neither of these learned Judges has considered the possibility of branches within the tavazhi and as pointed out by Sadasiva Aiyar, J., when there are branches within a Tarwad there is really no reason why there could not be similar branches within the tavazhi. If the possibility of that is conceded, then undoubtedly Ooli Amma and her children by Raman Nair would constitute a separate branch and we think that that was the effect of the gifts in their favour by Raman Nair. If that is so plaintiff as the Karnavan of the main Tarwad would have no interest in these properties, although he is a descendant of Ooli Amma by Rarappan Nair, and would have no right to interfere with the alienation of the property by members of the branch consisting of the children of Raman Nair.

Apart from this point there is the question of adverse possession. The plaint property has been dealt with ever since 1875 by the sons of Raman Nair, although at the time these dealings took place there were members of the Tarwad senior to them. In fact at one period Kanaran Nair, son of Ooli Amma by Rarappan Nair, was Karnavan of the Tarwad when the property was dealt with by the children of the other husband, and also later on Benares Govindan Nair was the Karnavan and his claim in respect of other properties of the subtavazhi was disallowed in a suit brought by him. No doubt the learned Subordinate Judge has found that there was no adverse possession by this tavazhi. But for coming to this conclusion he has relied upon a proposition for which there is apparently no support on the record, for he says that "it is not uncommon in Malabar to take demises in the names of junior members of the Tarwad." This may be correct but it is not in evidence in this case, and when it is remembered that the demise was taken in the name of a man who was not only a junior member of the main Tarwad but might be also the Karnavan of a branch, the case bears a

(1) [1892] 16 Mad. 201 (F.B.).
(2) [1915] 39 Mad. 317=35 I. C. 755 (F.B.).

somewhat different appearance. The delaying of this property by this tavazhi was to the knowledge of the plaintiff's predecessors and apparently of plaintiff himself, and consequently of the fact that it has been so dealt with for the first 40 years would constitute adverse possession against the Tarwad of which plaintiff is now the Karnavan. The appeal must accordingly be allowed and the suit dismissed with defendant 8's costs throughout.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 30 (1)

KRISHNAN, J.

Bhimanagowd — Petitioner.

v.

Eswaragowd and *others* — Opposite Party.

Civil Revn. Petn. No. 480 of 1917, Decided on 22nd January 1918, from order of Temporary Sub-Judge, Bellary, in Civil Misc. Petn. No. 218 of 1916.

Administration—Suit for—Court can make defendant plaintiff— It is not necessary as condition precedent to apply O. 1, R. 10 to find expressly that there was bona fide mistake in array of parties—Civil P. C. (1908), O. 1, R. 10.

In an administration suit the Court has jurisdiction to make a defendant a plaintiff to enable him to have the estate administered himself.

It is not necessary that as a condition precedent to the applicability of O. 1, R. 10, the Court should expressly find that there was a bona fide mistake in the array of parties. [P 30 C 2]

H. Bala Krishna Row—for Petitioner.

T. R. Venkatrama Sastri—for Opposite Party.

Judgment.—This suit is in the nature of an administration suit and asks for accounts to be taken of the deceased's estate and to administer it in accordance with his will. In the administration properties will no doubt be partitioned and given to various persons entitled. Defendant 5 is one of those persons so entitled and though he was originally arranged as a defendant, I see no objection to his being made a plaintiff to claim his share. It is argued that as the original plaintiff had no right to institute the suit, this suit would have been dismissed and that the Court has no jurisdiction to add a new plaintiff as it has done. The question whether the original plaintiff has a right or not, has not been found yet. It is a matter of controversy between the parties. But even if we assume for argument that he would ultimately be found to have no interest, that is no bar to adding a new plaintiff. [*Vide Krishna Boi* v. *Collector and Government Agent, Tanjore* (1).] It was next argued that no bona fide mistake is found by the trial Judge to apply O. 1, R. 10, Civil P. C. This being however an administration suit, as I have already out, I do not think it is neeessary to find it expressly. Defendant 5 is entitled to have the estate administered himself.

There is no ground for interference under S. 115, Civil P. C. The petition is dismissed with costs.

S.N./R.K. *Petition dismissed.*

(1) [1907] 30 Mad. 419.

A. I. R. 1919 Madras 30 (2)

WALLIS, C. J. AND KUMARASWAMI SASTRI, J.

V. Ramamurthi Ayyar and *another*—Defendants—Appellants.

v.

Parasaram Mangayacharyulu and *others*—Plaintiffs—Respondents.

Second Appeal No. 1839 of 1917, Decided on 16th December 1918, against decree of Addl. Temporary Sub-Judge, Guntur, in Appeal Suit No 43 of 1916.

Criminal P. C. (1898), Ss. 65 and 190 — Complaint under S. 448, Penal Code—No order on occurrence report—Arrest of accused is legal — Magistrate is not liable in damages—Tort, Liability.

A Sub-Magistrate, acting under Ss. 65 and 190 in respect of a complaint under S. 448, I. P. C., went to a temple, where the accused were in hiding and arrested them, although he had passed no final order on the occurrence report which he had received the day previous:

Held: that, independently of the occurrence report, the Magistrate's action was justified and he was not liable in an action for damages.

[P 31 C 1]

V. Ramesam and *N. Kunjitapatam Ayyar*—for Appellants.

C. Rama Rao for *P. Narayanamoorthy*—for Respondents.

Judgment.—The pleadings clearly state that the defendant 2, the Sub-Magistrate, was acting under S. 190 and 65, Criminal P. C., in respect of a complaint under S. 448, I. P. C., when he went to the temple and found the plaintiffs barricading themselves inside and re-

fusing to open the door, and then arrested them, releasing them immediately after on their recognizance to appear to answer a charge under S. 448, I. P. C. His acts and those of defendant 1, the Inspector of Police, were perfectly legal. The Subordinate Judge has misread the evidence of the Sub-Magistrate, who does not say that he had disposed of the occurrence report which reached him on the previous day. As he has passed no final order on the report, it was open to him to take action upon it next day, and further under S. 190 (1) (c) the facts which he saw at the temple were sufficient to justify him in taking action independently of the occurrence report. We set aside the decree of the Subordinate Judge and restore that of the District Munsif with costs here and in the lower appellate Court.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 31 (1)

AYLING AND SESHAGIRI AIYAR, JJ.

Sankaralinga Mudaliar and *others*—Plaintiffs—Respondents.

v.

Kuthalinga Mudaliar and *others*—Plaintiffs—Appellants.

Civil Appeal No. 35 of 1917, Decided on 30th January 1918, against decision of Sub-Judge, Tinnevelly, in O. S. No 35 of 1914.

Limitation Act (9 of 1908), Arts. 131 and 142—Suit for possession of temple—Art. 142 and not Art. 131 applies.

The period of limitation applicable to a suit for possession of a temple, the value of the temple itself being included in the plaint valuation of the suit, is contained in Art. 142 and not Art 131. 4 *Cal.* 683, *Dist.* [P 31 C 2]

K. R. Gurusami Aiyar and *A. Subbaram Aiyar*—for Appellants

M. D. Devadoss—for Respondents.

Judgment.—We agree with the lower Court that the suit is barred by limitation, although in our opinion the appropriate Article is Art. 142, and not Art. 131 Lim. Act. The suit is in effect for possession of the temple and the value of the temple itself is specifically included in the plaint valuation of the suit. The judgment in *Eshan Chunder Roy* v. *Monmohini Dassi* (1), which is relied on by appellants' vakil, proceeds on the basis that no interest in immovable property was involved and *Ramanathan Chetty* v. *Murugappa Chetty* (2), *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (3) and *Charapattada Siddalinga Swamulu* v. *Sondur Ramachandra Charlu* (4) all support the view that Art. 142 is the proper article to apply in the present case.

But this makes the case of plaintiffs worse for under Art. 142 the burden of proof must rest on plaintiffs, and on the meagre evidence on record we have no hesitation whatever in holding that they have not discharged it. The appeal is dismissed with costs as also the memorandum of objection.

S.N./R.K. *Appeal dismssed.*

(1) [1879] 4 Cal. 683.
(2) [1904] 27 Mad. 192.
(3) [1900] 23 Mad. 271=27 I. A. 63=17 Sar. 671 (P. C.).
(4) [1916] 35 I. C. 646.

A. I. R. 1919 Madras 31 (2)

OLDFIELD AND SADASIVA AIYAR, JJ.

Rajeswara Muthuramalinga Sethupathi—Petitioner—Appellant.

v.

Mahalinga Raju and *another*—Defendants—Respondents.

Letters Patent Appeal No. 73 of 1917, Decided on 15th January 1918, against judgment of Seshagiri Aiyar, J., in Criminal Revision Petition No. 413 of 1916.

(a) Madras Local Boards Act (5 of 1884), S. 73—Cess—Liability of tenant to pay is only to landlord for portion actually paid.

A landlord is primarily liable to Government under S. 73 and a tenant is liable only to the landlord in respect of the portion of cess which the latter has actually paid and contingently on his having made the payment: 27 *I. C.* 22, *Foll.* [P 32 C 1]

(b) Limitation Act (9 of 1908), Arts. 61 and 120—Suit by landlord to recover cess paid by him from tenant—Arts. 120 and not 61 applies.

A suit by a landlord to recover from the tenant the cess actually paid by him must be instituted within the period prescribed by Art. 120, and not by Art 61. [P 32 C 1]

L. A. Govindaraghava Aiyar—for Appellant.

Judgment.—The sum at stake in this Letters Patent Appeal is small and presumably for that reason the appeal has not been opposed. Looking at the terms of the Local Boards Act, we regret that we are unable to agree with the material portion of the learned Judge's judgment, that in which he holds the tenant liable to Government. The contrary view that only the landholder is liable to Government was taken by Tyabji, J., in *Puchakayala Jagannaikulu* v. *Manager of*

Nandigam Estate (1) and is, we think, entailed by the language of S. 73, Local Boards Act, the only liability of the tenant being that imposed by the proviso thereto. He is liable only to the landlord in respect of the portion of the cess which the latter has actually paid and contingently on his having made the payment. Taking this view, we cannot apply Art. 61, Sch. I, Lim. Act, since it applies to cases of money paid by the plaintiff on behalf of the defendants, and plaintiff's payment was not of that description. No other contention being suggested, the Article applicable is No. 120. The decision of the learned Judge must therefore be set aside and that of the lower Court must be modified by addition of Rs. 5-6-0 to the decree amount, Rs. 3-15-1. Defendants will pay half plaintiff's costs in this Court.

S.N./R.K. *Decree modified.*

(1) [1916] 39 Mad. 269=27 I. C. 122.

A. I. R. 1919 Madras 32 (1)

PHILLIPS, J.

Ponnusami and *others* — Plaintiffs—Petitioners.

v.

Palayathan and *another*—Defendants Opposite Parties.

Civil Revn. Petn. No. 153 of 1918, Decided on 7th March 1919, against decree of Court of Dist. Munsif, Melur, in Sm. C. C. Suit No. 1169 of 1917.

Contract Act (9 of 1872), S. 23—Agreement to serve in lieu of interest of debt is not illegal.

A stipulation in a bond whereby the debtor contracts to work for a specified term in lieu of payment of interest is not opposed to public policy and is enforceable. There is little difference between such contract and one of apprenticeship. [P 32 C 2]

K. V. Krishnaswamy Aiyar—for Petitioners.

Judgment.—This case is by no means identical with *Ram Sarup* v. *Bhagat Bansi Mandar* (1), in which the debtor bound himself to serve until the debt was repaid and in default to pay exorbitant interest. Here the debtor only undertakes to work for five years, and this undertaking is accepted by the creditor in lieu of interest. There is nothing to prevent the debtor leaving service at the end of five years, and if he commits default he has to repay the advance with 25 per cent interest. This can by no means be called a contract of slavery, for the work done by the debtor is to be paid for at the ordinary rates and the agreement to continue in service is treated by the employer as consideration equivalent to interest. Respondents are not unfortunately represented in this Court, but there seems to me very little difference between such a contract and one of apprenticeship or indenture and therefore it cannot be treated as opposed to public policy. It appears that respondents completed their contract so far as the labour was concerned and plaintiff can only claim his principal amount subject to limitation or any subsequent contract. The decree is set aside and the suit remanded for disposal in the light of the above remarks. Costs will abide the result.

S.N./R.K. *Petition allowed.*

(1) [1915] 42 Cal. 742=30 I. C. 955.

A. I. R. 1919 Madras 32 (2)

ABDUR RAHIM AND SPENCER, JJ.

Gangamirtham Pillai — Defendant—Appellant.

v.

Rajamanikkathammal and *others* — Plaintiffs and Defendants—Respondents.

Civil Appeal No. 84 of 1918, Decided on 19th February 1919, from decree of Sub-Judge, Trichinopoly, in Original Suit No. 41 of 1916.

Hindu Law—Widow—Compromise by—If in interest of estate is binding— Reversioner can challenge it on ground of absence of care and negligence in effecting compromise.

Where there is a litigation pending in the subject-matter of which a Hindu widow is interested, she has a discretion as to how to conduct that litigation and to come to an arrangement with her opponent, if she believes that it would be in the interests of the estate. But a reversioner is entitled to show that the compromise was not arrived at with due care and caution and was such as really showed negligence on the part of the widow, and if he succeeds in showing that, the compromise will not be binding upon him. [P 34 C 1]

T. V. Muthukrishna Aiyar — for Appellant.

T. R. Ramachandra Aiyar, *K. S. Ganesa Aiyar* and *Sundara Row* — for Respondents.

Abdur Rahim, J.—The first question raised in the appeal relates to the effect of a compromise in a previous proceeding between defendant 2, the widow of Krishnaswami Konar, his father, Karuppanna Pillai, his brother, Perumal, and

defendant 1. Krishnaswami Konar who died in 1907, had, by his first wife, two daughters, the plaintiff, and another daughter now deceased. After the death of his first wife he married defendant 2, Muthukannammal. Karuppanna, his father, died in 1912 and Perumal, his brother, died in 1910. Defendant 1 is the son of Perumal. It is not necessary to refer to the other defendants, for these are the principal parties concerned.

It would appear that, on the death of Krishnaswami Konar, his father and brother laid claim to the properties standing in his name as belonging to the joint family. They applied for succession certificate and defendant 2, the widow, apparently acquiesced at that time in their claim and made no objection to the grant of a certificate to Perumal. Then apparently she changed her mind not long afterwards, for we have got a number of notices, MM series, which she gave to the debtors of her husband; they were asked not to pay over outstandings to Perumal because he was making a fraudulent attempt to secure the moneys which did not belong to him. Thereafter the parties seem to have come to an amicable understanding, for a deed of maintenance was executed in 1909. Under that document the widow accepts Rs. 20 a month for her life as maintenance and also a right of residence in the family house. But again apparently she fell out with her husband's relations, for we find that Karuppanna, Perumal and defendant 1 instituted a suit, Original Suit No. 44 of 1910, for recovery of debts due under certain bonds in the name of Krishnaswami Konar, and in that suit defendant 2 filed a written statement alleging that the properties were the separate property of her deceased husband, being his self-acquisitions. Then apparently there was an attempt at mediation by common friends, with the result that a document, Ex. 18, called settlement Sridhanam deed, was executed under which Perumal assigned to the plaintiff and her deceased sister hypothecation bonds to the value of Rs. 2,300. This was on 28th May 1910. The suit was compromised by a razinamah petition Ex. 20. In that petition defendant 2 expressed herself as satisfied with receiving Rs. 3,200 cash in quit of all her claims to the property of her deceased husband.

A decree based on that petition, Ex. 21, was passed, the Court sanctioning the compromise on behalf of the minor defendant 3 (defendant 1 in this suit). The present plaintiff or her sister was not a party to that suit; and the Court's sanction was naturally not obtained on behalf of them, who were also minors at the time, for the compromise. It is the effect of Exs. 20 and 21 that we are mainly concerned with in this appeal. I might also mention another suit which was filed (Original Suit No. 3 of 1915) by defendant 1 seeking to set aside the settlement in favour of the plaintiff and her sister under Ex. 18. The plaintiff in this suit filed a written statement, Ex. GGI, contesting that suit. The contention on behalf of the appellant is that the compromise evidenced by Exs. 20 and 21 was in the nature of a family settlement arrived at by the widow and therefore binding on the plaintiff, the presumptive reversioner. No doubt the father and brother of Krishnaswami did make allegations that the properties standing in the name of Krishnaswami were joint family properties and that defendant 2 was a member of the joint family, and it may be taken that defendant 2, the widow of Krishnaswami, acquiesced in that allegation on several occasions and even accepted the allegation as true. But any such statement of hers cannot amount to an estoppel by which the plaintiff would be bound and it is not so contended. These various statements of defendant 2 have been referred to only as showing that there was a bona fide dispute and that the razinama was executed in settlement of that dispute. The most significant fact however is that in the very razinama petition all the properties are alleged by the parties as belonging to Krishnaswami himself and not as belonging to the joint family.

There is no allusion whatever either in Exs. 20 or 21 to any claim by Perumal or by Karuppannah that Krishnaswami was a member of the joint family, that the properties belonged to the joint family and that the parties were adjusting their disputes in the manner stated in Ex. 20. In Ex. 21 also, the decree, they, in more than one place, speak of the properties as belonging to the deceased husband of defendant 2. How came these documents to be drafted in that

way it is impossible to tell, because no evidence has been brought to our notice which furnishes any explanation. In the face of those documents it is impossible to say that defendant 2 was adjusting a bona fide dispute in regard to the estate, and the facts which have already been mentioned show clearly that defendant 2 was not making any attempt to protect the interests of the reversioner. All that she was content with was a sum of Rs. 3,200, and for that amount she parted with all the properties of her husband amounting to about Rs. 20,000. These documents really are in the nature of an alienation purporting to be made by the widow of her husband's properties and not a settlement of a bona fide dispute as to the title of these properties. We have been referred to a ruling of the Privy Council on the subject of compromise by widows in *Khunni Pal* v. *Gobind Krishna Narain* (1). All that their Lordships lay down is to this effect :

> "that a compromise is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is."

Such an agreement is altogether wanting in this case, for it proceeds on the assumption not that Karuppanna and Perumal had any title to those properties but that they belonged solely to defendant 2's deceased husband. Further, as pointed out by a Bench of this Court in a case reported as *Muthukumarasami Odayar* v. *Subramania Iyer* (2), a compromise effected by a widow, in order to be binding, must be shown to have been made with due care and caution :

> "When there is a litigation pending, the widow is also interested in the subject matter of the litigation and she must have a discretion as to how to conduct that litigation and to come to an arrangement with her opponent, if as a matter of fact she believed that it would be in the best interests of the estate. On the other hand, the reversioner is entitled to show that the compromise was not arrived at with due care and caution and was such as really showed negligence on the part of the widow."

In this case, as already stated, defendant 2 cannot be said to have taken any caution whatever to protect the interests of the reversioner. All the evidence points to the conclusion that she was from time to time acting either at the whim of the moment or at the advice of persons who happened to surround her at the time. I therefore agree in the conclusion arrived at by the Subordinate Judge on this point. Then Mr. T. V. Muthukrishna Ayyar appearing on behalf of the appellant argued that the finding that the family was divided and that these properties were the self-acquisitions of Krishnaswami is wrong. He did not in fact attempt to take us through the entire evidence in the case which has been fully dealt with by the Subordinate Judge, but he brought to our notice what apparently he thought was the most important evidence in favour of his client in this connexion and as we did not think that that evidence in the light of the admitted facts of the case showed that the family was joint and the properties in dispute were properties of the family, he did not think it would serve any useful purpose to go further into the matter. I shall assume that he has succeeded in showing that Ex. CC, which is a mortgage of the two houses for Rs. 3,000, alluded to two previous mortgages, Ex. BB and Z. The mortgage under Ex. Z for Rs. 1,000 purports to be in favour of Karuppanna, the father of Krishnaswami. But Ex. CC does not, as pointed out by the Subordinate Judge, say that part of the consideration was a previous mortgage in favour of Karuppanna.

Whether Ex. Z was a benami transaction or whether there is some other explanation forthcoming as to how that is included in Ex. CC, if that be a fact, we are not in a position to determine because no evidence has been given as to the circumstances under which Ex. CC was executed, and as to how it referred to Ex. Z even though it purported to be in favour of Karuppanna. It would be going much too far to say that these transactions showed that Krishnaswami was joint at their date with Karuppanna and Perumal. Krishnaswami admittedly left the family house in 1889, and he carried on separate business in contracts in his own name. A long list of documents which have been filed stand in his name alone. Similarly Karuppanna had a business in his own name and Perumal also was earning money and acquired properties separately. There cannot be any doubt whatever that the finding of the Subordinate Judge that Krishnaswami had separated from the family and all these

(1) [1911] 33 All. 356=38 I. A. 87 (P.C.).
(2) [1916] 33 I. C. 687.

properties were his self acquisitions is correct. The next question relates to the appointment of a receiver. The learned Subordinate Judge thought that in the circumstances disclosed the best thing for the parties was that there should be a receiver to collect the outstandings due to the estate of the deceased Krishnaswami. Defendant 2 parted with her interest in the properties as a widow in favour of Perumal and Karuppanna now represented by defendant 1. It is so held by the Subordinate Judge and although she is represented by a pleader in this appeal, she takes no objection to the finding of the Subordinate Judge to that effect. She therefore has no interest in safeguarding the estate of Krishnaswami. As the bulk of the property of the estate consists of outstandings, the Subordinate Judge was right in the circumstances to appoint a receiver. At the same time defendant 1, who, it may be pointed out, is still a minor though he will attain majority soon, is entitled to make the best use of the money which he is entitled to hold during the lifetime of defendant 2, and the learned pleader for defendant 1 has asked us therefore to modify the decree by directing that as soon as the receiver has collected a sum of Rs. 1,000 or thereabouts he should hand over the amount to defendant 1 on his (defendant 1's) furnishing security to the satisfaction of the Court after due notice to the plaintiff.

This I think is reasonable. With that modification, the decree of the Subordinate Judge must be confirmed and the appeal dismissed with costs of the plaintiff. As regards the memorandum of objections, the first point urged by the learned pleader for the plaintiff was that as a matter of fact defendant 2 did not alienate her interest in the properties to Perumal and Karuppanna. Bu defendant 2 herself, though there is, as already pointed out, the decree against her so far as her interest is concerned, does not contest it and even in this Court her pleader is content with the decree. It is not open to the plaintiff to dispute this part of the judgment of the lower Court. The same answer applies to the second point urged in the memorandum of objections, namely that the suit comprised properties other than those set out in the schedule to Ex. 21, the decree on the compromise and therefore, at least with respect to those properties, defendant 1 has no right even during the lifetime of defendant 2. Defendant 2 in Ex. 20, the razinama, says that she has relinquished all her rights to the estate of her husband. As she does not raise any question before us as regards any item of the properties, the memorandum of objections must be dismissed with costs of defendant 1.

Spencer, J.—The plaintiff is the daughter and nearest heir of the deceased Krishnaswami Konar, who died in 1907. Defendant 2 is plaintiff's stepmother and Krishnaswami Konar's second wife. Plaintiff sued to obtain a declaration that the decree in Appeal Suit No 44 of 1910, on the file of the District Munsif of Trichinopoly, was not binding on the reversioner. The first point argued in appeal was that when defendant 2 entered into the compromise in Original Suit No. 44 of 1910, she represented the estate of her deceased husband and that the compromise shold be upheld as a bona fide settlement of family disputes and as binding on the plaintiff. I feel quite clear that the widow, defendant 2, did not represent any interests but her own when she entered into the compromise embodied in Exs. 20 and 21 in Original Suit No. 44 of 1910. What Muthukannammal got out of that arrangement was a lump sum of Rs. 3,200 in quit of all her claims on the estate of her deceased husband and a right of residence for her lifetime in a certain house. This she took "absolutely and for her sole and exclusive benefit," as stated in Ex. 20. If anyone represented the reversionary interest in that suit, it was rather the plaintiff in that suit, as may be seen from the words "that the plaintiffs or other reversionary heirs of the said Krishnaswami Konar be entitled to the house after her." Beyond the words "other reversionary heirs of the said Krishnaswami Konar," there is no indication that the future claim of the reversioners to Krishnaswami Konar's estate was even considered at the time; much less that steps were taken to protect the interest of those minors.

Although the leave of the Court was obtained under O. 32, R. 7, Civil P. C., for the present appellant Gangamirdham, who was then, as now, a minor, entering into that compromise, Rajamanikkathammal (plaintiff in this suit) and her sister Meenammal (now deceased) were not

personally made parties to that suit and no similar permission was obtained on their behalf for compromising it, although they were then minors. It would be manifestly unjust to hold the plaintiff and her sister bound by the acts of their stepmother in that suit. On the other questions argued before us I have nothing to add to what my learned brother has said, and I agree in the order proposed by him.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 36

ABDUR RAHIM AND OLDFIELD, JJ.

Bappu Reddiar—Appellant.

v.

Official Assignee, Tinnevelly — Petitioner—Respondent.

Appeal No. 321 of 1918, Decided on 25th April 1919, against order of Dist. Judge, Tinnevelly, in Civil Suit No. 27 of 1917, D/- 31st August 1918.

Provincial Insolvency Act (3 of 1907), S 37—Transfer with fraudulent preference—Burden of proof is on receiver—Deliberate intention must be proved—Transfer will have such effect is not sufficient.

Where a transaction is impugned as amounting to fraudulent preference within the meaning of S. 37, Provincial Insolvency Act, the burden lies on the Receiver, or the creditors who impugn the transfer, to make out that the transfer was made with a view to give preference. It is not sufficient to prove that the transaction took place within three months of the insolvency, and that in fact it had the effect of giving preference to the transferee: it must be shown positively that the transfer was made with a view to prefer the creditor to whom the transfer was made, and unless such an intention is made out, the mere fact that the transfer would hav e such an effect is not sufficient to bring the case within the scope of the law. [P 36 C 2]

T. V. Muthukrishna Aiyar and *Subbarama Aiyar*—for Appellant.

V. Purushotham Aiyar and *T. R. Venkatarama Sastri*—for Respondent.

Judgment.—After the order of remand was made by this Court on 26th March 1918 giving an opportunity to the transferee, the transfer in whose favour is impeached in this case under S. 37, Provincial Insolvency Act, both the parties adduced evidence relevant to the matter and we have now got to decide on that evidence whether there is a case under S. 37. A ruling of this Court in *Official Assignee of Madras* v. *Mehtha & Sons* (1) and another of the Calcutta High Court in *Nripendra Nath Sahu* v. *Ashutosh Ghose* (2) lay down clearly after a full discussion of the authorities that it is for the Receiver, who is impugning a transaction as amounting to fraudulent preference within the meaning of S. 37, Provincial Insolvency Act, to prove the allegation. No doubt in the order of remand, the learned Judges seem to have taken the opposite view. This is a question of law and we agree with the decisions already mentioned. The facts of this case are that Nagalingam Pillai's creditors' petition to declare him insolvent was filed on 27th January 1914 and the transfer which is a deed of sale in favour of the appellant, one of the creditors, was made on 11th December 1913, that is within three months of the insolvency. The consideration for the sale was Rs. 1,000, out of which Rs. 500 was paid towards the debt due to the vendee himself and out of the balance Rs. 400 was paid to a relation of the respondent's witness 2 who had a mortgage on another property of the insolvent and Rs. 100 to another creditor who had a mortgage. These are practically all the facts we have before us, to find whether the case comes under S. 37.

The law lays down that it is not sufficient to prove that the transaction which is impugned took place within three months of the insolvency and that in fact it had the effect of giving preference to the transferee, but it has to be shown positively that the transfer was made with a view to prefer the creditor to whom the transfer was made. The burden lies, as pointed out in the decisions, on the receiver or the creditors who impugn the transfer to make out that the transfer was made with a view to give preference. Unless such intention is made out, the mere fact that the transfer would have such an effect is not sufficient to bring the case within the scope of the law. As we have suggested, beyond the fact that the transfer was made within three months prior to the insolvency and that it had the effect of paying the transferee in full, while the other creditors would probably receive much less than their debt, there is nothing on which we can hold that the transfer was made with the intention contemplated by law. It is not suggested that the consideration for the transfer was not the proper value of the property. The transferee it may

(1) [1919] 42 Mad. 50=49 I. C. 968.

(2) [1916] 43 Cal. 640=33 I. C. 548.

be mentioned is not a relation of the insolvent, in which case the Court might be inclined to view the transfer with suspicion. And there is some evidence though it cannot be said to be of a very cogent character, that the transferee had been pressing for payment of his debts and that it was in pursuance of that demand the sale was effected. Under the circumstances we cannot uphold the view taken by the learned District Judge that the case fell within the purview of S. 37, Insolvency Act.

The learned pleader for the respondent before us suggested that his client was misled by the observation in the previous order of the High Court as to the burden of proof. But there is nothing to show that the respondent was in any way prevented from adducing any evidence either at the original trial or after remand. In fact after the order of remand, he did adduce some evidence and we do not think that we can entertain the suggestion that he would have adduced better evidence if he did not think that the burden lay on the other side. It was his duty to have adduced the best evidence he had, either to prove that the transaction amounted to fraudulent preference or to rebut the proof of the other side that the transfer was bona fide and made for valuable consideration. In the result we set aside the order of the District Judge and dismiss the petition with costs here and in the Court below.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 37

WALLIS, C. J. AND AYLING, J.

G. Aravamuda Chariar and *others*—Defendants—Appellants.

v.

Aramanai Krishna Iyer and *others*—Plaintiffs and Defendants—Respondents.

Civil Appeal No. 420 of 1917, Decided on 29th January 1919, against decree of Sub-Judge, Kumbakonam, in Original Suit No. 2 of 1917.

Contract — Construction — Purchase by plaintiff from defendants 1 to 3 who had already purchased half-share from defendant 4 as guardian of *P*—Suit by *P* against plaintiff for recovery of her share—No application by defendant 4 for impleading him—Suit compromised by plaintiff by paying off *P*—Suit subsequently brought by plaintiff for refund of purchase money and for interest—Suit held maintainable—Cause of action held to arise on payment to *P*—Plaintiff held entitled to interest — Limitation Act (1908), Art. 97—T. P. Act (1882), S. 55 (2).

Plaintiff purchased certain properties from defendants 1 to 3 who had already purchased a half-share of these from defendant 4, as guardian of *P*. *P* filed a suit by her next friend to recover her share of the properties with mesne profits from the plaintiff. Defendant 4 not applying to be impleaded to defend his title, plaintiff compromised the suit with *P* by paying her Rs. 5,925 in settlement of her claim. Plaintiff brought the present suit for refund of the purchase-money as damages and for interest on the same from the date of his payment to *P*:

Held: (1) that the suit was maintainable as one for return of the purchase-money on failure of consideration: (2) that the cause of action arose on the date of plaintiff's payment to *P* and the suit was not barred: (3) that plaintiff was entitled to interest on the purchase-money. [P 38 C 1]

T. R. Venkatarama Sastri and *S. Parthasarathi Aiyar*—for Appellants.

T. Rangachariar and *K. Narasimha Iyengar*—for Respondents.

Judgment. — This is a suit for damages brought by the plaintiffs who purchased certain properties from defendants 1 to 3. Defendants 1 to 3 had purchased one-half share of these properties from defendant 4, the guardian of his minor daughter, Ponnammal, who had inherited them from her deceased mother. After Ponnammal's marriage a suit Original Suit No. 43 of 1915, was filed on her behalf to recover back her share of the properties with mesne profits from the present plaintiffs. The plaintiffs gave notice to defendant 4 to come in and defend the title, but he failed to do so and in these circumstances the plaintiffs, on 28th September 1916, consented to a decree by which they became liable to pay Ponnammal Rs. 5,925 in settlement of her claims, which sum they duly paid and then sued to recover the amount as damages from their vendors, defendants 1 to 3, and defendant 4 and his son, defendant 5.

At the trial the plaintiffs said they would be satisfied with the return by defendants 1 to 3 of the one-half of the purchase-money which was attributable to Ponnammal's half-share in the lands with interest at 6 per cent. and the Subordinate Judge has given judgment against them for this sum. The appellants object that the plaintiff's claim for damages for breach by defendants 1 to 3 of their covenant of title is barred as time ran from 1898, the date of the sale deed, Ex. B. For the plaintiffs it is argued that the suit must be regarded

as instituted to recover damages for breach of a covenant to quiet enjoyment. There is no implied covenant for quiet enjoyment in a deed of sale, and the plaint does not allege that there was any such covenant in the sale deed, Ex. B, or base the suit upon it. In para. 10 of the plaint it is merely stated that

"since defendants 1 and 2 and their father, and defendant 3's father, the late Srinivasa Raghava Chariar, made plaintiff 1 believe that the plaint A schedule properties belonged to them undisputedly and sold the same to him and since the re-ponsibility of protecting the said properties and delivering them to the plaintiffs free of dispute lies upon them according to law, and since they are legally bound to discharge the encumbrance which was created upon them by the said Original Suit No. 43 of 1915, and since they have not so discharged it, they are liable to make good all the loss which has accrued to the plaintiffs."

This is more like a claim for breach of covenant of title and does not contain any averment of a covenant for quiet enjoyment nor was any issue framed as to whether Ex. B contains such a covenant, nor does any such contention appear to have been put forward at the trial. The suit would appear to have been treated by the Subordinate Judge at the suggestion of the plaintiffs, as a suit for return of the purchase-money as on a failure of consideration, which was not barred according to the decision in *Subbaraya* v. *Rajagopala* (1).

The appellants object that on this basis the plaintiffs ought not to have been allowed interest on the purchase-money for the years during which they were in possession and in receipt of rents and profits. They were however obliged to compromise Ponnammal's suit for recovery of possession and for mesne profits for Rs. 5,925 which is considerably more than the principal and interest awarded, and in these circumstances there does not appear to be any sufficient reason for depriving them of the interest on the purchase-money. The appeal is dismissed with costs of plaintiffs.

S N./R.K. *Appeal dismissed.*

(1) A. I. R. 1915 Mad. 703=38 Mad. 887=23 I. C. 570.

A. I. R. 1919 Madras 38

ABDUR RAHIM AND NAPIER, JJ.

Lingappaya and *another*—Appellants.

v.

Sankaranarayana Bhatta and *another*—Defendants—Respondents.

Second Appeal No. 189 of 1917, Decided on 1st March 1918.

Civil P. C. (5 of 1908), S. 11, Expl. 6—Suit for partition and for setting aside alienation—Co-heir made pro forma defendant along with alienee—Dismissal of suit on ground of limitation—In appeal decree for plaintiffs' share—Death of co-heir defendant pending appeal—Legal representatives not impleaded—No memorandum of objections—Assignment by heirs of co-heir of his share—Fresh suit by assignees for assignor's share—First Court's decree in prior suit held did not operate as res judicata as decision was reversed on appeal—Failure by co heir to file memo of objections did not affect question—Appeal Court's finding so far as decision in plaintiffs' favour was res judicata.

Plaintiffs, sons of a daughter of *G*, sued to recover their 2-3rds share in a property alienated by the widow of the last male holder. Both the alienee and another co-heir, *R*, the son of another daughter of *G*, were made parties. *R* claimed his 1-3rd share offering to pay court-fee thereon. The alienee pleaded limitation. The trial Court dismissed the plaintiffs' suit as barred. This decree was reversed on appeal and the plaintiffs were awarded their 2-3rds share. *R*, who was a party to the appeal, did not file a memorandum of objections. *R* died pending the disposal of the appeal and his legal representatives were not brought on the record. After the termination of the appeal *R*'s heirs assigned *R*'s share to the plaintiffs. The plaintiffs filed the present suit against the alienee from the widow of the last male holder. The defendant pleaded that as *R* did not file a memorandum of objection in the appellate Court the decision of the first Court on the question of limitation operated as a bar by res judicata to the present suit:

Held: (1) that the claim was not barred as res judicata as the decision of the first Court was reversed on appeal and there was no subsisting decision of the former on the question of limitation to operate as a bar to the plaintiffs' suit;

[P 39 C 1]

(2) that the failure of *R* to file a memorandum of objections in the prior case did not affect the question as the plaintiffs who did appeal raised the very question in which he was interested;

[P 39 C 2]

(3) that the finding of the appellate Court in the previous litigation was res judicata so far as the question decided by it was in favour of the plaintiffs, 28 *Mad.* 457, *Expl.* and *Dist.*

[P 40 C 1]

H. Balakrishna Row—for Appellants.

K. Yegnanarayana Adiga—for Respondents.

Abdur Rahim, J.—This was a suit to set aside an alienation. There were two brothers, Gopala Aiya and Govinda Aiya. The plaintiffs are sons of a daughter of Gopala Aiya They were also assignees of the property in dispute from the legal representatives of Ramchandra Aiya, the son of the other daughter of Gopala Aiya. Both the plaintiff and Ramchandra Aiya were entitled to the reversion. The present plaintiffs instituted Original Suit No. 58 of 1910 to re-

cover 2/3rds of their share from an alienee of the widow of the last male holder who was in possession. To that suit Ramchandra Aiya was made a party defendant. The suit was one for partition, but the person in possession claiming an independent right, was also made a party. Defendant 11 in that suit, that is, Ramchandra Aiya, supported the plaintiffs' case and said that he was also entitled to 1/3rd share in the property and expressed his willingness to pay the necessary court-fee and asked that a decree might be passed in his favour. The District Munsif however did not make him a plaintiff as he ought to have done; but an issue was raised as to whether he was entitled to 1/3rd share as claimed by him.

The real question for trial was common both to the plaintiffs and defendant 11. One of the pleas of the contesting defendants was limitation and that turned upon the question who died first —Gopala Aiya or Govinda Aiya. The District Munsif, finding that Gopala Aiya died first, held that the suit, that is No. 58 of 1910, was barred. The plaintiffs appealed from that decree and the appellate Court decided in favour of the plaintiffs, holding that Govinda Aiya was the surviving brothers and the suit was not barred. He gave the plaintiffs a decree for 2/3rd share claimed by them. Pending the appeal, Ramchandra Aiya, defendant 11, had died and his legal representatives were not brought on the record. His legal representatives afterwards assigned Ramchandra Aiya's share to the plaintiffs in this suit, who were also reversioners to the property in their own right, and the present suit is for the recovery of that share. One of the issues framed in this suit was whether the judgment of the District Munsif on the question of limitation in the previous litigation did not bar the suit. Both the Courts have held that it did. I am of opinion that this is a wrong view of the law. The decree of the Munsif was reversed by the lower appellate Court and so was the finding on which the decree was based. It is difficult for me to understand how the finding of the Munsif on the issue of limitation could be held to operate as a bar to the plaintiffs' present suit when that finding was reversed by the appellate Court. It is true that defendant 11 did not either appeal or file a memorandum of objections. But it was not necessary for him to do so when the plaintiffs who did appeal raised the very question in which defendant 11 was interested. He was made a party to the appeal and the appellate Court reversed not only the decree, but the finding of the Munsif on the question of limitation.

The effect of that must be that not only there was no decree of the District Munsif but also there was no subsisting decision of his on the question of limitation to operate as a bar to the plaintiffs' suit. Then in this connexion, a further question was raised that even if the finding of the Munsif in the previous suit on the question of limitation still held good so far as Ramachandra Aiya, defendant 11, or his successor-in-title is concerned, whether the judgment of a Full Bench of this Court in *Somasundara Mudali* v. *Kulandaivelu Pillai* (1) would not apply. That was a case somewhat similar to the present. The suit was by a co owner to recover his share of the property and there also the trespasser was made a party to the suit. It was ruled that S 13, Expl. 5, Civil P. C. 1882, which corresponds to S. 11, Expl. 6 of the present Code, did apply so as to make the judgment in the previous litigation as against one co-owner seeking to recover property res judicata against another co-owner who was made a defendant. The ground on which the decision was based was that the relief claimed in the one suit was not the same as that claimed in the other. In that case the word "right" in S 13 was interpreted as being synonymous with the actual relief sought by the plaintiff, that is to say, his share of the property. The suit in *Somasundara Mudali* v. *Kulandaivelu Pillai* (1) was also framed as a suit for partition, but it appears that the Court then gave only a decree for the share of the plaintiffs. That would be a good ground for distinguishing the present case from the case before the Full Bench. As however the decision of the Munsif in Original Suit No. 58 of 1910 was reversed by the appellate Court, it could not be held that that decision operated as res judicata against the plaintiffs' claim. On the other hand, the question arises, upon the facts already stated, whether the finding of the appellate Court in the previous

(1) [1905] 28 Mad. 457.

litigation would not be res judicata in favour of the plaintiffs. No doubt this question was not raised by the appellants, but what the effect of the previous litigation was had been put in issue and we have got all the facts before us in this connexion. The appellate Court in Original Suit No. 58 held that the plaintiffs were entitled to a decree for partition in respect of their share, that is to say, for 2/3rds. Its finding that Govinda Aiya was the survivor and the suit was not barred must have the effect of debarring the same question being raised again. I am therefore of opinion that the final judgment in Original Suit No. 58 of 1910 is res judicata so far as the question decided by it is concerned in favour of the plaintiffs. The result will be that the judgment of the lower Courts be set aside and the suit remanded to the District Munsif to be tried on the other issues arising in the case. Costs will abide the result.

Napier, J.—My learned brother has stated the facts of the case both in this and in the previous litigation, and it is not necessary for me to recapitulate them. In the present suit, defendant 2 raised the plea that the judgment of the District Munsif in Original Suit No. 58 of 1910, finding on the facts as to the date of the death of the parties, on which finding he held that the suit was barred by limitation must be taken to be a decision which will bind the plaintiffs in this suit because their predecessor in title, defendant 11, did not appeal against that decision and therefore he was not entitled to the benefit of the decision of the Court of appeal in that suit. In consequence of that plea, the Court framed an issue:

"Whether the suit is barred by reason of the decision in Original Suit No. 58 of 1910, on appeal, Appeal Suit No. 281 of 1911, and on Second Appeal No 2143 of 1913."

Mr. Balakrishna Row has contended here that the matter is not res judicata by virtue of that decision of the District Munsif, and he has relied on the decision of the Full Bench in *Somasundara Mudali* v. *Kulandaivelu Pillai* (1). That was a suit in which the plaintiff sued for partition and recover possession of his share from defendant 1, who denied that defendant 5 was a reversioner and set up his own title. The matter was referred to the Full Bench and the Full Bench gave the opinion based on the form of the decree, which was that there should be no decree for partition but only a decree for a particular share, and in that view held that as the defendant who was sought to be held bound by that decree was not a person entitled to share in the relief given to the plaintiff, Expl. 6, S 11, Civil P. C., did not apply, the words being:

"where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others."

The view taken by the Full Bench, which is of course binding upon us, is expressed in the opinion on p. 465 of 28 Mad. that

"Defendant 5. in the present suit is not interested in the relief that may be granted to the plaintiffs in the first suit. The conduct of the suit was not in his hands and with reference to the share of the plaintiffs in that suit he could not have been made a co-plaintiff. He gets no advantage therefore from that suit. He cannot enforce any rights of his own under that decree."

Mr. Yegnanarayana Adiga has contended that this case can be distinguished on two grounds. First that there was in this suit a decree for partition. In the prior suit, the decree was for a partition. That appears from the papers in that case. On p. 36 of the papers in Second Appeal No. 2143 of 1913 the decree is set out containing this clause:

"That the plaint item No. 2 hereunder described be divided by metes and bounds into three equal shares, having regard to the good and bad soil, and two shares out of them be made over to the plaintiffs for their shares; that defendant 3 do pay 2/3rds of the past mesne profits, etc."

He further contends that the Full Bench case is not applicable where there is in fact an active contest between the defendant who is sought to be bound by that decree and the other co-defendants; and he points out that there is nothing in the judgment in *Somasundara Mudali* v. *Kulandaivelu Pillai* (1) to show that their Lordships intended to apply the reasoning in their judgment to such a case. With regard to the first ground, bearing in mind the language which I have referred to, especially the words

"he is not interested in the relief that may be granted; he gets no advantage from that suit; he cannot enforce any rights of his own under that decree."

I am satisfied that the distinction is sound and that the decision of the Full Bench will not affect this case. With regard to the other contention, it is true that what the Full Bench were doing was the construing of the language of

what is now Expl. (6) to S. 11, namely, the words "litigate bona fide in respect of a private right claimed in common for themselves and others." They did not purport to be construing the language of S. 11, namely:

"where the matter has been directly and substantially in issue in a former suit between the same parties."

Therefore the decision does not affect such a case. That is the view taken in *Ramaswamy Reddi* v. *Abhoy Chetty* (2). There the language is:

"The decision in *Somasundara Mudali* v. *Kulandaivelu Pillai* (1) is inapplicable (though it is written applicable in the report) to this case, as there was no active controversy between the co-defendant there."

In my opinion that case was rightly decided and I would follow it. The defendant is entitled to say that the decision in *Somasundara Mudali* v. *Kulandaivelu Pillai* (1) does not stand in the way of his plea of res judicata. But although that is so, it seems to me, and I agree with my learned brother in that view, that the appellant has taken a wrong line in the presentation of his case to this Court and that he should have argued that the decision of the District Munsif in Original Suit No. 58 of 1910 is not a bar to him, because the judgment and decree in that case had been set aside and the appellate Court had arrived at opposite findings and substituted another decree. There can be no question of one thing, namely, that the decree in neither the suit nor the appeal has any bearing on the subject whatsoever, because it does not mention the rights of the person who was then defendant 11 in that suit. It is only the finding on the issue of fact or law which can operate as res judicata, and as my learned brother has pointed cut, the facts found and the inference of law arrived at on these facts by the District Munsif have been negatived by the findings of the appellate Court. This is of course not a case where there have been several judgments or a single judgment in several suits and some of these suits had not been appealed from; in such a case, of course, the finding still remains because the decision in the suit remains. But here we have a case where there has been an appeal and defendant 11 was a party to that appeal, and in that appeal the findings and inference of law arrived at on those findings by the District Munsif have been negatived. It seems to me to follow therefore that there cannot remain any finding of the District Munsif on the question of law or fact which will bind defendant 11. That disposes of the plea of res judicata raised by the defendant as if founded on the judgment of the District Munsif. There then remains the question whether it is necessary for us to give leave to the plaintiff to amend his suit and frame a further issue as to whether the finding of the appellate Court does not operate as res judicata in favour of the plaintiffs.

I agree with my learned brother that there is no necessity to do that. The question of res judicata was brought for decision by defendant 2, and the issue in fact names both the decisions of the District Munsif and that of the Court of appeal and this Court in second appeal. I agree with my learned brother that the findings of the appellate Court in that suit are res judicata in favour of the plaintiffs and that therefore on a preliminary issue as to the question of res judicata there must be a decision that those findings govern the case of the plaintiffs and that they are binding on the Court in respect of the case of the plaintiffs. The question having been raised on a preliminary issue there may be other issues which will arise on the proceedings, and these the first Court will dispose of in the light of the observations which we have made on the subject of res judicata. I agree with the order proposed by my learned brother.

S N./R K. *Suit remanded.*

(2) [1911] 11 I. C. 17.

A. I. R. 1919 Madras 41

KUMARASWAMI SASTRI, J.

C. Krishnaswami Iyer, In re—Accused—Petitioner.

Criminal Revn. No. 218 of 1919, and Criminal Revn. Petn. No. 180 of 1919, Decided on 8th August 1919, against order of Chief Presy. Magistrate, Egmore, D/- 8th January 1918.

Motor Vehicles Act (1914), S. 16—For conviction under R. 16-A for not lighting lights owner must be near about or in car.

Rule 16-A, Madras Motor Vehicle Rules, does not apply to an absent owner, and the conviction of the owner under the rule for not lighting the car is illegal when the owner was not in the car or so near it as to be aware that the lamps were not lighted : 47 *I. C.* 444, *Rel. on.*

[P 42 C 1]

A. V. Narayanaswami Iyer—for Accused.

Crown Prosecutor—for the Crown.

Order.—The petitioner has been convicted under S. 16, Motor Vehicles Act, for having left his car without a light contrary to R. 16-A, Madras Motor Vehicle Rules. R. 16-A states that no person may cause or permit a mortor vehicle to stand or be used in a public place between half an hour after sunset or half an hour before sunrise unless it carries lights burning as stated in the rule. Before the owner of a motor vehicle can be covicted for an offence under this rule it must be shown that he caused or permitted the car to stand without lights burning. As pointed out by the Punjab Chief Court in *Sohan Singh* v. *Emperor* (1) rules cannot apply to an absent owner. There is no evidence that the accused knew that the car had no lights burning or permitted it to stand without lights. The evidence is that he purchased and put oil lights on the car and that his chauffeur was also given carbide. He was not in the car or so near it as to be aware that the lamps were not lighted.

I set aside the conviction snd direct that the fine be refunded.

S.N./R.K *Conviction set aside.*

(1) [1918] 27 P. R. 1918 Cr.=47 I. C. 444.

A. I. R. 1919 Madras 42

SADASIVA AIYAR AND SPENCER, JJ.

Alur Lakshmi Narasimha Sastrulu and *others*—Appellants.

v.

Venkata Narasamma — Respondent.

Appeal No. 68 of 1918, Decided on 20th November 1918, against order of Dist. Judge, Cuddapah, in Execution Petn. No. 35 of 1916.

(a) Civil P. C. (5 of 1908), O. 22, R. 4—Suit for partition—Preliminary decree—Death of defendant—Application for bringing legal representatives and for division and allotment of property — Legal representatives brought on record—Transfer of case for execution treating other prayers as prayers in execution — Transfer held illegal—Application was in substance to pass final decree.

After a preliminary decree for partition was passed by the District Court at Cuddapah defendant 1 died. The plaintiff filed an application for bringing his representatives on to the record, for the appointment of a Commissioner to divide the properties into six shares, and for delivery of one such share to herself. The District Judge brought defendants 8 to 10 on to the record as defendant 1's legal representatives, but treated the other prayers as prayers in execution and transferred the execution to the District Court at North Arcot:

Held: (1) that as the Cuddapah District Court had jurisduction under the law to continue the further trial of the suit, which must be considered as pending in that Court till a final decree was passed, the order of transfer to the District Court of North Arcot was illegal;

(2) that the plaintiff's application was in substance not an application for execution, but an application in the suit to pass a final decree. [P 43 C 1]

(b) Practice—New plea—Legal representatives brought on record—Objection on score of limitation cannot be raised in second appeal.

Where an application to bring the legal representatives of a deceased party on to the record is granted by a trial Court without any objection being taken thereto on the ground of limitation, an objection that the suit had abated by the application not having been made within the prescribed period, cannot be entertained in second appeal. [P 43 C 1]

(c) Hindu Law—Partition—Suit for—Preliminary decree against father — Death of father—His sons can be brought on record as legal representatives—Civil P. C. (5 of 1908), O. 22, R. 4.

Where a preliminary decree is passed against a Hindu father for partition, it is presumably passed against him as representing his undivided family and binds his sons, and on his death the plaintiff is entitled to add his sons as his legal representatives or even as parties whose names should be deemed to be already on the record as represented by their father till his death and which names are merely sought to be inscribed on the record openly after his death. [P 43 C 2]

K. Rajah Aiyar—for Appellants.

S. Subramanya Aiyar—for Respondent.

Judgment.—Defendants 8 to 10 (the sons of the deceased defendant 1) are the appellants before us. A preliminary decree for partition of Sch. B properties was passed by the District Court, Cuddapah, in the plaintiff's favour against defendant 1 in 1904. Defendant 1 died in January or February 1914. The plaintiff filed the present petition on 8th December 1916 in the form of an execution petition and she filed it in the District Court of Cuddapah praying for defendants 8 to 10 being brought on the record as defendant 1's legal representatives, for the appointment of a Commissioner to divide Sch. B properties into six shares and for delivery of one such share to her. The District Court has brought defendants 8 to 10 on the record as defendant 1's legal representatives (evidently because no objection was taken by them to that course). But it treated the other prayers in execution and transferred the execution to the North Arcot District Court. The appellants contend before us that:

Ground No. 2: The appellants not having been made parties to the suit cannot be proceeded against in execution. *Ground No.* 3: The Court below erred in treating the application as a proceeding in execution. *Ground No.* 4: The legal representatives of the deceased not having been brought on the record within the time limited by law the District Judge ought to have held the suit as against him had abated. *Ground No.* 6: The lower Court has failed to note that the High Court expressly treated the decree as a preliminary decree to be followed up by a final decree, which alone is capable of execution. *Ground No.* 8: The District Judge ought to have held that the application was barred by limitation. *Ground No.* 10: The Court below had no jurisdiction to transfer the decree for execution to the District Court of North Arcot.

So far as grounds Nos. 3, 6 and 10 are concerned, the appellants' contentions are sustainable and the order of the District Judge of Cuddapan transferring execution to the District Court of North Arcot must be and is set aside. It must be admitted that the judgment of the High Court in A. A. O. No. 252 of 1912 is not quite clear on the question whether the District Court of North Arcot had exclusive jurisdiction over the further proceedings in the suit but that judgment, in our opinion, did not intend to deprive the Cuddapah District Court of its undoubted jurisdiction under the law to continue the further trial of the suit, which must be considered as pending in that Court till a final decree is passed in the suit. Ground No. 8 is unsustainable, as the petition is in substance not an execution petition but an application in a suit to pass a final decree and as such is not affected by the bar of limitation Too great a stress should not be laid on the from of the petition. As regards ground No 4, the contention that the suit had abated by an application not having been made within six months of defendant 1's death was not raised or argued in the lower Court and defendants 8 to 10, the appellants, were brought on the record of the suit without such an objection having been raised on their part. It is too late to raise the objection now and even if it is not too late, the plaintiff having filed a similar application (to bring on the record the legal representatives of defendant 1) in March 1915 in the North Arcot District Court and it appearing to us that the judgment of this Court in the previous proceeding between these same parties might have misled the plaintiff into the impression that applications as in execution proceedings could be taken by her once in three years and that they may be made to the District Court of North Arcot, we consider that the delay in filing the present application in the District Court of Cuddapah to bring in defendants 8 to 10 as the legal representatives of defendant 1 might be excused and we excuse it accordingly.

As regards ground No. 2 when a preliminary decree is passed against a Hindu father for partition, it is presumably passed against him as represnting his undivided family and binds his sons, and on his death the plaintiff is entitled to add his sons as his legal representatives or even as parties whose names should be already on the records as represented by deemed to be their father till his death and which names are merely sought to be inscribed on the records openly after his death. [See also *Hira Lal Sahu* v. *Parmeshar Rai* (1)] In the result we modifiy the lower Court's order by setting aside the direction transferring the decree for execution to the North Arcot District Court and direct the Cuddapah District Court to treat the application of the plaintiff, not as one in execution but as one in the pending suit itself, to pass a final decree after appointment of a commissioner, &c., and to pass fresh orders accordingly. We need not say that the commissioner appointed under O. 26, R. 14, may be a resident within the jurisdiction of the North Arcot District Court, if the District Court of Cuddapah thinks it desirable or convenient to appoint such a person. There will be no order as to the costs of this appeal.

S.N./R K. *Decree modified.*

(1) [1899] 21 All. 356.

A. I. R. 1919 Madras 43

AYLING AND SESHAGIRI AIYAR, JJ.

Raman Chetty—Appellant.

v.

Pasupathi Aiyer—Respondent.

Appeals Nos. 112 and 150 of 1916, decided on 1st February 1918, against decree of Temporary Sub-Judge, Ramnad, D/- 20th December 1915 in O. S. No. 152 of 1911.

(a) Contract Act (1872), S. 2 (d)—**Promisor cannot be promisee.**

The definition of the term "consideration" in S. 2 excludes the idea that a promiscr can also be the promisee. [P 45 C 1]

(b) **Promissory Note—Pro-note benami by two persons in name of one of two payees—Suit by ostensible payee is not maintainable.**

A suit on a promissory note executed by two persons, one of whom is the real promisee from whom the consideration actually passed, is not maintainable by the ostensible payee who is only a benamidar for one of the executant. [P 45 C 1]

T. Rangachariar, T. Narasimha Iyengar and *K. Krishnama Chariar*—for Appellants.

C. V. Ananthakrishna Aiyar, K. P. Madhava Rao, K. P. Lakshmana Rao, K. Srinivasa Aiyangar, and *A. Viswanatha Iyer*—for Respondents.

Judgment. — The Subordinate Judge was wrong in holding that the previous decision of this Court dispcsed of issue 1. The first part of the latter runs thus:

"Whether Nachiappa Chetty and defendant 8 executed plaint promissory note and received consideration from plaintiff:"

and the question of whether the promissory note was supported by consideration was not considered at all by the learned Judges. We must therefore call for a finding cn the evidence on record on the question of whether the plaint promissory note was or was not supported by consideration. The finding should be submitted in two months from this date, and seven days will be allowed for filing objections.

The trial Court submitted his finding that no consideration was paid by the plaintiff and that therefore nothing was due to him thereunder.

Judgment.—This case has come up to this Court more than once and has given rise to differing comments on the wording of the judgments cf this Court. It is therefore desirable to state once again the facts of the case, so that there may be no occasion for further misunderstanding. The plaintiff sued on a promissory note standing in his name. His case was that he paid money for the note. The executants were one Nachiappa Chetty who, it was alleged, was the agent of the firm of which defendants 1 to 5 were said to be the partners, and defendant 8 who it was alleged, was the agent and partner of a firm of which defendants 6 to 10 were the partners. Defendants 1 to 5 stated that no money came from the plaintiff and that the real lender was defendant 8, between whose firm and the firm of defendants 1 to 5 the loan was adjusted. In this state of the pleadings, the first issue was raised which in substance involved the decision of two questions, (a) whether plaintiff advanced the money and was consequently entitled to sue and (b) if not, whether the plaintiff being a benamidar for defendant 8 was entitled to maintain the suit. On the first occasion the Subordinate Judge held that plaintiff being a name-lender was not entitled to maintain the suit. He also found that there was an endorsement to defendant 8 by the plaintiff, and that the note went out of the possession of the plaintiff. Sankaran Nair and Oldfield, JJ., who heard the appeal on the first occasion held that the note had left the hands of the plaintiff. On the question of the plaintiff's right of suit, they held that although he may only be a benamidar, his right of suit was not lost. The case was remanded to the Subordinate Judge.

On this second occasion, the Subordinate Judge held that the question of the payment of consideration by the plaintiff was res judicata by virtue of the decision of Sankaran Nair and Oldfield, JJ. We heard the appeal from this latter judgment of the Subordinate Judge. We disagreed with him on the question of res judicata and remanded the suit for trial. In our judgment we stated the issue in these terms:

"Whether the plaint promissory note was or was not supported by consideration."

But it is clear from the previous portion of our judgment that we did not intend to vary the issue originally framed; and we stated specifically that the trial of the first part of the first issue originally framed was not barred by res judicata. On the present occasion, the Subordinate Judge has come to the conclusion that plaintiff paid no portion of the consideration. Mr. Anantakrishna Aiyar does not seriously attack this finding, and we think the Subordinate Judge's decision is borne out by the evidence on the record. What the learned vakil for the plaintiff urges is that even though the money might have belonged to defendant 8, so long as the plaintiff is the holder of the note, he is entitled to sue for its recovery. We are unable to agree with him. The de-

fendant 8 who is the real promisee is himself a co-promisor. If the note had been executed to defendant 8 by himself and by Nachiappa Chetty, defendant 8 would not have been entitled to maintain a suit. No authority to the contrary has been cited to us. The definition of the term "consideration" excludes the idea that a promisor can also be the promisee. Mr. Anantakrishna Aiyar's suggestion that defendant 8 was different from the firm which was the promisor has not been raised or tried hitherto and we cannot allow that question to be argued. If defendant 8 as promisee of a note of which he is the promisor cannot maintain a suit, it also follows that the plaintiff who is his benamidar cannot maintain the suit. A benamidar cannot be in a better position than the real owner. In this view, the suit brought by the plaintiff must be dismissed with costs. In the result we accept the finding of the Subordinate Judge, allow Appeals Nos. 112 and 150 of 1916 and dismiss the suit with costs against the plaintiff throughout, subject to plaintiff's right to recover costs awarded to him in Appeal No. 349 of 1912. The memorandum of objections is dismissed without costs. The appellants in Appeal No. 112 of 1916 must pay the costs of respondents 2 to 4.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 45 (1)

SPENCER AND KRISHNAN, JJ.

Aiyanar Raja and *another* — Appellants.

v.

Alagar Raja and *others* —Respondents.

Second Appeals Nos. 2122 and 2123 of 1915, Decided on 29th August 1917, against decree of Dist. Judge, Ramnad, in Appeal Suits Nos. 491 and 490 of 1912.

Civil P. C. (5 of 1908), O. 2, R. 2—Suit for declaration and injunction restraining disturbance of possession—Dismissal of suit for failure to prove possession—Subsequent suit for declaration and possession is not barred.

A suit for declaration of title to and possession of property will not be barred under O. 2, R. 2, by reason of the dismissal of a previous suit for declaration and injunction restraining defendant from disturbing plaintiff's possession, on account of the failure of the plaintiff to prove possession: 8 *Cal.* 819 and 20 *I. C.* 418, *Foll.* 6 *I. C.* 233, *Dist.* [P 45C 2]

A. Krishnaswmy Ayyar and *A. S. Viswanatha Aiyar*—for Appellants.

C. Narasimhachariar—for Respdts.

Judgment.—On the authority of the decisions in *Jibuniti Nath Khan* v. *Shib Nath Chuckerbutty* (1), *Bandey Ali* v. *Gokul Misir* (2) and *Siliman Sahib* v. *Buntala Haman* (3) we have no hesitation in holding that the lower Courts were right in thinking that the present suit for a declaration of the plaintiff's title coupled with a prayer for possession is not barred under O. 2, R. 2, by reason of the plaintiff's previous suit, which was for a declaration of title and for an injunction against disturbance, having been dismissed through his failure to prove possession. The case in *Naganada Iyer* v. *Krishnamurti Aiyar* (4) is distinguishable on the ground that there the previous suit was dismissed for default which involved a finding of all the issues against the plaintiff. The question of res judicata upon which that case was decided does not arise for decision against the plaintiff in this case, as in both suits here the plaintiff succeeded on the issue as to the character of the sale-deeds. The Second Appeal No. 2123 of 1915 fails and is dismissed with costs. A further question has been raised in Second Appeal No. 2122 of 1915, namely, whether Original Suit No. 249 of 1911 was properly instituted on a cause of action which was in the previous litigation combined with that which formed the basis of Original Suit No. 183 of 1911. This point was not raised at the trial in the Courts below and we cannot allow it to be argued at this stage. This second appeal is also dismissed with costs.

S.N./R.K. *Appeals dismissed.*

(1) [1882] 8 Cal. 819.
(2) [1912]34 All. 172=13 I. C. 154.
(3) [1913] 38 Mad. 247=20 I. C. 418.
(4) [1910] 34 Mad. 97=6 I. C. 233.

A. I. R. 1919 Madras 45 (2)

SADASIVA AIYAR AND NAPIER, JJ.

Nalluri Chenchiah, In re and *others*—Accused—Petitioners.

Criminal Revn. No. 583 of 1918, and Criminal Revn. Petn. No. 471 of 1918, Decided on 16th January 1919, from order of Sess. Judge, Guntur, D/- 15th July 1918 in Criminal Revn. Petition. No. 10 1918.

(a) Criminal P. C. (1898), S 436 — Direction by Sessions Court to commit accused to Sessions for offence under S. 471 of Penal Code is not legal.

A direction by a Court of Session to a Magistrate to commit an accused person to the Sessions for an offence under S. 471, Penal Code, is

beyond its power under S. 436, Criminal P. C. as the offence is not exclusively triable by the Sessions Court. [P 46 C 2]

(b) Penal Code (1860), S. 193 — **Deposition not read over to witness and not acknowledged as correct—Omission is not mere irregularity—Conviction under S. 193 is not sustainable.**

A conviction under S. 193, Penal Code, is not sustainable where the deposition after it had been completed was not read over to the witness and acknowledged by him to be correct. The omission is more than an irregularity and it is dangerous and against public policy to make a witness liable on an unsafe record: 45 *I. C.* 507, *not Appr.* [P 47 C 1]

(c) **Criminal Trial—Evidence—Depositions.**

The deposition is the only evidence admissible of the statement alleged to have been made by the witness. [P 47 C 2]

(d) **Criminal P. C. (1898), S. 239 — S. 239 does not prohibit preliminary inquiry for commitment to Sessions.**

Section 239 only prohibits a joint trial and not a joint preliminary inquiry for the purpose of commitment to the Sessions. [P 47 C 1]

P. Chenhiah —for Petitioners.

Public Prosecutor—for the Crown.

Sadasiva Aiyar, J.—The petitioners in revision are the four accused in P. R. C. No. 4 of 1918 on the file of the Stationary 2nd Class Magistrate, Ongole. An inquiry for the purpose of commitment or discharge, as the case may be was made in this case by the said Stationary 2nd Class Magistrate, the complaint against accused 1 being under two Ss. 471 and 193, I. P. C. and against the other accused under S. 193, I. P. C. alone. The charge under S. 193 relates to the depositions Exs. K, L, M and N, given by accused 4 before the District Munsif of Ongole in Original Suit No. 47 of 1913, to the effect that the complainant executed a promissory note for Rs. 500 in favour of accused 1's father. The Stationary Sub-Magistrate discharged all the accused under S. 209, Criminal P. C. He considered that Exs. K, L, M and N were not admissible in evidence as the legally correct record of the statements given by the accused in the Ongole District Munsif's Court's suit because it appeared from the evidence of the Trial Clerk (P. W. 3) of the District Munsif's Court that the depositions after they were completed were not interpreted and read over to the witnesses as required by O. 18, Rr. 5 and 6, Civil P. C. He also held that the statements could not be proved by the other evidence except these records (Exs. K, L, M and N) under S. 91, Evidence Act. This is the ground on which the Stationary Sub-Magistrate based the discharge of the accused so far as the offence under S. 193, I. P. C. was concerned. As regards the offence under S. 471, I. P. C. against accused 1 alone the Magistrate's reasons are not quite clear except that the depositions (Exs. K, L, M and N) cannot be used to connect accused 1 with the forged document Ex. A.

Against the order of discharge a petition under Ss. 435 and 437, Criminal P. C. seems to have been presented to the Sessions Judge and the learned Judge set aside the order of discharge and passed an order containing two directions, the first being that the case against accused 1 should be committed to the Sessions Court by the Sub-Magistrate in order that accused 1 may be tried for the offence under Ss. 471 and 193, I. P. C. and the second direction being that as regards accused 2, 3 and 4, the District Magistrate of Guntur should direct either the Joint Magistrate of Ongole or any other Magistrate he thinks fit to make a further inquiry into the complaints against these persons and try them as separate cases and dispose of them according to law. I must say that the learned Sessions Judge's first direction out of the two directions found in his order is not warranted by the powers exercisable by him under the provisions of S. 435 or S. 436, Criminal P. C. The offence under S. 193, I. P. C. is not exclusively triable by the Court of Session. The offence under S. 471, I. P. C. is also not exclusively triable by the Court of Session, unless the forged document is a promissory note of the Government of India. The Criminal Procedure Code (S. 436) gives the Sessions Judge power only to call for and examine records. S. 436 gives him power to order commitment only when the offence is exclusively triable by the Sessions Court. The Sessions Judge's order therefore directing accused to be committed to his Court is illegal and must be set aside. As regards the charge under S. 193, I. P. C., against all the accused there is a case not officially reported but mentioned in *Meango* v. *Baviah* (1), which goes to the length of holding that even serious irregularities in making the record of the depositions of witnesses do not render that record inadmissible in evidence to prove the

(1) [1918] 45 I. C. 507.

statement so recorded and only go in mitigation of the weight to be attached to that record as accurate. I am not prepared to agree to that extent.

Where a deposition after it has been completed has been interpreted and read over to the witness and acknowledged by him to be correct any irregularity due to the omission of the observances of further formalities such as the presence of the Judge and his listening to the reading during the time when the deposition is interpreted and read over to the witness may not affect the admissibility of the record as evidence of the witness's statement: see *Bogra, In re* (2). But the omission to interpret and read over the deposition to the witness after the deposition is completed cannot in my opinion be put on the same footing because the guarantee provided by the law for the accurancy of the deposition has been substantially ignored and it is dangerous and against public policy to make a witness liable on such a wholly unsafe record. I would therefore set aside the Sessions Judge's order so far as it directs the District Magistrate to make further inquiry in respect of the charge under S. 193, I. P. C.

I may add that the Sessions Judge fell into another error in holding that the Sub-Magistrate contravened the provisions of S. 239, Criminal P. C. in enquiring into the cases of these four accused jointly. S. 239 prohibiting only a joint trial and not a joint preliminary inquiry into a case for the purpose of commitment to the Session. Though the Sessions Judge's order as against accused 1 must be set aside as illegal, I think that this is a case in which the powers of this Court under S. 439, Criminal P. C. might properly be utilized for passing the necessary order in connexion with the alleged forging of the promissory note for Rs. 500 in the interests of justice. There was some evidence before the Sub-Magistrate that accused 1 did use the document as genuine in a Court of Justice and that the document is a forgery. The proper course for the Sub-Magistrate under those circumstances was to have committed accused 1 to the Sessions Court as regards the offence under S. 471, I. P. C. I would therefore direct him to do so.

Napier, J.--I agree. I would add that I am strongly influenced in the view I take as to the admissibility of the Exs. K, L, M and N, which have clearly been recorded in an irregular manner, by the provisions of S. 91, Evidence Act, which seem to lay down that the deposition is the only evidence admissible of the statements alleged to have been made by the witness. The words are:

"In all cases in which any matter is required by law to be reduced to the form of a document no evidence shall be given in proof of such matter except the document itself or secondary evidence of it."

It seems to me that where the legislature has imposed so narrow limits on methods of proof we should be careful to see that this sole proof is forthcoming in a form which is free from suspicion and I entirely agree with my learned brother that where the ground of the attack goes to the knowledge of the witness as to what has been recorded as his statement we have not got that certainty of accuracy which the law must require under S. 91, Evidence Act. I agree with the order proposed by my learned brother.

S.N./R.K. *Accused 1 committed.*

(2) [1910] 34 Mad. 141=7 I. C. 414.

A. I. R. 1919 Madras 47

SPENCER AND KRISHNAN, JJ.

Secy. of State—Defendant—Appellant.

v.

Sami Chettiar—Plaintiff—Respondent.

Civil Misc. Appeal No. 379 of 1917 Decided on 12th July 1918, against order of Temporary Sub-Judge, Tanjore, D/- 31st March 1917, in A. S. No. 12 of 1917.

(a) Madras Land Encroachment Act (1905), S. 14—S. 14 provides period of 6 months limitation for all suits coming within purview of 1st part—Tenant in occupation evicted and cattle shed demolished by Revenue authorities—Landlord suing for possession after notice to Collector—Landlord is "person deeming himself aggrieved"—His suit if brought after six months is barred.

The effect of S. 14 is to substitute a period of 6 months for the various periods provided in the Limitation Act for all suits which come within the purview of the first part of the section. [P 48 C 2]

Where a tenant in occupation of land was evicted in proceedings under the Madras Land Encroachment Act and a cattle-shed thereon was demolished by the Revenue Authorities, and the landlord, in assertion of his right, sued for possession after notice to the Collector:

Held: (1) that the plaintiff was a person deeming himself aggrieved' within the meaning of S. 14 of the Act; (2) that the suit was barred

having been brought more than six months after the eviction.

Per *Krishnan, J.*—It is not necessary that the plaintiff should say in so many words in his plaint that he has been aggrieved, but if the effect of his allegations shows that he considers himself aggrieved by the action of the authorities, he is the person who will come within the words' "deeming himself aggrieved" within the meaning of S. 14. An amendment of title made to show that the eviction proceedings were illegal cannot be taken as necessarily showing that the suit is for vindication of title, nor does it take the plaintiff out of the category of "persons deeming themselves aggrieved." [P.49 C 1]

(b) Madras Land Encroachment Act (1905), S. 14—S. 14 includes claims for recovery of possession.

The wording of S. 14 is wide enough to include a claim for recovery of possession, which is one of the ways of redressing a person who has been wrongly evicted. [P 49 C 1]

(c) Madras Land Encroachment Act (1905), S. 14—Person though not party to proceedings resulting in eviction, his rights may be invaded in actual eviction.

Though a man may not be a party to the proceedings resulting in the order of eviction, and, therefore not affected by it, his reghts may be subsequently invaded by the actual eviction itself and thereby he may become a person aggrieved. [P 49 C 2]

K. Ramesam—for Appellant.

K. Narasimha Aiyangar—for Respondent.

Krishnan, J.—In this case plaintiff sues to recover from the defendant, the Secretary of State for India in Council, a small plot of land in the village of Thuhili with Rs. 35 as damages for the demolition of a cattle-shed on it. In his plaint he alleges that the land in question belongs to him, that in any event he has acquired a title to it by adverse possession for over 60 years, that he had leased it out to his tenant, one Appaswamy Chetty, and that while it was in the latter's possession, the Collector of Tanjore issued notice to his tenant under Madras Act 3 of 1905 and evicted him, wrongly treating the land as Government property, and that the defendant's Revenue Inspector demolished the cattle-shed on it which also belonged to plaintiff. He asserts that these proceedings are not valid and binding on him and seeks to recover possession of the land with damages as above stated. He puts his cause of action as arising in June 1914 on the date of eviction and states that even if the period of limitation prescribed by S. 14, Act 3 of 1905, be held applicable, his suit is saved by the fact that the final orders on his petition to the Collector were only passed in July 1915, the suit being within six months of that date. The defendant, among other pleas, raised the plea that the suit was barred by limitation. The District Munsif upheld this plea and dismissed the suit without trial on the merits, as under S. 14 the cause of action arises on the date of eviction, the final orders of the Collector not affecting the question. On appeal, however the Sub-Judge reversed that decision, holding that the general law of limitation applied to the case and not the rule laid down in S. 14, and remanded the case for trial on the merits. It is against that order that the defendant has appealed to us. The Government Pleader contends for him that the six months' rule in S. 14 applies and that the suit should be dismissed as barred by limitation. It is not denied that the suit must fail, if the rule applies. The question for decision therefore is whether the special rule in S. 14, Act 3 of 1905, or the general law of limitation applies to this case.

Section 14 provides that nothing in that Act should be held to prevent persons deeming themselves aggrieved by proceeding under the Act, except as provided in it, from applying to the Civil Courts for redress. The Act thus preserves the right of such persons under the general law of the country to sue in the ordinary civil Courts to enforce their rights which have been invaded by such proceedings. But under the 2nd part of the section such suits are subjected to the limitation of 6 months from the date of cause of action and this term is explained, in the case of eviction, to be the date of eviction. The effect of this section is thus to substitute a period of 6 months for the various periods provided in the Limitation Act for all suits which come within the provisions of the 1st part of it. From a perusal of the allegation in the plaint there can be no doubt that the plaintiff's case is that the eviction proceedings and the demolition of his shed were wrongs done to him under the Act, and he asks for redress of these wrongs by possession of the property being returned to him and by compensation being paid to him for the destroyed buildings. The case therefore seems to fall exactly within the scope of the section. The Sub-Judge has taken the view that though the plaintiff may be a person actually aggrieved by the proceedings

under the Act, he should still not be considered to be a person "deeming himself so aggrieved," those being the words of the section; because, in his opinion, plaintiff has nowhere expressly admitted it in his plaint; he holds that the present suit is one "brought to vindicate plaintiff's general title." I am quite unable to accept this view. It is not necessary that plaintiff should say in so many words in his plaint that he has been aggrieved but if the effect of the allegations he makes shows that he considers himself aggrieved by the action of the Collector, he is the person who will come within the words "a person deeming himself aggrieved."

His allegations show that the eviction proceedings were an invasion of his rights in the property, as it must be, as the eviction is carried out under an assertion of title in the Government and a consequent denial of the title and right to possession in every one else. To show that the eviction proceedings were illegal and were a grievance to him, it was quite necessary for him to aver title in himself and therefore that averment cannot be taken as necessarily showing that his suit was only one for vindicating his geueral title. It is not necessary to consider if plaintiff could have framed his suit omitting all reference to the eviction proceedings in such a manner as to avoid the applicability of S. 14. It is sufficient to say that the present suit is not such a suit.

It is next argued that, so far as the claim for possession based on plaintiff's title is concerned, it should be treated as cutside the scope of the section and not necessarily a redress for the wrong done by eviction. This question was considered in the case of *Kolla Gangama Naidu* v. *Secy. of State* (1), and both the learned Judges there held that the wording of S. 14 is wide enough to include claims for recovery of possession. It cannot be denied that delivery of possession is one of the ways of redressing a person who has been wrongfully evicted. The only difference between that case and the present one is that, whereas in that case the person evicted was the plaintiff himself, the man evicted here is the plaintiff's tenant as he was in occupation of the land at the time. I do not think this makes any difference as to the applicability of S. 14 to the present suit. Under S. 6 of the Act, eviction proceedings have to be taken against the person occupying the land and against none else. The validity of the proceeding in the present case is not therefore affected in any way by notice not having been served on the plaintiff. In fact plaintiff himself applied to the Sub-Collector against the notice and subsequently sent a lawyer's notice to the Collector against it, all before the eviction. He was aware of the proceedings and treated them as affecting his rights, and it is not alleged that the proceedings were vitiated by any irregularity. It is suggested that he is not bound by the proceedings, as he was not a party to them and therefore he cannot be looked upon as a person aggrieved by them. I do not think this argument is sound in the present case. We have here to deal with eviction proceedings and in such a case, though a man may not be a party to the proceedings resulting in the order for eviction, and therefore not affected by it, his rights may be subsequently invaded by the actual eviction itself and thereby he may become a person aggrieved. That is the position in the present case. It will be noticed that the section does not say that the persons suing should be aggrieved by any proceedings "against them." These words "against them" are not in the section and we cannot read them into it.

The result therefore is that the plaintiff in the present suit is a person deeming himself aggrieved by proceedings under Madras Act 3 of 1905 seeking redress in the civil court, and the six months' rule applies to the suit. The decree of the Sub-Judge must therefore be reversed and that of the District Muhsif restored with costs here and in the lower Court.

Spencer, J.—I agree that the appeal must be allowed and the decree passed by the District Munsif restored with costs throughout. The prayer in the plaint is plainly for redress for the proceedings taken by the revenue authorities under Act 3 of 1905. The gist of the plaint and the conduct of the plaintiff in petitioning those authorities and in giving a notice of suit to the Collector make it impossible for him to deny that he is a person "deeming himself to be aggrieved" by proceedings under that Act.

S.N /R.K. *Appeal allowed.*

(1) [1916] 33 I. C. 665.

A. I. R. 1919 Madras 50

AYLING AND COUTTS-TROTTER, JJ.

A. Venkatarama Aiyar—Defendant—Appellant.

v.

E. Venkatarama Aiyar and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 903 of 1917, Decided on 21st March 1918, against decree of Dist. Judge, Tanjore, in Appeal Suit No. 337 of 1916.

T. P. Act (1882), S. 41—Transfer of patta to help transferee to secure employment—Transferee whether ostensible owner — Purchase from transferee—Absence of enquiry as to title of vendor—Vendee held could not rely one title acquired by estoppel against real owner—Evidence Act (1872), S. 115.

When one person allows another to hold himself out as the owner of an estate and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the vendee, when seeking to create a title to the property by estoppel as against the real owner, must satisfy the Court that he had neither actual nor constructive noticee of the real title and had not before him any circumstances which would have put him on reasonable inquiry to find out the truth [P 51 C 2]

Apart altogether from S. 41, T. P. Act, the Evidence Act affords no definition of estoppel to dispense with the necessity of the purchaser making reasonable inquiry: *I. A. Sup. Vol.* 40. [P 51 C 2].

Plaintiff transferred the patta for some of his lands to the name of his son-in-law, defendant 1, to help the latter in securing the appointment of Village Munsif; some time after defendant 1 filed a petition in insolvency and the Official Receiver dealt with the plaintiff's property, patta whereof had been transferred to defendant 1, as the latter's property and put it up for sale. Defendant 2 purchased it. It was found that he had made no inquiry as to the security of his title:

Held: that defendant could not rely on a title acquired by estoppel as against plaintiff 1.

Quaere: Whether the fact of the transfer of a patta would make the transferee an ostencible owner within the meaning of S. 41. [P 50 C 2]

T. S. Ramaswami Aiyar—for Appellant.

A. V. Viswanatha Sastri—for Respondents.

Judgment.—This case raises a question as to the ownership of certain lands in a village in the Tanjore District. Plaintiff 1 was the Village Munsif of the village; plaintiff 2 is his son, and defendant 1 is his son-in-law. Some years ago plaintiff 1 who apparently was an old man—he has died since the institution of the suit—wished to relinquish his position as Village Munsif. His son was in the Revenue Department and did not wish to succeed him. So he desired the appointment for his son-in-law, defendant 1, and he applied to the Deputy Collector to appoint his son-in-law in his place. Apparently the Deputy Collector raised the point that the son-in-law must be a pattadar in the village in order to have the office of Village Munsif. Plaintiff 1 thereupon said that defendant 1 had not any lands standing in his name, but that he, plaintiff 1, would transfer his patta to defendant 1; and requested the Deputy Collector to carry out th transaction: and it appears from the documents in this case that what was done was that the patta of the suit lands wae transferred from the name of the fathers in-law to the name of the son-in-law, defendant 1. At a subsequent period defendant 1 filed his petition in insolvency in the Tanjore District Court and was adjudicated an insolvent. Thereupon his property vested in the Official Receiver; and finding, I suppose, that the patta of these lands stood in his name, the Official Receiver proceeded to deal with them as part of the estate available to the creditors. He put these lands up for sale and they were kept in suspense as soon as it was found that the title of defendant 2 would be questioned and it awaits the determination of this appeal.

Defendant 2 puts the case in three ways. In the first place, he says he is entitled to succeed under S. 41, T. P. Act. That section provides:

"Where with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfer the same for consideration, the transfer shall not be voidable, on the ground that the transferor was not authorized to make it; provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

Now, it is unnecessary to discuss whether the fact of the transfer of patta would create the transferee an ostensible owner within the meaning of this section for the simple reason that, however that may be, on the finding of the learned Judge, the transferee in this case has obviously failed to satisfy the requirements of the proviso that he should take reasonable care to ascertain that the transferor had power to make the transfer; because the learned Judge in terms says that:

"the slightest inquiry would have shown defendant 2 that the title deeds were not with defendant 1 and that defendant 1 had no claim whatever to the land."

We cannot go behind that finding and that appears to dispose entirely of any case that the appellant might be supposed to have on the section of the Transfer of Property Act. But he puts his case wider than that, and he says:

"Apart altogether from the special remedy provided by S. 41, T. P. Act, I am entitled to rely upon the general law of estoppel, which for this country is embodied in S. 115, Evidence Act."

And he says:

"unfettered by the proviso and unencumbered with any duty of making particular inquiries, the general law of estoppel simply provides me with this remedy, that as a representation has been made to me in common with all the world by plaintiff 1 by putting the name of defendant 1 as the pattadar of his property, I am entitled to say that he shall not in future be allowed to maintain that defendant 1 was not the transferee of that property, and that being so I can preclude him in this suit without any reference to the section of the Transfer of Property Act from alleging that he is in fact and in truth the owner of the property."

Now with regard to that, the contention for respondent 2 in the first place is this: he says, you must take the very general provisions of the section of the Evidence Act as controlled and curtailed by S. 41, T. P. Act, and there is in fact a decision—a single Judge's decision no doubt—in *Hoorbai* v. *Aisahbai* (1) where Beaman, J., carefully considered the relations between the two sections and came to the conclusion that S. 41 must be regarded as restricting the more general principles of the section of the Evidence Act. He says:

"A very superficial analysis would reveal obvious distinctions between the ordinary principles of estoppel on the one hand and the application of the principles to which effect has been given under S 41, T. P. Act,"

and the effect of holding that will be to hold that the section of the Evidence Act is curtailed in this sense that the Transfer of Property Act forbids any peson to avail himself of the estoppel created by the Evidence Act in the case of transfers of immovable property, unless the transferee satisfies the further condition of having made reasonable inquiries as to the security of his title. It is really not necessary for us in this case to say whether that be so or not, for this reason that in the year 1872, in *Ramcoomao Koondoo* v. *John and Maria McQueen* (2), the Privy Council, at a time when the section of the Evidence Act was in force and the Transfer of Property Act had not yet been enacted, laid down that an estoppel of this kind in cases of transfer of real property could only be availed of by those who used the care and inquiry required by the provision of English equity. This is what their Lordships say:

"It is not necessary to say whether this case is to be decided upon the principles on which the English Court of Chancery acts in cases of resulting trusts, when questions arise between the equitable owner and the purchaser for value without notice; or whether it is to be decided upon the general rules of equity and good conscience which bind the Courts in India, because the principle of decision must in either case be the same. It is a principle of natural equity, which must be universally applicable, that, where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct. . . notice of the real title; or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it."

It therefore appears that the Privy Council were prepared to hold, at a time when the section of the Transfer of Property Act was not in existence, that a person who sought to create a title to real property by estoppel must satisfy the Court that he had neither actual nor constructive notice and had not before him any circumstances which would have put him on reasonable inquiry to find out the truth. Here the learned Judge has found that this purchaser did not make the inquiries which were staring him in the face. He never inquired as to whom the lands belonged to, he never asked for the title-deeds, and we think one might gather from the fact that the Official Receiver held the purchase money in suspense all this time, he must have been told by the Official Receiver that he had no title-deeds and the question of title was one of great trouble and difficulty. However, we need not go into the evidence of that, because it is a matter definitely found by the Judge. We therefore hold following the decision of the Privy Council, that apart altogether from the section of the Transfer of Property Act, the Evidence Act affords no definition of estoppel to dispense with the necessity of the purchaser making a reasonable inquiry.

(1) [1910] 6 I. C. 898.
(2) [1873] I. A. Sup. Vol. 40—3 Sar. 160 (P.C.).

The result is that this second appeal must be dismissed with costs.

S.N. R.K. *Appeal dismissed.*

A I. R. 1919 Madras 52 (1)

PHILLIPS AND NAPIER, JJ.

Public Prosecutor—Appellant.

v.

Sankaralingam Moopan—Accused.

Criminal Appeal No. 778 of 1918, Decided on 31st March 1919, against acquittal of Subdivl. Magistrate, Sivakasi, in Criminal Appeal No. 18 of 1918.

Madras Local Boards Act (1884), S. 98 (2) —"Other person duly authorized as aforesaid"—Meaning explained.

The words "other person duly authorised as aforesaid" in S. 98 (2) do not refer only to "some person duly authorized by him in that behalf" mentioned in S. 98 (1) of the Act.

There must be a separate authorization under each clause of the section and the words "as aforesaid" in Cl. 2 must be read as meaning "by him in that behalf". [P 52 C 1]

Public Prosecutor—for Appellant.

Judgment.— We cannot agree with the Subdivisional Magistrate that the words "other person duly authorized as aforesaid," in S. 98 (2), Local Boards Act, refer only to "some person duly authorized by him in that behalf" mentioned in S. 98 (1), for we think that the use of the single word "other" precludes this view, which would require the word "any" or "such other" to support it. In our opinion there must be a separate authorization under each clause of the section, and the words "as aforesaid" in Cl. 2 must be read as meaning "by him in that behalf." In this view the notice issued by the Union Chairman was valid, as authority has been given to him by Ex. C. S. 33 of the Act does not restrict specific delegations allowed by other sections of the Act, and there is no reason to read the words "other person" as meaning Vice-President alone.

The case against accused being a summons case no charge was necessary, and as accused was represented by a vakil he must have been aware of the charge against him, and could not have been prejudiced by the Magistrate's omission to explain it to him. We set aside the order of acquittal and confirm the conviction and sentence of the Sub-Magistrate.

S.N./R.K. *Acquittal set aside.*

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* A. I. R. 1919 Madras 52 (2)

ABDUR RAHIM AND SRINIVASA AIYANGAR, JJ.

Vadlamudi Gopalakrishnayya and *anothers*—Defendants—Appellants.

v.

Vadlamudi Gangayya and *others* — Plaintiffs—Respondents.

Civil Appeals Nos. 373, 421, 422, 384 and 420 of 1915, Decided on 15th January 1917, against decrees of Temporary Sub-Judge, Masulipatam, in Original Suits Nos. 44 and 70 of 1913.

***(a) Hindu Law—Widow—Surrender in favour of reversioners is valid—Smallness of consideration and agreement to reconvey property to strangers does not matters.**

A surrender by a Hindu widow to her reversioners of practically the whole of her husband's estate is valid, though the actual consideration paid is small and very much below the value of the estate and though a part of the consideration is an agreement to reconvey the property to third parties: 17 *I. C.* 487 and 31 *Mad.* 446, *Foll.* [P 56 C 1]

(b) Hindu Law—Widow—Surrender—Small and inappreciable portion not included—Surrender is valid.

The fact that a small and inappreciable portion of the estate is not included in the deed of surrender will not invalidate it. [P 56 C 2]

T. R. Ramachandra Aiyar and *P. Narayanamurthi*—for Appellants.

V. Ramadoss—for Respondents.

Judgment.—(*Appeal No.* 373 *of* 1915.) —The object of the suit in which these appeals arise was to obtain a declaration that defendant 1 was not the adopted son of one Gopalakrishnayya and that the plaintiff was entitled to 1/15th share of the property in Sch. A to the plaint, to recover the same from the defendants, to obtain an apportionment of the property with reference to bad and good soil and for other reliefs. Defendants 84 and 85, unless defendant 93 was validly adopted by Manikyam, defendant 92, would be the nearest reversioners of Gopalakrishnayya and the plaintiff who is the remoter reversioner, claims 1/15th share of the estate under a deed of arrangement entered into between defendants 84 and 85, who had obtained a surrender of the properties from Gopalakrishnayya's mother Rangammah on 23rd November 1911, and the rest of the presumptive reversioners living at the time. Gopalakrishnayya had died on 30th July 1895 leaving a widow Ammama, who died subsequently on 23rd November 1911 whereupon the properties devolved on Gopalakrishnayya's mother Rangamma

who would be about 90 years old and is still alive. The main contest was between the whole body of reversioners on one side basing their title on the surrender by Rangamma and on the other defendant claiming to have been validly adopted by the widow Ammama and defendant 93 claiming to have been adopted by Manikyam, defendant 92, the widow of one Koniah, a deceased first cousin of Gopalakrishnayya and who would therefore have a better right to the reversion than defendants 84 and 85. The defendants in the suit are, besides the reversioners other than the plaintiff, various other persons who are in possession of different items of property under some claim or other, either by transfer from the reversioners or from the widow or otherwise. Defendant 91, it may be mentioned, is the National College of Masulipatam to which a gift was made of 1/15th share by the reversioners. A large number of issues were tried and in the result the learned Subordinate Judge decreed the plaintiff's claim. We shall deal with the different questions argued before us in the several appeals and memoranda of objections in their order. On the question relating to the authority alleged to have been given by Gopalakrishnayya to his widow Ammama to make an adoption, we have no hesitation in agreeing with the conclusion of the learned Subordinate Judge.

The burden of proving that the adoption was made under proper authority lay upon defendant 1, but having considered the evidence of the defendant's witness on this point, we are not at all satisfied that Gopalakrishnayya gave authority as is alleged. Gopalakrishnayya died on 30th July 1895 and the case of the defendant is that the authority was given to the widow on the same day. It is not clear upon the evidence what he actually died of. The evidence adduced in support of the authority to adopt is that he died suddenly and that the illness, whatever it was, only occurred on the very date of his death. The man who is allegsd to have treated him, the defendants' 14th witness Amba Narasayya, says that he hardly knew what the matter was with this man, but however that may be, the important evidence on which Mr. Ramachandra Aiyar naturally relies in support of his case is that of witness 13 for the defendants, a second grade pleader. He says that he came to know Gopalakrishnayya as both of them were fond of music and used to meet at music parties and theatres. The learned Subordinate Judge has discussed this evidence at great length and his conclusion is that the testimony of this witness cannot be acted upon.

He points out that this witness's name did not appear in any of the lists of witnesses but that he was summoned only a few days before the defendants let in their evidence, and was not served with summons until the day before he was examined. The explanation as to why his name did not appear in any of the previous lists of witnesses is that it did not transpire that he was present at the time of Gopalkrishnayya's death or knew anything about the alleged authority to adopt, until defendants 14th witness Amba Narasayya happened to be questioned by the pleader for the defence when he disclosed this man's name. We find it impossible to believe that if this witness was actually present at the death-bed of Gopalakrishnayya, his name would not have been known to everybody else present there and that the defendants would not have known from the very beginning that this man knew about the authority to adopt. The other men who were present at Gopalakrishnayya's bedside were ordinary villagers and if defendants' 13th witness was also there and heard the deceased give authority to his wife to adopt a child on his death, it is fairly certain he would have been one of the first to be summoned to give evidence in the case. As regards the other witnesses the Subordinate Judge has dealt with their evidence in para. 128 of his judgment and we are unable to say that his estimate of their evidence is incorrect. Further the circumstances of the case strongly support the conclusion of the trial Judge. The authority is stated to have been given in 1865, but it is not mentioned in any sort of document or writing until the very date of adoption, that is till 1911. If any such authority had been received by Ammama, it can be assumed with certainty that there would have been more than one occasion to mention the fact during all these years. Ammama was seriously ill in 1898 and the Subordinate Judge is right in pointing out

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that if she had any authority to adopt, he would have made some attempt to carry out her husband's wishes at that time. The absence of all reference in Ex. FF to any such authority also negatives the supposition that the authority was actually given. It is pointed out by the learned Subordinate Judge that the story of the defence is that from the very birth of defendant 1 Ammama wanted to adopt him. If there was the least truth in the suggestion we cannot understand why, if she had received authority from her husband, she would have refrained from making the adoption till the very last day of her death. We therefore agree with the Subordinate Judge that the adoption of defendant 1 is not valid.

The adoption of defendant 93 by Manikyam, the widow of Koniah, is said to have taken place on 29th October 1911, that is to say, previous to Ex. S, the deed of surrender executed by Rangamma on 23rd November 1911. Manikyam at that date was 30 years of age and it is not disputed that though the authority to adopt had been given to her by her deceased husband 14 years ago, she made no attempt to adopt all this time, and there can be little doubt upon the evidence that if she did make the adoption as alleged, it must have been brought about more or less hurriedly and with the object of defeating the reversioners of Gopalakrishnayya who, it is said, were anxious to get hold of the estate by means of a surrender from Gopalakrishnayya's mother, Rangamma. Manikyam had also inherited from her husband somewhat valuable properties of the value of Rs. 15,000 and we have no hesitation in saying that if she was at all anxious to adopt in accordance with the authority given by her husband, she would have made the adoption long before 1911. The suggestion made on behalf of the appellant is that it was at the time that Ammama was taken ill that the idea occurred to her advisers, especially defendant 1 who was the gumasta of both Ammama and Manikyam, to have an adoption made by Manikyam in order to make sure that the property of Gopalakrishnayya did not go to the reversioners. There can be no doubt that the relations both of Ammama and Manikyam on the one hand and of the reversioners on the other were anxious to secure to themselves the property which was in the possession of Ammama and which on Ammama's death would devolve on Rangamma, the mother of Gopalakrishnayya.

The learned Subordinate Judge, having considered the evidence on both sides, has come to the conclusion that the story of the adoption of defendant 93 is not true. He has found himself unable to accept the testimony of the witnesses of the defendants who speak to the adoption taking place on 29th October 1911, and is inclined to accept the evidence of the witnesses of the plaintiff residing in the village of Guraza where the adoption is said to have taken place. They all state that they never heard of any such adoption and that if there had been one they would have known of it. Most of the witnesses in support of the adoption are relations of Manikyam or Ammama, but that in itself would not in a case of this nature, throw discredit on their testimony if we were in a position to say on a view of the undoubted facts and probabilities of the case that the story set up is true. Defendant 93 at the time of the alleged adoption was 7 or 8 years old; he belonged to a very poor family in Kavutharam. He used to go to a school at Kavutharam and the case is that he was brought to Guraza on 29th October, which happened to be a Sunday, and after the adoption was hastily performed on the same day, he went back with his parents to his village. From the school register it appears that he attended school as usual on the 30th. It is observed by the learned Judge that it is hardly likely that if the boy had been adopted, the adoptive mother would have allowed him to return to Kavutharam on the same day. The Subordinate Judge also comments on the fact that though his original name was said to have been changed and under the law, being affiliated to the family of his adoptive father, he would henceforth be known as the son of his adoptive father no alteration was made either in his name or in that of his father in the school register. As regards the actual ceremony, the Subordinate Judge is impressed by the fact that no sufficient publicity was given to the adoption and the adoption was not celebrated as one would expect it to be having regard to the fact that Manikyam was in fairly well-to-do circumstances. The absence of any music at the time of the ceremony, as specially

pointed out, was a circumstance against the truth of the story of the defence.

There is one very important circumstance noted by the Subordinate Judge which militates against the theory of adoption, that is, the fact that the boy did not perform the shradh ceremony of the adoptive father which took place about 20 days from the date of the alleged adoption. Then the evidence is that he performed the two succeeding ceremonies at the village of Kavutharam while Manikyam herself was living at Guraza. It is also to be noted that the boy did not live with Manikyam at all for a long time after the alleged adoption. There are also other very significant circumstances which support the decision of the Subordinate Judge. On 24th November 1911, when the deed of surrender was presented for registration, it appears that a representation was made to the Sub-Registrar that as a matter of fact, Manikyam had adopted a son and therefore Rangamma was not entitled to make a valid surrender. Ex. LLLL is one of those petitions and it was sent by post and received by the Sub-Registrar on 24th. Ex. LLLL (1), the other petition, was presented to the Sub-Registrar personally by the brother of defendant 81. It is curious that in none of these petitions the name of the adopted son is mentioned, and we do not think that any proper explanation has been given for this omission. The Sub-Registrar who was examined in the case says that defendant 81 himself was present at the time of registration of Ex. S and when asked for the name of the adopted son he replied that the boy would come before the public in the course of a short time. We are asked to say that the evidence of the Sub-Registrar on the point is false. The Subordinate Judge, who saw the witness, did not find sufficient reason for disbelieving him; but apart from that, when we remember that there was so much anxiety displayed by the appellant's party to object to the registration of the deed of surrender and to set up an adoption, it is difficult to see why the name of the adopted son if the adoption had actually taken place, should not have been put forward.

Then we find that the will alleged to have been executed by Manikyam, Ex. XXX, and the deed of sale purporting to have been executed by her, Ex. UUUU, both bear the date of 29th October 1911, the date of the alleged adoption. The adoption is mentioned in Ex. XXX, and there can be very little doubt that the purpose for which Ex. XXX was executed whenever it might have been executed, was to supply evidence of this adoption. The Subordinate Judge has found that both these documents have been antedated, and it seems to us that there is force in the reasons given in support of this conclusion. If as a matter of fact the will was executed on 29th October, it is not at all clear why, having regard to the anxiety which Manikyam and her advisers had to defeat the contemplated surrender on the part of Rangamma no steps should have been taken at once to to register this document. Then in Ex. LLLL it is mentioned that certain documents, "executed between the said Manikyam and the adopted son were about to be registered," and this could not possibly refer to the will or to the deed of sale, Ex. UUUU, and it is not explained why if the will had been in existence it was not mentioned in Ex. LLLL. One would have thought that if Ex. XXX was in existence at that time, it would have been presented before the Sub-Registrar in support of the story of the alleged adoption. The truth seems to be, as suggested by the trial Judge, that Manikyam had no idea of adopting, but when her own relations and advisers found that the reversioners were going to obtain a surrender from Rangamma, they thought it necessary to give out that Manikyam had actually made an adoption. It may be assumed that Manikyam could not be persuaded to yield to the wishes of her advisers and make an adoption, but apparently it was not found easy to secure within the short time at their disposal a suitable boy whose parents or guardians would agree to such terms as would suit the purposes of Manikyam's relations and advisers. For instance the brother of Manikyam is claiming a valuable portion of the properties belonging to the estate of her husband, under a conveyance said to have been executed on the date of the alleged adoption. In these circumstances we must confirm the finding of the Subordinate Judge that the alleged adoption of defendant 93 has not been proved.

The surrender of Rangamma is attacked mainly on the ground that it is not a bona fide transaction, inasmuch as she

received Rs. 6,000 as consideration for making the surrender in favour of defendants 84 and 85 who were the nearest reversioners. The property is of the value of about 1½ lakhs yielding an annual income of something like Rs. 10,000. At the time of the surrender, Rangamma was about 80 years old. It also appears that defendants 84 and 85 came to an arrangement with all the remoter reversioners as regards this property, and it may reasonably be that one of these persons will succeed on her death. The plaintiff, who seeks to recover his share under an arrangement of purchase from the surrenderees, is one of the remote reversioners. The question of law is undoubtedly one of difficulty, but so far as this Court is concerned, we must take it as settled by recent decisions reported as *Kereti Brahmanaikudu* v. *Kereti Mahalakshmi* (1) and *Chella Subbiah Sastri* v. *Palury Pattabhiramayya* (2). In the previous case it was regarded at the time of the surrender that part of the property would be reconveyed to the brother of the widow, and there was also a stipulation that she was to receive Rs. 400 though the amount apparently was not actually paid. Even in the face of these facts it was ruled, following the earlier case of *Chella Subbiah Sastri* v. *Palury Pattabhiramayya* (2), that the surrender was a valid one. We think that the present case is covered by those decisions. Mr. Ramachandra Aiyar tried to distinguish the present case from that in *Chella Subbiah Sastri* v. *Palury Pattabhiramayya* (2) on the ground that there is an observation by Sankaran Nair, J. that if part of the property be reconveyed to the widow in pursuance of an understanding at the time of the surrender, that might make a difference. But this observation is only by way of obiter, the main principle of the decision being that the fact that the consideration for the surrender was reconveyance of a portion of the property, though to a third person, does not ipso facto invalidate the surrender. In this the consideration for the surrender which would not amount to more than Rs. 6,000 at the most, was but a very small fraction of the entire property.

It is also argued that inasmuch as a house site worth about Rs. 600 is not included in the deed of surrender, the surrender cannot be said to be the entire estate as the law requires and is therefore bad. We do not think that there is any force in this contention. It is a very insignificant fraction that is not included in the surrender very likely through inadvertence, and this cannot be held to affect the substance of the transaction. It was further sought to be argued by Mr. Ramachandra Aiyar that the so called surrender was in fact an alienation of the properties by the widow to a number of persons, some at least among them being strangers not concerned in the reversion. He suggested that the surrender was a mere cloak in order to support alienations in favour of strangers. But this case was never sought to be made in the lower Court. No doubt in para. 6 of defendant 1's written statement there is a vague averment of conspiracy, but it cannot be said to have been intended to put forward a case that what purported to be a surrender in favour of the nearest reversioners, viz., defendants 84 and 85, was really meant by Rangamma to be a cloak for supporting alienations in favour of strangers. No such issue was raised and the learned Subordinate Judge who dealt with every matter raised during the trial at great length, has not alluded to any such question in his judgment. The surrender then was of practically the whole estate without reserving any portion of it to the widow, though a small sum of money was paid to the widow. In these circumstances the validity of the surrender is concluded so far as this Court is concerned by the decisions in *Keretti Brahmanaikudu* v. *Kareti Mahalakshmi* (1) and *Challa Subbiah Sastri* v. *Palury Pattabhiramayya* (2).

Then another point was raised by Mr. Ramchandra Aiyar that so far as the gift to the National College of 1/15th share of the property is concerned, it was not shown to have been accepted by the trustee of the College, as neither he nor the Secretary produced the deed at the time of the trial. The gift was not of an onerous nature and there is no reason for saying that it has not been accepted by the trustee. As a matter of fact both in the lower Court and before us in the arguments on behalf of defendant 1 it was persistently and earnestly urged that it was the trustee and other

(1) [1913] 17 I.C. 487.
(2) [1908] 31 Mad. 446.

persons interested in the National College that brought about the surrender. We do not think that there is any substance in this objection. The next point urged before us is that this suit is not framed as a suit for partition and the Subordinate Judge was not right in declaring the shares of the different parties and in giving a decree for partition. As we read the plaint, it is a suit for partition and it has been so treated by the lower Court. The whole case has been tried on that basis.

The first point taken in the appeal on behalf of defendant 3 is that he should not have been made liable for mesne profits of item 9 in the schedule. It is suggested that he was in possession of that item on behalf of his minor natural son, defendant 1. It has been pointed out that defendant 1 is not entitled to the property, and as defendant 3 himself was in actual possession of the property, we think he has rightly been made liable for mesne profits. As regards costs, it is suggested that some issues were decided in favour of defendant 1 and defendant 3 and therefore the Sub-Judge was not right in awarding the whole costs against them. But they failed on the substantial questions raised in the trial and we do not think that the Subordinate Judge was wrong in his order as to costs. This disposes of the appeal by defendants 1 and 3. Appeal No. 373 of of 1915 is dismissed with costs.

(*Appeals Nos.* 420 *and* 421 *of* 1915).—These appeals must be dismissed with costs, on our finding that the adoption of defendant 93 did not, in fact, take place.

(*Appeal No.*384 *of* 1915).—This appeal relates to certain properties which belonged to the estate of Konayya and were inherited by his widow Manikyam. She sold these properties to her own brothers by Ex. UUUU for Rs. 5,000, which has been found and rightly so found to be a wholly inadequate consideration. assuming that it was paid, Mr. Narayanamurthi wishes to support the sale on the strength of Ex. 2, a will executed by Konayya. His contention is that under this will Manikyam became sole owner of the property inasmuch as no child was born to her. But it has been found in fact that there was no miscarriage and that a female child was born to Konayya after his death and died shortly after its birth. The last clause in the will to which reference is made says:

"If no such (child) should be born, the adopted son which my wife according to her pleasure may take, or my wife Manikyam should enjoy the . . . . property.

The gift to Manikyam is contingent on the child she was carrying not being born alive; this contingency did not happen as the child was in fact born alive and therefore the contemplated gift did not take effect in favour of Manikyam. This was the only question raised before us in the appeal which was argued on behalf of defendants 3 and 4. The appeal fails and is dismissed with costs.

(*Appeal No.*422 *of* 1915).—This appeal raises the question of the validity of the lease of item 1 in the schedule granted by Ammama on the 4th December 1898 for 20 years to her father for a rent of Rs. 1,500 a year. The lease will expire in two years' time, and the question argued before us is whether such a lease is competent for the widow to grant. The Subordinate Judge has found that in the circumstances it could not be said to be an improvident lease and has upheld it. It appears that the tenants, who were in possession of the lands, were creating difficulties and it was probable that without considerable litigation no rent would have been realized from them. We find that as a matter of fact Ammama's father had to bring a number of suits in order to eject the tenants who were denying his title and to recover the lands. It is stated that rent reserved in the original lease granted to Gopalakrishnayya was Rs 1,900. But having regard to the difficulty of realizing the rent, the Subordinate Judge is right in saying that the reduction of rent was justified. No doubt the lease was executed by Ammama in favour of her father, but it is difficult to say that it was done with a view to favour him as Ammama in fact prosecuted her father in a criminal Court on some charges in connexion with the accounts of her property. We are not therefore prepared to differ from the conclusion of the learned Subordinate Judge that the lease, under the circumstances, was a fair and bona fide transaction. That being so, it is undoubtedly valid in law. Mr. Ramadoss on behalf of the appellant also

claims interest on the rents decreed to him. But having regard to the frame of the suit and the fact that the rents decreed were mostly for periods subsequent to the institution of the suit, we do not think we would be justified in giving him interest.

Item 2 in the schedule was bought by Ammama's father at a Court auction. The property was under mortgage to Ammama's husband Gopalakrishnayya, and in order to enforce it, a mortgage suit was brought, and in pursuance of the decree in that suit it was brought to sale. It was sold for Rs. 600 odd, although the decretal amount was about Rs. 2,000. Ammama's father was apparently a fairly well-to-do man and had sufficient means to buy this property. It is found that after him his son, defendant 2, has been in possession, paying kist or Government revenue. It also appears that in a suit instituted by Rangamma against Ammama for maintenance Ammama disclaimed all interest in this property; and in the proceeding before the arbitrators in the dispute between Ammama and her father, she did not claim the property as her own. These facts go to show that the property really was brought by Ammama's father bona fide and not as benamidar for Ammama. Much reliance is placed on an entry in the account books of the pleader who acted in the proceedings in the mortgage suit. These accounts show that a ledger was opened in Ammama's father's name and this property was purchased on his behalf. There is however a transfer of a small sum of Rs. 2-12 0 to Ammama's ledger, she being debited with this amount as it was incurred in respect of costs for taking delivery of the property. We do not think that this is sufficient to outweigh the other evidence which goes to show that the property was bought by Ammama's father on his own account. The burden lay upon the plaintiff to prove that the transaction was of a benami character, but, far from that burden being discharged, the evidence shows that the purchase was not benami.

Item 10 in the schedule, which consists of 25 cents of land, appears to have been made a gift of by Ammama to her purohit, defendant, 73 on the occasion of the Kistna Pushkaram. It is alleged that there is no registered instrument to evidence the gift and therefore it must be disallowed. No such plea however was taken and the question was not raised before the lower Court. We cannot therefore allow it to be raised now. This objection as regards item 10 is therefore disallowed. Appeal No. 422 of 1915 fails and is dismissed with costs. So also the memorandum of objections in Appeal No. 373 of 1915 argued by Mr. Ramadoss.

The memorandum of objections in Appeal No. 422 of 1915 filed on behalf of defendants 5, 6, 7, 8, 9 and 21 relates to items 11, 15, 12, and 16, in the schedule. As regards item 11, the Subordinate Judge has awarded mesne profits at the rate of Rs. 20 for all the shares and as regards item 15 he has awarded at the rate of 15 tooms an acre and at Rs. 50 a patti. It is contended that, as a matter of fact, these items are not in the possession of defendant. 7. No doubt in his evidence he denies that he is in possession. But it is expressly alleged in the plaint that these items are in the possession of defendant 7 and in his written statement there is no clear or positive denial of the allegation in the plaint. As regards item 12, the Subordinate Judge has given mesne profits at Rs. 50 per patti and we are not in a position to say why he ought to have awarded, as is now contended, Rs. 44 and not Rs. 50. As regards item 16, the Subordinate Judge has awarded Rs. 480-6-0 while, as a matter of fact, the amount claimed is Rs. 413. The decree will therefore be modified by reducing the amount to Rs. 413, otherwise the memorandum of objections fails and is dismissed with costs.

The memorandum of objections in Appeal No. 373 of 1915. (For the memorandum of objections argued by Mr. Ramadoss vide under Appeal No. 422 of 1915 supra.) As regards the memorandum of objections of the defendant 76 (respondent 13) the mesne profits awarded will be reduced to what is claimed against him in the plaint.

Defendant 2's (respondent 2's) memorandum of objections. The Subordinate Judge has found that the 14 cents, which is part of item 2, belongs to Ammama and we do not see special reason for interfering with that finding. Nor is there any ground for interfering with the conclusion of the Subordinate Judge as regards the liability of defen-

dant 2 for the mesne profits of item 9. The technical objection however to the form of the decree with reference to item (1) is well founded, inasmuch as this item of property is under a lease and will not expire till some time in 1918. The Subordinate Judge was not therefore right in so framing the decree as to give the plaintiff a present right to partition of this property. We think that there ought to be a paragraph in the decree after para. 2 to this effect: that the right of the plaintiff to item (1) of the schedule be declared subject to the leasehold interest of defendant 2 under Ex. HHH. As a consequence of that in para. 3 of the decree, after the words "other than items" add "1 and 2." The paragraphs will be re-numbered. Subject to the above modifications of the decree the memorandum of objections is dismissed with costs.

Respondent 18's memorandum of objections.— This relates to a part of item 20 amounting to about 7 acres odd. This property was sold in auction in execution of the decree obtained by Rangamma against Ammama. The Subordinate Judge has found that the purchase by respondent 1 who was the gumasta of Ammama, was made on behalf of Ammama herself. There is considerable evidence in support of this finding which is also in accordance with the probabilities of the case. The memorandum of objections is dismissed with costs.

S.N./R.K. *Appeals dismissed.*

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PHILLIPS AND KRISHNAN, JJ.

Mangeshwar Naraina Rao — Defendant—Appellant.

v.

S. Shiva Rao and *others*—Plaintiffs—Respondents.

Second Appeal No. 912 of 1917. Decided on 3rd April 1918, against decree of Dist. Judge, South Canara, in Appeal Suit No. 301 of 1916.

Civil P. C. (1908), O. 34, R 14—Lease of mortgaged property to mortgagor—Covenant for payment of specified rent and for delivery back on default to mortgagee with interest on arrears of rent and future rent—Property charged with all sums due—Decree for rent—Redemption after decree becomes barred—Mortgagee cannot claim decretal amount for he has already elected one remedy—Civil P. C (1908), O. 2, R. 2.

A deed of usufructuary mortgage executed in 1863 provided that the mortgagor was himself to continue in possession paying a certain specified rent. In default of such payment before the end of March of each year, the mortgagee was to take possession at once and to charge rent at an amount equal to 12 per cent interest on the mortgage money; that 12 per cent was to be paid on the arrears of rent, the mortgaged property being liable for the total amount. There was a further clause that on redemption the mortgagor should pay the mortgage money together with any arrears of rent and interest due. Default having been made in payment of rent, the mortgagee sued the mortgagor in 1871 for possession and arrears of rent and interest at 12 per cent and for future rent and interest at the same rate. Possession was taken by the mortgagee under the decree but execution for the rent and interest decreed was allowed to become barred. In a suit for redemption by the mortgagor, the mortgagee claimed to be paid the amount due under the decree and all interest. The mortgagor offered to pay only the principal amount:

Held: that the mortgagee was not entitled to the barred decree amount: 21 *I. C.* 701 and 40 *I. C.* 358, *Dist.*

Per *Phillips, J.*—When a mortgagee elects to enforce one remedy, he cannot, after having obtained that relief, be allowed to abandon the relief first chosen and fall back upon the other, when his right to enforce the first has been allowed to become barred by limitation. [P 61 C 1]

Per *Krishnan, J.*—The obtaining of a personal decree by a mortgagee does not per se put an end to the charge on the property. That is the English rule and there is no reason why the same rule should not be applied to India. But the enforcement of the charge can be made only so long as the claim under the decree is not barred by limitation. The claim to rent was on the obtaining of the decree taken out of the operation of the contract between the parties and passed into the domain of judgment. It was not open afterwards to either party to ignore the decree and fall back on their antecedent rights and obligations. If the decree was satisfied or assigned away by the mortgagee he could no longer enforce any charge. On the same principle if the decree ceased to be enforceable by limitation the charge also failed. The mortgagee could not be allowed to take advantage of a redemption suit to enforce stale and time-barred claims. [P 62 C 2]

B. Sitarama Row—for Appellant.

K. Y. Adiga—for Respondents.

Phillips, J.—Plaintiffs sue to redeem a usufructuary mortgage of 1868 for Rs. 1,650. In the mortgage deed there is a provision that the mortgagor is to take back possession and pay a stipulated rent. In default of payment of this rent the mortgagee was to recover possession and the mortgagor was to pay a sum equivalent to 12 per cent on Rs. 1,650 as rent from the date of the mortgage deed until the mortgagee got back possession. The mortgagor failed to pay rent as stipulated and the mortgagee obtained a decree in 1873 for possession and for Rs. 200 odd claimed as rent and for

future rent. It does not appear that this decree was ever satisfied and the mortgagee now claims to add the decree amount and subsequent interest to his mortgage money. Under the mortgage deed the payment to be made by the mortgagor was made a charge on the property and there was an undertaking to pay it back together with the mortgage amount.

The question for consideration is whether the mortgagee is entitled to demand the decree amount of 1873 together with subsequent interest before redemption. It is contended for respondent that the amount due became merged in the decree, and that as the decree has now become barred the amount cannot now be claimed. It would appear that under American law the respondent's contention is correct (vide Jones on Mortgages, S. 936), but the position is not so clear either in English or Indian law ; for it would appear from a passage in 21 Halsbury 325 that the original charge would still remain unless the decree became satisfied, and it is questionable whether a decree that has become barred by limitation is on the same footing as a decree that has been satisfied. It cannot be disputed that a mortgagee is entitled, when accounts are settled at the time of redemption, to put forward claims, for the recovery of which a suit would be barred and it is unnecessary to cite authority for this proposition, but whether an amount for which the mortgagee has obtained a decree, the execution of which is barred by limitation, can be treated on the same footing as a barred debt is questionable. In *Hewanchal Singh* v. *Jawahir Singh* (1) it was held that when a decree had been obtained for interest due on a mortgage the tender of the principal amount alone would not be a proper tender of principal and interest ; but the question of whether the mortgagee could demand the decree amount again was not specifically decided and in that case the decree was still alive. The judgment of the Judicial Committee is very brief and gives no reasons for the decision. In the present case we have not to consider whether the decree amount and subsequent interest can be claimed ; for it is not claimed on the ground that the amount was decreed, but on the ground that the whole amount can be claimed under the mortgage deed. On looking into the deed it appears that the penalty that could be claimed by the mortgagee on default in payment of rent by the mortgagor was a sum equivalent to 12 per cent. interest per annum on the principal amount, and although it is called rent it is really interest on the mortgage money, and out of the total decree amount Rs. 198 is really one year's interest on the mortgage money. To allow a claim for this amount with subsequent interest from 1873 to date of redemption would be to allow compound interest for which no provision is made in the mortgage-deed. No doubt the deed provides for interest on arrears of rent but the decree did not really provide for arrears of rent, and although it does not enforce the stipulation that interest shall be payable from the date of the deed, but only from date of default it is impossible to go into that question now, and we can only assume that only one year's interest was due at the date of decree. This amount without subsequent interest can alone be claimed. The balance of Rupees 5-6-0 due under the decree, is for road cess, but if the Rs. 198 awarded is treated as interest the mortgagor was under no obligation to pay road cess, which is only payable upon rent. In this view the appellant mortgagee is only entitled to claim Rs. 198, the amount due to him at date of the decree.

Treating this Rs. 198 as interest upon the principal which is made a charge upon the property, can it be said that the charge upon the property has become merged in the decree? It is contended for appellant that O. 34, R. 14, Civil P. C., supports the view that the claim can be enforced apart from the decree, but that rule only provides that a decree for money in satisfaction of a claim under a mortgage is no bar to a subsequent suit for sale in enforcement of the mortgage, but it is no authority for saying that the decree amount can also be claimed in the subsequent suit. It is urged then on the other side that to allow the decree amount to be claimed again would be contrary to the principle of O. 2, R. 2, for by bringing a suit for money the claim to make it a charge upon the property must be deemed to be abandoned, but in order that this argument should succeed, it is necessary to show that a suit against the property could have been brought when

(1) [1889] 16 Cal. 307.

the claim was made for money alone. In this case it certainly could not have been, and consequently the mortgagee's claim is not contrary to the principle of O. 2, R. 2. It may however be contended that by obtaining a decree for money which could be enforced at once the mortgagee abandoned the charge which he would only enforce later, and there is considerable force in this contention. It is the view taken in *Imdad Hasan Khan* v. *Badri Prasad* (2), in which case *Hewanchal Singh* v. *Jawahir Singh* (1) was considered and I think it is in this case the correct view, for having elected to enforce one remedy, and having obtained that relief, the mortgagee cannot now be allowed to abandon the relief first chosen and fall back upon the other when his right to enforce the first has been allowed to be barred by limitation. It is possible that the Allahabad view that even while the decree is alive the other remedy cannot be enforced goes too far, but it is unnecessary to consider that now.

This appeal accordingly fails and is dismissed with costs. In view of the above finding the memorandum of objections relating to mesne profits from the date of tender of the mortgage money must be allowed with costs. The amount which has now been found to be correct was tendered through Court, and under S. 84, T. P. Act, interest ceased from that date. Time for redemption extended to four months from this date. Mesne profits to be determined before final decree.

Krishnan, J.—The suit from which this second appeal arises was one for the redemption of a mortgage by conditional sale of 1868. The plaintiff mortgagor sought to redeem on payment of the mortgage money alone, viz., Rs. 1,650. The mortgagee claimed that he should be paid in addition a sum of Rs. 2,474-12-0, which was stated to be the amount of rent and interest on it due to him under the decree in Original Suit No. 199 of 1872. The way in which the decree came to be passed is as follows:

Though the mortgage was one with possession, it was arranged in the mortgage deed itself that the mortgagor should himself continue in possession as the mortgagee's tenant paying a stipulated rent every year before the end of March. There was a condition added that if the mortgagor failed to pay the rent on the due date in any year, the mortgagee was to have the right to take possession at once, and to charge rent at an amount equal to 12 per cent. interest on the mortgage money, which works out at Rs. 198 a year; this amount was much higher than the rent originally fixed. It was also arranged that 12 per cent. interest should be paid on the arrears of rent and that the mortgaged property should be liable for the total amount. There was a further clause that on redemption the mortgagor should pay the mortgage money together with any arrears of rent and interest due. In 1871 default was made in payment of the rent due and the mortgagee brought Original Suit No. 199 of 1872 against the mortgagor and obtained a decree for possession and for arrears of rent and interest at 12 per cent. and for some road cess, in all for a little over Rs. 200 with future rent and interest at the same rate. In execution of this decree possession was taken by the mortgagee but it does not appear that he has been paid the rent decreed. It is that rent with interest added to it for the last 40 years and more that he now claims to be paid before redemption. It is not denied that his decree was long ago barred by limitation.

The first Court allowed his claim but the appellate Court disallowed it and he has appealed to us to claim it. It was conceded on his behalf that his claim was not sustainable so far as it was based on the covenant in the mortgage deed to pay the arrears of rent with the mortgage money, in view of the ruling in *Ramakrishna Kukkilaya* v. *Nekkar Kuppanna* (3), but it was argued that as in the present case there was a charge on the property for the rent due, he could rely upon it and claim to be paid the amount of it before redemption in spite of the having obtained a decree for it and in spite of that decree having become barred by limitation. That there is a charge created by the language of the document must be admitted, and in this particular there is a difference between the present case and the one in *Ramakrishna Kukkilaya* v. *Nekkar Kuppanna* (3). But I do not think that makes any real difference in the result. I am inclined to agree with the appellant's argu-

(2) [1898] 20 All. 401.

(3) [1918] 43 I. C. 236.

ment that the obtaining of a personal decree does not per se put an end to the charge on the property. That that is the English rule is clear from the statement of the law in Halsbury's Laws of England, Vol. 21, S. 579, and from the cases cited there in support of it : *Lloyd* v. *Mason* (4) and *O'Brien* v. *Lewis* (5). There is no reason why the same rule should not be applied in India In fact O. 34, R. 14, Civil P. C., recognizes the principle and gives the right to bring a second suit to enforce the security. It seems to me also that their Lordships of the Privy Council adopted this rule in the case in *Hewanchal Singh* v. *Jawahir Singh* (1), though the matter is not free from doubt as their judgment is very brief. It may however be remarked that they make no difference between interest for the first year for which a decree had been obtained even before payment into Court and that for the second year it is no doubt possible to take their ruling to refer to interest for the second year, as has been done by the Allahabad High Court in *Imdad Hasan Khan* v. *Badri Prasad* (2). But I think having reference to the facts of the case as appear from the report and the argument before the Privy Council, the learned Judges of the Allahabad Court have taken too narrow a view of the effect of that decision.

On the authority of the same Allahabad case, the respondent has contended that the obtaining of a decree by itself put an end to the mortgagee's right to rely upon the charge. It is not clear from the report whether the decree which the mortgagee had obtained there for Government revenue paid by him was a subsisting one at the date of the suit for redemption or not, and also whether it had not been assigned away. If it was subsisting and unassigned, I am, with all respect to the learned Judges, inclined to think that their ruling on the point has gone too far. They treat the case as one of election of remedies and hold that having elected to sue on the personal covenant the mortgagee could not rely on his right under S. 72, T. P. Act I do not think the principle of election was properly applied, as in the second suit the mortgagee was only a defendant and was not seeking any remedy himself but was only setting up a condition for granting to the mortgagor the right of redemption sought to be enforced by him. To apply the principle of election in such a case seems to me to be in effect equivalent to extending the scope of O. 2, R. 2, Civil P. C., or of S. 43 of the old Code, which was then in force, to defences. which is unwarranted. The argument that, if the mortgagee is allowed to rely on his security for the amounts for which he has obtained decrees, the mortgagor may be compelled to pay the same amount twice over in cases where those decrees are assigned to third parties, does not seem to me to be of any force, as the security is attached to the decree and an assignment of the decree can no longer be availed of by the mortgagee. In fact it is exactly like the transfer of any other part of a mortgagee's claim to third parties. As I have already pointed out, it is doubtful whether too narrow a view has not been taken of the effect of the Privy Council decision by the learned Judges. Furthermore, the English rule on the point was not brought to their notice. For all these reason I think the ruling in that case on the point in question cannot be followed if the decree there was a subsisting one and was not assigned away. But even assuming that a mortgagee does not lose his charge by obtaining a personal decree, but can plead it and claim to be paid the amount of it in a redemption suit, the appellant must still fail as I think that can be done only so long as the claim under the decree is not barred by limitation.

When the appellant obtained his decree for rent, his rights with regard to it were regulated thereafter entirely by the terms of that decree; the claim to it was taken out of the operation of the contract between the parties and passed into the domain of judgment. It was not open afterwards to either party to ignore the decree and fall back on their antecedent rights and obligations. In short, the claim for arrears of rent became merged in the decree and though the charge did not become extinguished, it became thereafter attached to the decree amount so far as it represented the original rent. If the decree was satisfied or assigned away by the mortgagee, he could no longer enforce any charge. I think on the same principle if the decree ceased to be enforceable by limitation the charge also failed. By the obtaining of the de-

(4) [1845] 4 Hare 132.
(5) [1863] 3 De. G. J. & S. 606.

cree the claim for rent, even though it was originally a part of the mortgage transaction, was dissociated from the mortgage and became an independent claim on the property; and therefore the principle recognized in the cases in *Athan Kutti* v. *Matavil Illoth Sutarjanam* (6), *Kesar Kunwar* v. *Kashi Ram* (7) and *Ramakrishna Kukkilaya* v. *Nekkar Kuppanna* (3), that a mortgagee cannot be allowed to take advantage of a redemption suit to enforce his stale and time-barred claims unconnected with the mortgage under redemption, applied to it. The cases in *Parasurama Pattar* v. *Venkatachalam Pattar* (8) and *Nathamuni Pillai* v. *Vengammal* (9), cited by the appllant, referred to claims arising under one and the same mortgage transaction. In neither of them had any decree been obtained for a part of the mortgage claim as in the present case, and therefore the question arising here was not considered.

The principle stated in the last case, following the English cases of *Edmunds* v. *Waugh* (10) and *Marshfield, In re, Marshfield* v. *Hutchings* (11), that the limitation of a mortgagee's right to recover must not be read as a good plea to be urged by a mortgagor endeavouring to redeem, applies only to claims arising under the particular mortgages under redemption and not to those outside it. In the Privy Council case in *Hewanchal Singh* v. *Jawahir Singh* (1) and in the two English cases of *Lloyd* v. *Mason* (4) and *O'Brien* v. *Lewis* (5), above cited, the decrees were alive. In fact in *O'Brien's case* (5) Knight Bruce L. J., adds a direction

"for allowing against the judgment what has been or shall be obtained by means of the lien", showing that the enforcement of the lien was for the purpose of paying the decree debt. No case has been cited by the appellant against the view I am taking. On the other hand Jones in his Treatise on Mortgages, S. 936, states the American rule clearly thus;

"The merger of the note in a judgment does not extinguish the debt and the mortgage continues a lien till it is satisfied or the judgment is barred by the Statute of Limitation,"

and cites numerous American authorities in support of it. Though this is the American law, it seems to me it enunciates a principle which we may well accept. It follows then that assuming the appellant could have asked at the time of redemption to be paid the amount of his decree in Original Suit No. 199 of 1872, so far as it represented the rent due to him, if his decree had been kept alive, his right to do so ceased on that decree becoming barred by limitation. The second appeal therefore fails, and I agree with my learned brother that it must be dismissed with costs. As a result I also agree that the memorandum of objections should be allowed with costs and to the other portions of his order.

S.N./R.K. *Appeal dismissed.*

(6) [1917] 37 I. C. 756.
(7) A. I. R. 1915 All. 480=30 I. C. 777=37 All. 634.
(8) A. I. R 1914 Mad. 661=21 I. C. 701.
(9) [1917] 40 I. C. 358.
(10) [1866] 1 Eq. 418.
(11) [1887] 34 Ch. D. 721.

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AYLING AND KRISHNAN, JJ.

Brahmandam Venkata Lakshmi Narayana Row—Plaintiff—Appellant.

v.

Allamaneni Venkayya and *others*—Defendants—Respondents.

Second Appeal No 1127 of 1916, Decided on 9th October 1918.

Civil P. C. (1908), Ss. 11 and 47—Suit by first mortgagee impleading puisne mortgagee—Decree for sale and for payment of surplus proceeds to persons entitled—Puisne mortgagee's right to sue on his mortgage is not barred — Transfer of Property Act (1882), Ss. 85, 88 and 89.

Where, in a suit on a mortgage to realize the amount of the security, the puisne mortgagee is impleaded as a party and a decree is passed directing the sale of the property and the application of the proceeds in satisfaction of the decree and payment of the surplus to the defendant or whoever is entitled to it, the puisne mortgagee is not barred either by the provisions of S 11, or by those of S. 47, from enforcing his mortgage by sale of the property: 49 *I. C.* 36, *Foll.* 24 *All.* 429, *Expl.* 30 *Mad* 352 and 45 *I. C.* 798, *Dist*; 34 *I. C.* 507, *not Appr.*

Where a decree does not provide for the working out of the rights of the puisne encumbrancer without additions to it which the executing Court has no power to make, such rights are not barred of enforcement by a separate suit by the provisions of S. 47, Civil P. C. [P 64 C 2]

The fact that a puisne mortgagee did not, in the first mortgagee's suit in which he was impleaded as a party defendant, take steps to ascertain the extent of his right of redemption of the earlier mortgage will not affect his right to have the equity of redemption sold as against his mortgagor. This right is different from the right to redeem. The puisne mortgagee may elect to bring his own suit for his money.

T. V. Venkatarama Ayyar and *T. V. Vaidyanatham*—for Appellant.

V. Ramadoss—for Respondent.

Judgment. — As the Subordinate Judge has dismissed the plaintiff's suit on the preliminary ground that it is barred by S. 11 and by S. 47, Civil P. C., it is not necessary to state all the facts of the case which are a little complicated. The question arises in these circumstances: Plaintiff's father, as puisne mortgagee, was made a party to each of the two suits of the prior mortgagees, defendants 17 and 18, brought to enforce their mortgages by sale of the hypotheca. He did not appear and raise any pleas; decrees were passed in both suits in the usual form under S. 88, T. P. Act, which was then in force, and naturally the decrees made no mention of the puisne mortgagee's right to redeem; as to the surplus sale proceeds if any the order was that they were to be paid "to defendant or other persons entitled to them." Orders absolute were subsequently obtained, but before any sale in Court auction took place, the mortgaged properties were sold by private arrangement to defendant 14 who was to pay the sale proceeds to the decree-holders. Sale deeds were accordingly executed to him by the mortgagors and one decree was satisfied in full and the other in part by him. The question for our decision is whether in the above circumstances, this suit by the plaintiff as the puisne mortgagee to enforce his mortgage by sale of the property mortgaged subject to the prior mortgagee's claim is barred either by S. 11 or by S. 47, Civil P. C.

As stated above the Subordinate Judge has answered the question in the affirmative, but we are unable to support his view. The objection based on S. 47, Civil P. C., may be considered first. For that section to apply, the question raised in the second suit should relate to the execution, discharge or satisfaction of the previous decree. The relief claimed must be such as could be obtained by execution proceedings. That depends on the terms of the decree. The question is really concluded by the ruling of the Privy Council in *Gopi Narain Khauna* v. *Bansidhar* (1), where their Lordships held that where the decree did not provide for the working out of the rights of the puisne encumbrancer without additions to it which the executing Court had no power to make, a new decree was necessary for the purpose and S. 244 (now S. 47) of the old Civil P. C. would not bar the second suit. It is impossible to hold in the present case that on the terms of the decree here plaintiff could have got the relief, he now seeks by execution. The question whether he has lost his right by not getting a proper decree is irrelevant in considering the applicability of S. 47.

It has been held that even when a puisne mortgagee is expressly given by the decree a right to redeem and a right to share in the surplus sale proceeds, he is not barred from bringing a fresh suit for sale against the mortgagor. on the ground that in execution of a prior mortgagee's decree when it is in the form given in Appendix D (Sch. 1, Form 7), he is not entitled to insist on being redeemed himself or to get the property sold for his debt: see *Sarat Chandra Roy* v. *Nahapiet* (2). *Mackintosh* v. *Watkins* (3). *Sarurijigar Begam* v. *Baroda Kant Mitter* (4). The ruling in *Debendra Nath Sen* v. *Mirza Abdul Somed* (5) is also to the same effect, though there is an observation there that this suit would be barred if he was in a position to have his claim satisfied from the surplus proceeds. That must be understood as applying only to a case where the pusine mortgagee is given by the decree itself the right to apply for sale of the property.

The first three Calcutta cases above cited were recently considered and followed by a Bench of this Court in *Vedavyasa Ayyar* v. *Madura Hindu Sabha Nidhi Co. Ltd.* (6), which was a case where the decree gave the puisne mortgagee the right to redeem and also a right to share in the sale proceeds; and the property was sold in Court-auction, but the sale was set aside under O. 21, R. 89, Civil P. C. The learned Judges held that the second suit was not barred either by by S. 47, or by S. 11 We agree with this ruling and hold that S. 47, is no bar to the present suit, the circumstances here being more favourable to the second

(1) [1905] 27 All. 325=32 I. A. 123=8 Sar. 799 (P.C.).

(2) [1910] 37 Cal. 907=8 I. C. 1142.
(3) [1905] 1. C.L. J. 31.
(4) [1910] 37 Cal. 526=5 I. C. 539.
(5) [1909] 1 I. C. 264.
(6) [1919] 42 Mad. 90=49 I. C. 36.

mortgagee than in that case on the point under consideration.

The next question is as to the applicability of S. 11, Civil P. C. To apply that section the matter in issue in the second suit must have been in issue and been decided in the previous suit. It is not suggested that there has been any express decision against the right the plaintiff now claims. But it is argued that S. 11 read with Expl. 4, raises a bar. That explanation says, so far as it is relevant here, that any matter that might and ought to have been a ground of defence should be deemed to have been in issue; and therefore if the decree involved a decision on it, that decision will be res judicata in the same manner as an express decision on an issue. The question then is to what extent the decree in the prior mortgage suit can be taken to have decided by implication the right of the second mortgagee.

The Sub-Judge observes that the second mortgagee

" could have and ought to have proved his mortgage and obtained a decree for redemption and failing that he could not institute a second suit ignoring the previous litigation."

No doubt the Sub-Judge is right when he says that if he wished to exercise his right of redemption he should have appeared and claimed it in the previous suit. The ruling of the Privy Council in *Sri Gopal* v. *Pirthi Singh* (7), referred to by the Sub-Judge has decided that point. But the mistake made by the Sub-Judge is that he overlooks the fact that the present suit is not one for redeeming the prior mortgage ; plaintiff is seeking now to sell the property subject to the prior mortgage : that is not a right he could have put forward against the prior mortgagee. That a puisne mortgagee can now sue for sale of the equity of redemption without joining the prior mortgagee as a party and without offering to redeem him is made clear by the explanation to O. 34, R. 1, Civil P. C. The same view was held in Madras even before: see *Gangadhara* v. *Sivarama* (8), *Srinivasa Rao Saheb* v. *Yamunabhai Ammal* (9) and *Ranga Aiyangar* v. *Narayana Chariar* (10).

That being so the fact that the previous decision might have barred him from asserting again his right of redemption against the prior mortgage under S. 11, Civil P. C., does not affect his right to have the equity of redemption sold as against his mortgagor. No doubt if he had appeared on the previous occasion he might have claimed to share in the surplus sale proceeds also, but his right to it has not been negatived by the previous decrees; for the provision in them is that these surplus sale proceeds are to be paid to any person who is entitled to them. This leaves the matter open apparently to be decided in another suit. As stated before, it was decided in *Vedavyasa Ayyar* v. *Madura Hindu Sabha Nidhi Co., Ltd.* (6) that even where the puisne mortgagee has a right under the decree to share in the sale proceeds, his right to sue is not barred as the former right is different in many respects from the latter right. This conclusion was arrived at after considering the case in *Govinda Taragan* v. *Veeran* (11) which was also cited to us. Though we accepted that ruling in *Vedavyasa Ayyar* v. *Madura Hindu Sabha Nidhi Co., Ltd.* (6) in this case we need not go so far: for in the present decree there is no definite provision as to who should be paid those excess proceeds. It cannot be said that the puisne mortgagee was bound to get an order in his favour to share in the sale proceeds when he was made a party. No rule of law has been pointed out to us that compels him to do that. He may elect to bring his own suit for his money.

The Subordinate Judge relied also on the ruling in *Nattu Krishnama Chariar* v. *Annangara Chariar* (12) in support of his view that the second suit was barred. But that was a case where a person had two mortgages himself on the same property and failed to mention the second when suing on the first. He was held barred from suing again on the second. The decision is therefore clearly distinguishable from the present case, which is one of a prior and a different puisne mortgagee. In any case we consider the authority of that decision has been much shaken by the ruling of the Full Bench in *Subramania Aiyar* v. *Balasubramania Aiyar* (13), though it has not been expressly overruled. We see no distinction bet

(7) [1902] 24 All. 429=29 I. A. 118=8 Sar. 293 (P. C.).
(8) [1885] 8 Mad. 246.
(9) [1906] 29 Mad. 84.
(10) [1916] 39 Mad. 896=32 I. C. 80.
(11) [1911] 36 Mad. 32=12 I. C. 432.
(12) [1907] 30 Mad. 353.
(13) [1915] 38 Mad. 927=30 I. C. 317 (F. B.).

ween the holder of two mortgages suing on the second reserving the first and vice versa. If the nonreservation is to make the difference between the 30 Madras case and the Full Bench case, it must be a difference based on S. 43, old Civil P. C., or O. 2, R. 2, of the present Code. That difference does not seem to be valid, for the Full Bench have held that the two mortgages are two different causes of action and have answered the query of their Lordships of the Privy Council in *Sri Gopal* v. *Pirthi Singh* (*i*) in the affirmative. We are not prepared, with all respect to the learned Judges, to follow the view in the *Nattu Krishnama Chariar's* case (12). Our attention was also drawn to the sixth proposition laid down by Srinivasa Aiyangar, J., in *Chinnu Pillai* v. *Venkatasamy Chettiar* (14) that:

"if mortgagee 1, sues first making mortgagee 2, a party as he ought to, there cannot be a trial of a further action."

With all respect to the learned Judge this is clearly an obiter dictum and it has, in our cpinion, been stated somewhat too broadly. The question must depend on the findings and the decree in the first suit and on the execution proceedings. We are unable to adopt the proposition as stated without qualification. We must therefore hold that S. 11, Civil P. C., is also no bar to the present suit. Two further arguments of Mr. Ramadas for the respondents remain to be noticed. He drew our attention to the observations of their Lordships in *Het Ram* v. *Shadi Ram* (15) and to S. 89, T. P. Act, and contended that on the order absolute being passed the right to redeem was extinguished as well as the security and there was thereafter nothing for the plaintiff to get sold. This argument is the result of confusion between the equity of redemption which is an interest in land and is by itself immovable property and the right to redeem which is only a right attached to the equity of redemption. The former is not affected by an order absolute and can only be extinguished by a sale in Court auction confirmed subsequently of the whole property. The second argument was that the security of mortgagee 2 was also extinguished by the order absolute. Neither the section nor the observations of their Lordships referred to the security of mortgagee 2; they clearly refer to the security sought to be enforced in suit; that is that of mortgagee 1, in this case. If the property is sold by Court free of encumbrances mortgagee 2's security will cease to have effect on that property, but that effect is not produced by a private sale by the mortgagor as in the present case. We must therefore hold that the decree of the Subordinate Judge cannot be supported on the ground taken by him and we must reverse it; but as he has not disposed of all the questions raised in appeal we must remand the appeal to him for fresh disposal. The costs of this second appeal will be costs in the cause and will be disposed of by the Subordinate Judge.

S.N./R.K. *Suit remanded.*

(14) [1916] 40 Mad. 77=34 I. C. 507.

(15) A. I. R 1918 P. C. 34=45 I. C. 798=40 All. 407=45 I. A. 130 (P. C.).

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* A. I. R. 1919 Madras 66

OLDFIELD AND SESHAGIRI AIYAR, JJ.

Uma Venkataratnam & Co.,—Petitioner.

v.

Methewala Adamji Usman & Co., and *others*—Opposite Party.

Civil Revn. Petn. No. 829 of 1917. Decided on 19th February 1919, from order of Dist. Munsif, Ellore, D/- 11th April 1917.

***(a) Civil P. C (1908), S. 73—Specific fund belonging to judgment-debtor attached—Application by decree-holder for payment out of the money—Court cannot suspend payment for effecting rateable distribution in respect of claims not matured into decrees.**

Where a specific fund in Court belonging to a judgment-debtor is attached by a decree-holder of the former and an application is made for payment out of the money to him, the Court has no jurisdiction to suspend payment in order to enable rateable distribution to be effected among the creditors of the judgment-debtor whose claims have not yet matured into decrees of Court. 29 *I. C.* 239, *not Foll.*; *A. I. R.* 1915 *Mad.* 236, *Foll.*; 29 *I. C.* 622; 41 *I. C.* 516; 30 *Mad.* 413 *and* 25 *Cal.* 179 (*P. C.*) *Expl. and Dist.*

[P 68 C 1]

(b) Civil P.C. (1908), O. 21, R. 52—Attachment under—Priority.

It cannot be said that an attachment under O. 21, R. 52, in no circumstances confers priority;

[P 68 C 1]

(c) Civil P. C. (1908), O. 21, R. 52 and S. 73—Fund attached under O. 21, R. 52, requires no further realization—No creditors applying under S. 73—Payment to attaching creditor can be made.

Per *Oldfield, J.*—A fund attached under O. 21, R. 52, requires no further realization, and in the absence of creditors entitled to apply under S. 73, there can, from the moment that the attachment is laid on it, be no obstacle to its payment to the attaching creditor. [P 68 C 1]

Per *Seshagiri Aiyar, J.*—S. 73 is restricted in its operation to other than administrative actions. Priority is within the contemplation of O. 21, R. 52, of the Code. [P 69 C 2]

***(d) Civil P. C. (1908), S. 73—Diligent decree-holder invoking aid of Court should not be kept out of right because others are not equally diligent—Only restriction is rateable distribution under S. 73.**

The general principle is that a person who is diligent enough to invoke the aid of the Court in satisfaction of his decree should not be kept out of his rights because others have not been equally diligent in seeking their redress. The only restriction upon his rights is that if, before he sets the process of the Court in motion to realize the assets, others have applied for execution, he should share the realized assets with those other applicants. There is no warrant for holding that a person who has applied for payment should be put off on the chance of some others having claims on the property coming in at some time to have the property distributed rateably.

[P 69 C 2]

(e) Civil P. C. (1908), Ss. 73 and 115—Execution of decree—Suspension of payment is irregularity in exercise of jurisdiction.

The suspension of payment is an irregularity in the exercise of jurisdiction by the Court within the meaning of S. 115.

Chenchiah for *T. Prakasam*—for Petitioner.

Kamanna for *P. Narayanamurti*—for Opposite Party.

Oldfield, J.—The fund in dispute in this case represents property originally attached by one of the present respondents before judgment. But we have not been shown that this fact in any way improves his claim or that of the others. None of them had even obtained decrees when appellant secured his attachment. They applied in execution only after he did so; and the question is whether his application for payment out being (for whatever reason) still pending, when their applications were made, the whole fund should be distributed rateably. The lower Court quite properly followed *Suikeena Katun* v. *Mahomed Abdul Aziz* (1) and passed an order in respondents' favour.

But the case was decided by a single Judge and we are therefore not concluded by it. I deal with it and not with the decisions in *Bisheshar Das* v. *Ambika Pershad* (2) and *Thakurdas Moti Lal* v. *Joseph Iskender* (3), because in them the discussion proceeded either with reference to the incidents of an attachment before judgment, which are not relied on before us, or on very general grounds. With all due deference, I cannot follow Bakewell, J., in *Suikeena Katun* v. *Mahomed Abdul Aziz* (1), where he lays down that an attachment under O. 21, R. 52, Civil P. C., in no circumstances confers priority. In *Frederick Peacock* v. *Madan Gopal* (4), the first case relied on by him, the competition being between an attaching creditor and the Official Assignee, special considerations arose; and in it and in the other case cited, *Sankaralinga Reddi* v. *Kandasami Tevan* (5), the attachment was of property, which as the language used in the former suggests and the latter states explicitly was not a fund in a Court, but had to be sold before its value could be realized. This affords a clear ground of distinction from the facts before us and it must be added, those in question before Bakewell, J., for S. 295 of the former Code referred to assets realized in execution and applications made prior to their realization as S. 73 of the Code now in force refers to applications for execution made prior to the Court's receipt of the assets; and accordingly in both the cases relied on by the learned Judge the provision which justified rateable distribution was directly applicable, whilst in the case before him, as in the case before us, it is not. A similarly general statement by the Judicial Committee in *Moti Lal* v. *Karrab-ul-din* (6) that attachment only prevents alienation and confers no title, is no doubt relied on in the Calcutta case above referred to and it, no doubt, was made without reference to any provision of the Code corresponding with the present S. 73.

But the question arose with reference the effect of an attachment, which apparently was made in execution of a mortgage decree and which clearly differed from that in question here and before Bakewell, J., because a sale, which was to transfer ownership, was to follow. It is, with all respect, unsafe to rely on these authorities as decisive, when the question is of circumstances with which they were not concerned. It is in fact hardly disputed that the one provision of the Code authorizing rateable distribution, S. 73, is inapplicable in terms to

(1) [1915] 38 Mad. 221=29 I. C. 239.
(2) A. I. R. 1915 All. 275=29 I. C. 622=37 All 575.
(3) [1917] 44 Cal. 1072=41 I. C. 516.
(4) [1902] 29 Cal. 428 (F.B.).
(5) [1907] 30 Mad. 413.
(6) [1898] 25 Cal. 179=24 I. A. 170=7 Sar. 222 (P. C.).

the present case, if only because the assets in question were received by the Court, before respondent's applications were or could have been made. The provision attained its present scope by stages at successive revisions of the Code; and as it is to be supposed that it was enacted advisedly, there is no reason for a liberal construction. It is true that S. 270 of the Code of 1859, by which the attaching creditor was entitled to be paid first out of the proceeds of property sold under his attachment, was not re-enacted in 1882 or 1908. But that provision did not in terms affect the attachment of a fund and there is no reason for assuming that its disappearance, whatever its effect in cases to which it was applicable, affected the application of the English rule conferring a priority to which Bakewell, J., has referred. The material point is that a fund, attached under O. 21, R. 52, requires no further realization and that in the absence of creditors entitled to apply under S. 73, there can, from the moment that the attachment is laid on it, be no obstacle to its payment to the attaching creditor. This is recognized by the procedure authorized by the Civil Rules of Practice Nos. 179, 180, under which, after (if necessary) his decree has been transferred to the Court, where the fund is the attaching creditor is entitled to be paid as if he were an assignee of the judgment-debtor.

In the present case, as the diary shows the appellant had applied for and was ready to receive payment, when the lower Court's proceedings were suspended by a prohibitory order from the subordinate Court, of what nature and passed at whose instance does not appear. No reliance has been placed on that order before us; and the conclusion must be that appellant should not have been frustrated in his effort to obtain money, to which he had established a subsisting right, by respondents, who had none, and that the lower Court in allowing rateable distribution acted without jurisdiction.

The lower Court's order must be set aside, the petitions being remanded to it in order that it may deal with them according to law in the light of the foregoing, dismissing the petitions of respondents and ordering payment on that of appellant. Costs to date will follow the result and be provided for in the order to be passed.

Seshagiri Aiyar, J.—I agree. The question for consideration relates to priority among the various decree-holders of a common judgment-debtor. The undisputed facts are, that the petitioner obtained a decree against the common judgment-debtor on 2nd December 1916. On 4th December he applied for attachment of a fund in Court belonging to the judgment-debtor and on 6th December he applied for the payment out in him of the money in Court. The other judgment-creditors of the common judgment-debtor had not obtained their decrees on this date. The District Munsif, instead of directing the payment to the petitioner, held his hand as there were other claims, though they had not matured into decrees on the date of the application by the petitioner and were still pending decision in various Courts. The conclusion of the District Munsif was that the petitioner was not entitled to priority, and that the money in Court should be distributed proportionately to all persons who may obtain decrees against the judgment-debtor. This civil revision petition has been filed against that order.

There was no contention before us that the application to this Court is not within S. 115, Civil P.C. It may safely be said of this petition that there was irregularity in the exercise of jurisdiction. The real question is whether the procedure adopted by the District Munsif is one allowed by law. He is undoubtedly supported by *Suikeena Katun* v. *Mahomed Abdul Aziz* (1) and by the observations of Mookerjee, J., in *Thakurdas Moti Lal* v. *Joseph Iskender* (3). As against these decisions there is *Tiruvangadial* v. *Thiruvangadih* (1), in which the present Chief Justice took a difierent view. Although the learned Chief Justice refers to the decision of a Bench of this Court as supporting him it is clear, on examining the reference, that the point now in question was not decided by the late Chief Justice and Sankaran Nair, J., in the appeal referred to in *Tiruvangadial Thiruvangadih* (7). The question has now to be examined on principle. Bakewell, J., is apparently of opinion that there is a general principle in the Indian legislature that all creditors of the same

(7) A. I. R. 1915 Mad. 236=24 I. C. 617.

debtor should have equal rights in the latter's property. I am not satisfied that there is any such principle in our Code. The first enunciation of the rule on this subject is to be found in Ss. 270 and 271, Act 8 of 1859. S. 270 distinctly declares that a person who first takes out execution of his decree is entitled to be first paid out of the proceeds of the sale. S. 271 introduced the principle of the rateable distribution with regard to the surplus proceeds that may be left after the first attaching creditor had satisfied himself. Apparently under this Code the person who attached the property and brought it to sale was regarded as having a claim to priority over their creditors. In the next two Codes of Civil Procedure, namely, those of 1877 and 1882, a further change was introduced in favour of rateable distribution. The priority of the attaching creditor was abolished and the rule was stated to be that where assets are realized by sale or otherwise in execution of a decree and where more persons than one had prior to the realization applied to the Court by which such assets are held the assets shall be divided rateably amongst all such applicants.

In the Act of 1908 another change in favour of rateable distribution was introduced by omitting the words "realized by sale or otherwise" and substituting for them the words "are held by the Court." But the essential condition was retained, namely, that persons applying for distribution pari passu must have made applications to the Court for the execution of decrees before the receipt of assets. It is thus clear from an examination of these provisions that there is progressive tendency in favour of rateable distribution. I may even say that there is a tendency to restrict the rights of the first applicant. But certain conditions have still to be complied with if the benefit of such a provision is to be availed of. Bakewell, J.'s judgment would lead one to suppose that wherever there are a number of decrees against a common judgment-debtor the principle of rateable distriction should be enforced, whether there have been applications for execution prior to the realization of the assets or not. If that were the object of the legislature, it could have then easily declared that no person having a decree against a judgment-debtor shall be entitled to priority by virtue of the fact that he had applied for execution before others. The Indian law has provided for rateable distribution to all creditors in administrative actions and in insolvency matters. Under O. 20, R. 13, if there is an administrative action and the assets are in the hands of the Court, its distribution is governed by the same principles as obtain with regard to distribution of assets of an insolvent judgment-debtor. No question of applying priority to the realization of assets and no question of execution application arise under this rule. S. 73, Civil P. C., is therefore restricted in its operation to other than administrative actions. If we turn to O. 21, R. 52, it seems clear that priority is within the contemplation of the legislature because it says:

"Any question of title or priority arising between the decree-holder and any other person shall be determined by the Court."

In my opinion the general principle is this, that a person who is diligent enough to invoke the aid of the Court in satisfaction of his decree should not be kept out of his rights because others have not been equally diligent in seeking their redress. The only restriction upon his right is that, if before he sets the process of the Court in motion to realize the assets, others have applied for execution he should share the realized assets with these other applicants. There is no warrant for holding that a person who had applied for payment should be put off on the chance of some others having claims on the property coming in at some time to have the property distributed rateably. It is not easy to see how long this process of waiting should be enforced. Is it to be only, as in the present case, in favour of persons who have filed suits or is the Court to embark on an inquiry whether there are other creditors who may at some future time file suits to obtain decrees? In my opinion, as pointed out by the Judicial Committee in *Mina Kumari Bibi* v. *Bijoy Singh* (8), S. 73 should be construed as applying only to persons who come within the strict letter of the law. I am unable to agree with Bakewell, J., that there is an underlying principle in our jurisprudence and in our Procedure Code that every creditor should have

(8) A. I. R. 1916 P. C. 238=40 I. C. 242 = 44 Cal. 662=44 I. A. 72 (P.C.).

equal chance of payment from out of the assets of the judgment-debtor, whether he is diligent or not and whether he takes prompt steps to enforce his rights or not. I agree with the conclusion come to by the present Chief Justice in *Thiruvangadial* v. *Thiruvangadih* (7). As regards *Thakur Das Moti Lal* v. *Joseph Iskender* (3) on the facts of that case the present question did not arise for decision. There are some observations by way of obiter in the judgment of Mookerjee J., who invokes the aid of justice, equity and good conscience in favour of equal apportionment to all decree-holders. It has been laid down by the Judicial Committee that under S. 53, T. P. Act, if one creditor is preferred by a debtor honestly, that would not be a preference which would avoid the transaction. I am referring to this for the purpose of showing that a person who is diligent enough to get from his debtor his rights is not to be asked to give them up because there are others who have similar rights but who have not taken steps to enforce them. If there is any one principle which guides our Courts, it is the principle of enabling persons who are diligent enough to secure their rights to get full satisfaction of their claims without compelling them to share the property of the judgment-debtor along with others who did not move promptly in the matter.

I would therefore allow the petition and set aside the order of the District Munsif and direct him to proceed with the matter in the light of the above observations.

S.N./R.K. *Petition allowed.*

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WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Avula Kondama Naicken Aiyar Avergal and *another*—Plaintiffs—Appellants.

v.

Aparanji Amma and *another*—Defendants—Respondents.

Second Appeal No. 139 of 1917, Decided on 2nd May 1919, from decree of Temporary Sub-Judge, Madura, in Original Suit No. 9 of 1916.

Compromise—Advantage derived malafide by one party must be deemed to be held in trust for person prejudiced and should be restored—Alienee in good faith from such person is not affected — Trusts Act (2 of 1882), Ss. 89 and 96

Where a compromise is entered into as between persons one of whom could not have in good faith believed in the claim put forward by him and the latter secures an undue advantage to the prejudice of the other party, such advantage must be deemed to be held in trust for the benefit of the person prejudiced or his representative and should be restored to the latter. An alienee in good faith and for consideration from the party who has secured such advantage is not however affected by the infirmities affecting his alienor's title: *A. I. R.* 1917 *P. C.* 146, *Foll.*

[P 75 C 2]

T. R. Venkatarama Sastri and *T. S. Ramaswami Aiyar*—for Appellants.

T. Rangachariar, *S. Srinivasa Aiyangar* and *B. Sitarama Row*—for Respondents.

Judgment.—We are not satisfied that the learned Subordinate Judge has sufficiently considered the bearing of all the material evidence in this case on the questions whether there was a bona fide dispute which was settled by the compromise embodied in Ex. A and the partition deed Ex. C or a fair family settlement. He has not considered the effect of the evidence as to the property, which is the subject of the present suit and in the hands of the alienee, having been the separate property of Mailchamy and his branch, having come to them from their grandmother's father, the Zamindar of Ayakudi. He has also not considered with reference to the question of bona fides the evidence as to whether the two branches were divided or not. This evidence must be taken into account in order to arrive at a conclusion whether the compromise now in question was really a bona fide compromise of doubtful claims or a fair family settlement. Before disposing of the case we must call for a fresh finding on these questions. We leave it to the discretion of the learned Subordinate Judge to decide whether fresh evidence should be taken.

We direct the Subordinate Judge to return findings on the following issues:

(1) Was the property in dispute the separate property of Mailchamy? (2) Were Mailchamy and Mandalathipathi undivided? (3) Was there a bona fide dispute which was settled by Exs. A and C or did they amount to a fair family arrangement? In considering this question the evidence as to the existence of a will by Mailchamy leaving property to be divided into three shares, will also have to be considered. Two months will be allowed for the submission of the finding and seven days for objections.

[In compliance with the order contained in the above judgment the Temporary Subordinate Judge of Madura submitted the following:]

Findings.—The High Court having remanded the case for finding on the following issues, viz: (i) Whether the property in dispute is the separate property of Mailchami and his branch, having come to them from their grandmother's father the Zamindar of Ayakudi? (ii) Were Mailchamy and Mandalathipathi undivided? (iii) Was there a bona fide dispute which was settled by Exs. A and C or did they amount to any family arrangement? I submit the following findings:

Issue 1.—The suit properties consist of eight items. Of these items Nos. 6 and 8 are house properties and the rest are lands. It is not clearly stated in the plaint how the suit properties are the separate properties of Mailchamy and his branch.

Plaintiffs' vakil says that it is never the plaintiffs' case that the properties are Manjakkani properties of Mailchamy's grandmother Madamma, but their case is that they are the self-acquisition of Mailchamy in his own lifetime, having been given to him by the Zamindar of Ayakudi on account of love and affection towards him. I shall therefore consider whether the properties were the self-acquisition of Mailchamy in his own lifetime. In support of their contention, plaintiffs examined Sivaswami Pillai (P. W. 10), who was Karnam of Ayakudi. They also rely on the statement, Ex. LL, filed by defendant 3 in the criminal proceedings and on the decriptions contained in the documents Exs. CC, DD, G and E executed by Mailchamy. Sivaswami Pillai (P. W. 10) says in his chief examination that items 1, 2 and 7 (which are situate in the block called Panchanthangi and irrigated by Papan channel) and also items 4 and 5 (which are Combai Punjai) were given to Mailchamy by the Zamindar. Defendant 3 also in her statement (Ex. LL) stated that the suit properties were given to her father-in-law Mailchamy by the zemindar. But the statement of these two witnesses is worthless. P. W. 10 admitted in his cross examination that he had no personal knowledge of the alleged gift to Mailchamy by the zemindar. Defendant 3 also had no personal knowledge, and in the plaint, Ex. M, which she subsequently filed, she ceased to mention that the suit properties were her father-in-law's self-acquisition. As regards items 2 to 6 and 8, Mailchamy himself nowhere described them as his self acquisition. He was describing as his self-acquisition only items 1 and 7 (for the description of item 1, see Exs. CC, DD, G and for description of item 7, see Ex. C). To consider that at least these two items 1 and 7 were his self-acquisition, I do not think that the mere recitals in the above said documents are sufficient in the evidence.

I therefore hold that none of the suit properties are the self-acquisition of Mailchamy in his lifetime. They are not either Manjakkani properties (streedhanam) of Mailchamy's grandmother according to the plaintiffs' vakil's own admission.

Issue 2.—Then with regard to the second question, there is no direct evidence, either oral or documentary, on the point of division set up by the plaintiffs. The matter is to be judged merely from circumstantial evidence. It is conceded on all hands that Mandalathipathi's father and grandfather lived at Balasamudram and remained in possession of the properties there, while Mailchamy and his father lived at Ayakudi and remained in possession of the properties situate in that village. It is also in evidence that the patta for Ayakudi lands stood in the name of Mailchamy (vide pattas T series) and that he alone was paying the taxes on those lands and also on the houses situate in that village (vide receipts Exs. U, W, Y series), while the patta for Balasamudram lands stood in the name of Mandalathipathi's father (vide receipts Ex. L) and after his death in the name of Mandalathipati (vide patta Ex. SS). Also each branch was alienating the properties in its separate possession as its own. To begin with the alienations of Balasamudram properties by Mandalathipati's branch alone, Mandalathipati's father executed in 1865 two mortgages of some ancestral lands at Balasamudram as if they belonged to him exclusively, and died in 1868 (vide recitals in Ex. L). Afterwards Mandalathipathi's mother as guardian of Mandalathipathi discharged these two debts by selling away the mortgaged lands for Rs. 8,000 (vide sale deed Ex. L). Mandalathipathi's mother as his guardian sold away also one ancestral house in 1873 under sa

deed Ex. H, as if it belonged to Mandalathipathi's branch alone. Mandalathipathi himself after he attained majority executed a mortgage of all the remaining ancestral lands at Balasamudram as if they were his own (vide mortgage-deed Ex. M) and lent the money so raised on that mortgage to a certain Mahomedan, Kadir Lebbai (vide Ex. AA), without the concern of Mailchamy. Similarly from 1881 Mailchamy alone commenced to make alienations of the ancestral properties at Ayakudi in his possession as if they were his own (vide mortgages and sale deed—Exs. Q, R, OO, and CC). All these circumstances—the separate living of the two families from the time of Mandalathipathi's grandfather, separate possession and enjoyment of separate properties by each branch, separate pattas and separate payment of kists and separate dealings with the separate properties in their repsective possession as if they were their own properties—all these clearly indicate that the two branches must have become divided both in status and estate at least so far back as 1865.

It is argued by the defendants' vakil that the two branches might be joint and the alienations made by Mandalathipathi's father in his time and those made after his death by Mailchamy might be in their capacity as the then family managers. But the subsequent conduct of Mandalathipathi and his mother leaves no room for any such supposition. If the two families were undivided, Mailchamy as the senior member and manager would be the proper person in execute Exs. L and H either singly or jointly with Mandalathipathi's mother. But instead of that we find Mandalathipathi's mother alone executing those deeds as guardian of Mandalathipathi and treating him as the absolute owner of Balasamudram properties. As above pointed out, Mandalathipathi also after attaining majority considered himself to be the absolute owner of the properties situate at Balsamudram. He got the patta for Balasamudram lands issued in his name and he sold away some of those properties and mortgaged some, without reference to Mailchamy. Such cannot be the case if the two families were joint and Mailchamy was the manager after the death of Mandalathipathi's father. Defendants' vakil next argues that the properties described as ancestral and dealt with under Exs. H, L, K and M might have been the self-acquisition of either Mandalathipathi's grandfather or father, and not derived from the common ancestor, and that Mandalathipathi and his parents therefore rightly dealt with those properties without reference to Mailchamy. But there is no proof that the properties so dealt with were the self-acquisition of Mandalathipathi's grandfather or father.

Then with regard to the evidence on the defence side, defendants have absolutely no evidence whatever to show that the income from the lands of the two villages was ever mixed together and used by both families for common purposes during the lifetime of Mandalathipathi's father and grandfather. To prove jointness defendants rely mainly on the fact that during his minority Mandalathipathi lived with Mailchamy and that the latter then managed the properties in the two villages. Mandalathipathi lost his father in 1869 and mother in 1876. At the time of the death of his mother he was about 7½ years old. Defence witnesses Viswanatha Monigar (D. W. 1), Suppiah Chetti (D. W. 3), Sankaralingam Pillai (D. W. 4), Venkatagiri Nainavaru (D. W. 6), and also defendant 3 (D. W. 7) say that since his mother's death and until 1896 Mandalathipathi lived at Ayakudi with Mailchamy. D. Ws. 1 and 2 further say that Mailchamy then managed also the lands at Balasamudram and received the paddy from those lands. That Mandalathipathi lived with Mailchamy for some time after his mother's death is admitted also by plaintiff's eleventh witness (Chithanaha Vadhiar) and by Mailchamy himself in his written statement Ex. K K-1. But I do not attach any special importance to this circumstance. It may be that Mailchamy took Mandalathipathi into his protection and looked also after his lands, seeing that he lost both his parents and there was no other to take care of him. This was what Mailchamy stated in Ex. K-K 1. There is not a single document to show that Mailchamy treated Balasamudram properties as his own even during that period.

During the time Mandalathipathi lived with Mailchamy, Mailchamy attested two sale deeds (Exs. J and K) executed by Mandalathipathi in respect of the ancestral houses at Balasamudram. Simi-

larly Mandalathipathi attested usufructuary mortgage (Ex. B-B) and a sale deed (Ex. Z) of Ayakudi lands executed by Mailchamy. Further Mandalathipathi having owed some rent to the mortgagee under Ex. B-B, Mailchamy undertook to pay it on Mailchamy's behalf (vide Ex. XV). Defendants contend that these acts indicate that Mailchamy and Mandalathipathi had joint interest in all the properties situate in both the villages. But mere attestations alone of each other's documents do not signify any such thing. At no time they executed or took any document in their joint names. Then about Mailchamy's undertaking to pay the rent due by Mandalathipathi, it is not known under what circumstances he had so undertaken. The above circumstances are therefore not sufficient to warrant an inference of jointness.

Defendants rely also on the written statement Ex. KK-1 put in by Mailchamy in answer to Mandalathipathi's plaint Ex. KK. But I do not think that statement helps them in any way. No doubt Mailchamy has not expressly stated in Ex. KK-1 that there was any regular partition between the two families. But he openly denied that the two families were joint and alleged that the sole and independent enjoyment by each branch of the properties in their respective possession from several years operated as a virtual or de facto division. That appears to be his plea by reading together paras. 4 and 5 of that statement. Such is the evidence on both sides. In my opinion, the whole evidence and inferences from facts proved are consistent only with the hypothesis of separation of the two branches in estate also long before the death of Mandalathipathi's father. My finding then is that Mailchamy and Mandalathipathi were not joint.

Coming now to the question whether the will set up by defendant 3 is true, Viswanatha Monigar (D. W. 1), Suppiah Chetti (D. W. 2), Sankaralingam Pillai (D. W. 4) and defendant 3 (D. W. 7) say that Mailchamy died on 14th May 1901, that four days before his death, i. e., on 10th May, he executed a will by which he bequeathed all his properties equally to his daughter (defendant 1), daughter-in-law (defendant 3) and nephew (Mandalathipathi) and that the said will was written by one Perumalswami Naicken and attested by D. Ws. 1, 2 and 4 and 15 others. Venkatagiri Nainavaru (D. W. 6) says that he came to Ayakudi on the next day after the execution of the will, that Mailchamy then mentioned the will to him and that it was also read over to the witness. But the evidence of these witnesses is interested and conflicting. D. Ws. 1 and 2 hold decrees against defendant 2 and it is therefore their interest to see that defendant 2 is not deprived of the plaint properties. D. W. 4 is indebted to defendant 4. D. W. 6 is a near relation of defendant 3, and it was he who conducted all the criminal proceedings on behalf of defendant 3 and also the suit of 1902. D. W. 4 says that Mailchamy divided his properties among the three legatees and that three lists showing the properties given to each legatee were prepared along with the will. But D. W. 1 does not say that any such division was made and lists were prepared. In her plaint, Ex. MM, defendant 3 set up that her father-in-law made another will previously on 7th May 1901, by which he bequeathed all his properties equally to her and her daughter alone. But that prior will is now denied. The first mention of the will now in question was made by defendant 3 only in her plaint (Ex. MM) filed in February 1902 after a long interval of nine months. It was never put forward before. The reason given by the defendant's witnesses for its nonregistration is that at the instigation of Mandalathipathi, Perumalswami Naicken duped defendants 1 and 3 by saying that the Registrar would come. But it is not a satisfactory reason. Mailchamy would not have allowed Perumalswami Naicken to make any delay.

On the plaintiffs' side P. W. 1 (defendant 1) denies that any will was executed by her father. Also plaintiff and P. W. 11 (Palace Tutor) say that Mailchamy did not execute any will before his death. For the above reasons I find that the alleged will is not true.

Issue 3.—I have found that the two branches were divided Neither defendant 1 nor Mandalathipathi could have been in ignorance or in doubt as to that fact. After he had attained majority, Mandalathipathi got the patta for Balasamudram lands issued in his name and mortgaged those lands as if they were his

own. He thus considered himself to be a divided member. Defendant 3 also cannot be said to have any honest and bona fide belief in the claim she was making. I therefore hold that the compromise (Ex. A) and the subsequent partition deed (Ex. C) were not bona fide, nor can they be properly called a family settlement.

This appeal came on for final hearing after the return of the finding of the lower Court on 28th April 1919.

Seshagiri Aiyar, J.—The property in suit was lost in the possession of one Mailchamy who died in May 1901. He left behind him a daughter, a daughter-in-law of a predeceased son and one Mandalathipathi, a distant cousin. This cousin was living with the deceased for some years before his death. After his death disputes arose regarding succession to his property. The daughter-in-law put forward a will alleged to have been executed by Mailchamy, under which she claimed that she was entitled to a third of his property. The Magistrate who inquired into the claim as to possession decided against her. Thereupon she sued to establish her one-third share in the properties. The daughter of Mailchamy, who is the defendant 1 in the suit, denied that the property was the separate property of Mailchamy and also the genuineness of the will. Mandalathipathi on the other hand claimed the property to have come to him by survivorship as he and Mailchamy were undivided. During the course of the trial the parties entered into a compromise which is Ex C in this case. By the compromise the daughter-in-law was given considerably less than the one-third which she claimed, and the rest of the property was directed to be divided practically half and half between the defendant 1 and Mandalathipathi. The property was enjoyed jointly by the defendant 1 and Mandalathipathi until 1907, when there was an actual division by metes and bounds between the two people. In 1910 Mandalathipathi mortgaged these and other properties not comprised in the suit to the present defendant 4 who brought a stit on the mortgage and obtained a decree. The present suit is by the sons of the defendant 1 to set aside inter alia the mortgage in favour of defendant 4.

On the last occasion the Subordinate Judge found, without deciding whether the will was genuine and whether Mailchamy and Mandalathipathi were divided or not, that the compromise was bona fide and should be enforced. We pointed out in our order that the bona fides of the compromise must be determined with reference to the facts whether the will was genuine and whether Mailchamy and Mandalathipathi were divided. The present Subordinate Judge has returned findings to the effect that the two branches were divided and that the will was not genuine. He has also found that the compromise is not binding, inasmuch as Mandalathipathi could not have honestly believed in the claim he put forward as being entitled to the property by survivorship. On the first two questions, we are satisfied that his findings are supported by the evidence he has referred to. It is true that the question has to be considered with reference to the state of affairs that existed at the time of the compromise and although Mandalathipathi filed a suit, which he subsequently withdrew, to set aside an alienation by Mailachmy on the ground that the property was undivided, the course of dealing by the two branches of family, their long separate residence and the absence of reliable evidence regarding common enjoyment far outweigh the absence of a regular deed of partition. I am not therefore prepared to differ from the Subordinate Judge on this question. As regards the will, both the first Subordinate Judge and the present Subordinate Judge have agreed in holding that the evidence is insufficient to support its genuineness and I see no reason to differ from them.

At the same time, I must point out that there is no evidence that the defendant 1 with full knowledge that there was no truth in the claim put forward by the daughter-in-law and Mandalathipathi agreed to the compromise from ulterior motives. There is not sufficient evidence to lead us to the conclusion that in assenting to the terms of the compromise she was not acting bona fide in the light of the circumstances then brought to her notice. I have now to deal with the last of the findings of the Subordinate Judge. It may be, if the question arose between the plaintiffs and Mandalathipathi having regard to the decision of the Judicial Committee in *Gunjeshwar*

Kunwar v. *Durga Prashad Singh* (1), the plaintiffs would be entitled to a decree, but the question is whether an alienee from a party who had not bona fide believed in the claim put forward by him is in the same position as the party himself. Our attention was drawn by the learned vakil for the respondents to Ss. 89 and 96, Trusts Act. The former section provides that where any advantage is gained by the exercise of undue influence in derogation of the interests of another, the person gaining such without consideration must hold the advantage for the benefit of the persons whose interests have been so prejudiced. S. 96 protects the right of transferees in good faith for consideration from persons who have gained an undue advantage. In my opinion, Mandalathipathi was in the position of a joint trustee within the meaning of S. 89, Trusts Act. Therefore the principle enunciated in these two sections is applicable to the present case. It is the principle of equity recognized in the Trusts Act and in other legislative enactments that a purchaser for value without notice of any defect of title in his transferor is entitled to protection if he obtained the transfer bona fide.

Then it was said that the defendant, did not really represent the reversioners in the previous litigation. There is some justification for this contention in the language of the written statement; but having regard to the fact that the object of the statement was to defeat the claim of the person who set up the will, too much importance should not be attached to the order in which the denials occur. In the written statement two alternative pleas were put forward, the one denying the will and the other suggesting a jus tertii. Further this question of defendant 1 not representing the estate was not put forward in the present case in the pleadings. Moreover, before the suit which ended in the compromise was filed, and also on the very same day on which the compromise was entered into, and afterwards, defendant 1 made statements about the property claiming it on behalf of her sons: vide Exhibits LL and V. Therefore I am of opinion that she must be taken to have entered into the compromise as representing the estate.

The further question is whether defendant 4 is a bona fide transferee for value without notice of any infirmities in the title of the transferor. On this question there is the evidence that he paid full consideration and that he was not aware of the defect in the title of Mandalathipathi. There is no evidence on the other side that he was aware that Mandalathipathi had practised any fraud upon defendant 1 and that he had no right to the property which he purported to mortgage. I must therefore hold that defendant 4 is a bona fide transferee for value. The result is that the suit against defendant 4 must be dismissed with costs, and the decree of the Subordinate Judge will be confirmed in that respect. As regards properties in the possession of the other defendants, having regard to *Gunjeshwar Kunwar* v. *Durga Prashad Singh* (1), plaintiff is entitled to recover possession including the properties in the possession of defendant 3, whose rights to maintenance will not be affected by this judgment. The decree, so far as these defendants are concerned, is reversed. Plaintiffs are entitled to their costs against these defendants and must pay the costs of defendant 4 in this Court.

Wallis, C. J.—I agree.

S.N./R.K. *Decree modified.*

(1) A. I. R. 1917 Cal. 146=45 Cal. 17=42 I. C. 849=44 I. A. 229 (P. C.).

** A. I. R. 1919 Madras 75
Full Bench

WALLIS, C. J.,
OLDFIELD, SADASIVA AIYAR, COUTTS TROTTER AND SESHAGIRI AIYAR, JJ.

Arumugam Chetty—Plaintiff—Appellant.

v.

Muthu Koundan and *others*—Defendants—Respondents.

Second Appeal No. 845 of 1918, Decided on 10th April 1919, from decree of Dist. Judge, Salem, in Appeal Suit No. 102 of 1916.

**** Hindu Law—Alienation—Father—Antecedent debts—Independent debts by father on security of family property before mortgage in suit is antecedent to bind son's shares.**

An independent debt, not immoral or illegal, contracted by a Hindu father on the security of the joint family estate antecedent to the mortgage debt which is being sued on may be treated as an antecedent debt, so as to support the charge on the sons' shares also to the extent of

the sums secured on the prior mortgage; 48 *I. C.* 289, **Overruled**; 50 *I. C.* 101, *Diss. from*; *A. I. R.* 1917 *P. C.* 61, *Expl.* [P 81 C 1]

T. Narasimha Aiyangar—for Appellant.

B. Sitarama Rao—for Respondents.

Order of Reference.

Sadasiva Aiyar, J.—The plaintiff is the appellant. The suit was brought to obtain a mortgage decree for sale on the mortgage document Ex. H, dated 11th May 1903, executed by defendant 1 to the plaintiff for Rs. 1,150. Defendants 2 and 3 are the undivided sons of defendant 1. Defendant 3 is still a minor, while defendant 2 was a minor on the date of the mortgage bond Ex. H. According to the recital in Ex. H, the sum of Rs. 1,150 mentioned in it as consideration is made up as follows: (a) Rs. 833-8-0 being the sum due on the registered mortgage bond Ex. G of 1899; (b) Rs. 130-1-0 due on the simple debt bond of 1902, Ex. K; (c) Rs. 43 received by defendant 1, for excavating a well in the family garden; (d) Rs. 100 for discharging the debt of Nattukottai Karuppan Chettiar; (e) Rs. 43-7 0 received for excavating the well already mentioned and for family expenses; total Rs. 1,150. Defendant 1 (the father) as usual remained ex parte. His sons (defendants 2 and 3), contended that their two-third share in the mortgaged properties cannot be affected by the mortgage because

"the suit debt was not contracted either for family benefit or for any necessity binding on the family (para. 4 of the written statement)."

It will be seen from the written statement defendants 2 and 3 did not question ths genuineness of the mortgage-deed Ex. H or the existence of the debts, that is the passing of consideration for Ex. H; nor did they plead that the document was legally invalid as a mortgage for any reason. Their defence was confined to the contention that the mortgage debt was not binding on their shares of the mortgaged property. As defendant 1 remained ex parte, the District Munsif had to raise the point for determination as to his execution of the document in order to give a decision against him. On 11th June 1915, a single consolidated issue was raised by the District Munsif as follows:

"Whether the suit document is genuine and supported by consideration and binding on defendant 2 and 3's shares."

In the judgment of the District Munsif, the issue has been split up into two as follows: (1) Whether the suit document is genuine and supported by consideration, and (2) whether the suit document is binding cn defendant 2 and 3's shares. The Munsif notes in para. 6 of his judgment that issue 2 was the only one really contested by the contesting defendants 2 and 3, whose vakil noted on Ex. H that he admitted its genuineness. The vakil also noted on the documents Exs. A to G that he admitted their genuineness. The plaintiff, who was not even cross-examined, proved the genuineness of Exs. J and K. Clearly Mr. R. Srinivasa Rao, who appeared as vakil for defendant 2 and 3's before the District Munsif, did not deny the genuineness or validity as a mortgage document of the deed Exs. H sued on or of the other documents Ex. A to G. The Munsif found on issue 1 (which was not contested by the contesting defendants) in the plaintiff's favour, and he found on issue 2 that the suit document is binding on the shares of defendants 2 and 3 to the extent of Rs. 1,106-9-0 out of the principal sum of Rs. 1,150 mentioned in Ex. H, the sum of Rs. 43-7-0 received in cash on the date of Ex. H not having been proved to have been borrowed for family necessity. The District Munsif held that the remaining Rs. 1,106-9-0 constituted antecedent debts, and hence the mortgage was binding to that extent on the shares of defendants 2 and 3 also. He gave a mortgage decree accordingly for that sum and interest.

On appeal the same vakil who had appeared for the appellants in the District Munsif's Court was allowed to contend that Ex. H was not proved to be valid as a mortgage because it had not been proved by the evidence of an attesting witness under S. 68, Evidence Act, and the other mortgage documents Exs. B, C, E, F and G had also not been so proved by the evidence of an attesting witness for each of the documents' or by proof that the attestation of one attesting witness was in his handwriting under S. 69, Evidence Act. I might add that in the grounds of appeal to the lower appellate Court, no express reference is made to the necessity of the proof of any of these documents by an attesting witness or to the necessity of the proof of an attesting witnesss' handwriting. The District Judge accepted this contention and held that Ex. B, C and E to H were

inadmissible in evidence as not properly proved. Yet he upheld, rather inconsistently, the decree of the District Munsif so far as it directed the sale of defendant 1's share in the mortgaged properties, that is, just as if Ex. H had been properly proved as a mortgage document, so far as defendant 1's share was concerned.

I am clear that the contesting defendants 2 and 3 did not dispute either the genuineness or the legal validity as mortgage documents of the deeds Exs. B, C and E to H before the District Munsif. So far as the suit document Ex. H is concerned, I think that O. 8, Rr. 3 to 5 (introduced into the new Civil Procedure Code) casting, as they do, the obligation on contesting defendants to make specific denials of facts alleged in the plaint and providing, as they do, that evasive denials are insufficient, precluded defendants 2 and 3 from raising the question that Ex. H did not create a valid mortgage or was not properly proved. Under S. 58, Evidence Aet, no fact need be proved which the parties have agreed to admit or which by any rule of pleading in force at the time, they are deemed to have admitted by their pleadings, though the Court may in its discretion require the facts admitted to be proved otherwise than by such admissions. The District Court is, no doubt, given a discretion under this section to require proof of these documents B, C and E to H, but, in my opinion, it would not have exercised its discretion properly if it called for such proof, notwithstanding what took place before the District Munsif. Assuming however that its discretion to call for proof would have been properly exercised, it did not call for such proof but decided at once that the documents had not been proved. The affidavits of three witnesses filed in this Court on behalf of the plaintiff establish that the District Munsif dispensed with the evidence, as the contesting defendants' vakil did not require formal proof of the documents Exs. B, C and E to H. I would therefore set aside the finding of the District Judge on issue 1 and hold that the suit document, Ex. H, is genuine and supported by consideration. I now come to issue 1, namely whether the debt is binding on defendants 2 and 3, assuming that the documents B, C and E to H are valid mortgage documents supported by consideration

The first document Ex. B was executed by defendant 1 to S. Koundan for Rupees 75 in 1891. Before the personal remedy under that document was barred, defendant 1 executed Ex. C (which superseded B) in 1895 for Rs. 115 to the same S. Koundan. Then Ex. E is a mortgage deed by defendant 1 to Chinnu Mudali in 1896 for Rs. 50. Ex. F is a mortgage deed executed in the year 1897 by defendant 1 to Palaniandi Chettiar for Rs. 400 to discharge Exs. C and E and for further sums borrowed. Ex. G is dated 1899 for Rs. 700 to discharge Ex. F and for moneys borrowed in cash and it was executed to the plaintiff Arumugam Chetty. Exs. J and K are simple debt bonds for Rs. 50 and Rs. 120 respectively dated in 1900 and 1902. Ex. K. superseding Ex. J The plaint document Ex. H was executed for Rs 1,150 due to the plaintiff partly under Ex. G (Rs. 833-8-0) (within six years of Ex. G), and partly under Ex. K (Rs. 130-1-0) (within three years of Ex. K) and partly under oral loans (Rs. 143) (total Rs. 1,106-9-0), the remaining Rs. 43-7-0 borrowed in cash on the date of Ex. H being disallowed by the District Munsif.

The District Judge has disallowed the plaintiff's claim against the shares of defendants 2 and 3 in respect of almost the whole of this entire amount of Rupees 1,106-9-0. He has allowed only the amount of Rs. 150-1-0 (due under the simple debt bond Ex. K) out of the above sum of Rs. 1,106-9-0. The District Judge's reason is that the term "antecedent debt", as explained in the Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh* (1), does not cover the debt due under Ex G (Rs. 833-8-0), and that the antecedent oral debts amounting to Rs. 143-1-0 are not proved. I have already held that defendants 2 and 3 did not deny and must be deemed to have admitted the existence of all the debts which made up the Rs. 1,106-9-0.

The learned District Judge does not explain why, according to the Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh* (1), the money due under the mortgage document Ex. G would not constitute an antecedent debt. Mr. Sitarama Rao who appeared for respondents 1 and 2 has however ably argued before us that according to that decision

(1) A. I. R. 1917 P. C. 61=39 All. 437=39 I. C. 280 (P. C.).

no debt secured by a mortgage of the ancestral family property would constitute "antecedent debt" of the father and that such a debt could not therefore support an alienation by the father so as to bind his sons' interests. It seems to be rather a startling proposition that while an antecedent debt of a simple character whether contracted orally or under a simple debt bond can support a subsequent mortgage or sale of the aons' share also in the ancestral property the fact that the antecedent creditor got the additional security of a mortgage deprives the subsequent alienee of the right given by the Hindu law to rely upon the antecedent character of the debt discharged by the consideration paid for his alienation. The point directly decided in *Sahu Ram Chandra* v. *Bhup Singh* (1) is that a loan contemproaneous with or just previous to the date of a mortgage transaction could not be treated as an antecedent debt as was erroneously held by Boddam and Bashyam Aiyangar, JJ., in *Chidambara Mudaliar* v. *Koothaperumal* (2), a view which had already been overruled by this Court in *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (3). Mr. Sitarama Rao relies however on the following passages found in their Lordships' judgment:

"The law was thus stated by Lord Hobhouse in *Nanomi Babuasin* v. *Modhun Mohun* (4): Destructive as it may be of the principle of independent co-parcenary rights in the sons the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt if not tained with immorality. In their Lordships' opinions these expressions . . do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate."

I think that having regard to the context, their Lordships only meant that if the so called antecedent debt is so shortly before the execution of the mortgage say two hours or two days, as to establish that it was incurred on the credit, or security available by the joint family immovable assets, such a debt is not an antecedent debt and the mortgage deed executed for such a so-called antecedent debt would not affect the sons' share. On the same (p. 447 *of* 39 *All.*) their Lordships say:

"to call a borrowing made on the occasion of the grant of a mortgage an antecedent debt is to extend unduly and improperly the whole scope of the exception on that topic."

At (p. 448 *of* 39 *All.*) their Lordships say:

"It is said that the transaction substantially is that the father got the Rs. 200 into his hands and that when he granted the mortgage he was accordingly an 'antecedent debtor. Their Lordships are of opinion that this contention cannot be upheld."

Thus their Lordships were only considering the question whether the debt incurred on the security of the mortgage was itself an antecedent debt so as to support that mortgage, and not whether a debt previously incurred which is really and substantially (and not in mere name and technically) a debt antecedent to the mortgage sued on could not be called an antecedent debt, when considering the validity of the latter security deed. The antecedent mortgage debt may not be able to support itself as a mortgage security as regards the sons' share secured under it, but that it ceases to be an antecedent debt so as to support the later alienation by mortgage is, as I said before, not only a startling proposition but seems to be devoid of any support from the language of their Lordships. In *Peda Vekanna* v. *Sreenivasa Deekshatulu* (5) my Lord the Chief Justice considered the above Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh* (1) and remarked as follows in answer to the argument that no suit could be brought during the lifetime of the father against the sons on a debt incurred by the father and which was neither illegal nor immoral:

"As to this, Lord Halsbury's well known observation in *Quinn* v. *Leathem* (6), that a case is only an authority for what it decides, and not for every proposition that may seem to follow logically from it, appears to me to apply with special force. That the Indian Courts have interpreted the earlier decisions ending with *Nanomi Babuasin* v. *Modhun Mohun* (4), in which last case it is stated that the sons cannot set up their rights against his creditor's remedies for their debts if not tainted with immorality, as authorizing suits for such debts against the son as well as the father may be seen, as regards Calcutta, from the Full Bench decision in *Luchmun Dass* v. *Giridhur Chowdhry* (7)."

(2) [1904] 27 Mad. 326.
(3) [1906] 29 Mad. 200.
(4) [1886] 13 Cal. 21= 13 I. A. 1. (P. C.).
(5) [1918] 41 Mad. 136=43 I. C. 225.
(6) [1901] A. C. 495.
(7) [1881] 5 Cal. 855.

and then my Lord proceeds to refer to other cases and finally holds that the Privy Council could not have meant to overrule all those decisions. Though the case of *Peda Venkanna* v. *Sreenivasa Deekshatulu* (5) did not raise the particular point now in question, I have referred to it to show that the language of their Lordships relied on by Mr. Sitaram Rao before us, namely "an obligation incurred wholly apart from the security afforded by the joint estate," refers to the obligation under the suit bond on which a particular suit is brought and which is sought to be treated as an antecedent debt and not a prior antecedent obligation of the father, though that prior obligation was accompanied by a charge on the joint estate. I might further add that as the father's personal liability under the prior obligation under Ex. G had not been barred on the date of the suit document Ex. H, there was in this case an obligation wholly apart from the security afforded by the joint estate which could form an antecedent debt and could be used as the foundation to support Ex. H to that extent, against the shares of the sons, even if their Lordships of the Privy Council intended by their language that a secured debt as such could never constitute an antecedent debt. While on principle the fact of the debt being barred on the personal covenant should make no difference, I have raised this point for consideration because, even if one is ultimately constrained by the language of their Lordships of the Privy Council to treat a debt which is altogether a mortgage debt as not being an antecedent debt, that doctrine (which, as I said before is to my mind a startling doctrine) may not be extended an inch beyond what is absolutely necessitated by their Lordships' language.

Mr. B. Sitaram Rao however relied upon the decision of Spencer and Krishnan, JJ., reported as *Badagala Jogi Naidu* v. *Bendalam Papiah Naidu* (8), where the learned Judges state that an antecedent debt which was also a mortgage debt could not be relied on as an antecedent debt to support the subsequent mortgage. I feel grave doubts as to whether the language of their Lordships of the Privy Council when interpreted with reference to the facts of the Privy Council case, was intended to lay down such a proposition, and as I have above tried to show, their Lordships were only dealing with the question whether a particular loan incurred on security of the joint estate and therefore not incurred wholly apart from the security afforded by the said joint estate would affect the sons' shares in the joint estate. Their Lordships were not considering at all the question whether if a really antecedent debt had also been accompanied by a mortgage security, it would or would not constitute as antecedent debt capable of supporting a subsequent alienation of the sons' shares by a mortgage bond executed for the discharge of that antecedent debt (and for fresh loans) so far as that antecedent debt was concerned. As however the question is an important one which must frequently occur and as my view is opposed to the decision of the Division Bench in *Badagala Jogi Naidu* v. *Bandalam Papiah Naidu* (8), I would refer the following questions for the decision of a Full Bench:

(1) Whether an independant debt, not immoral or illegal, contracted by the father on the security of the joint estate antecedent to the mortgage sued on can be treated as an antecedent debt so as to support the charge on the sons' shares also to the extent of the sums secured on the prior mortgage? (2) In such a case, can the former debt be treated as an antecedent debt for the purpose referred to if the personal liability of the father under the earlier mortgage is not barred on the date of the suit document?

Napier, J.—I entirely agree with my learned brother that it was not open to defendants 2 and 3 to take the point before the appellate Court that the mortgages A to H had not been proved. Their vakil did not deny the accuracy of the District Munsif's endorsement and his note as to the effect of the vakil's admission, and I am quite unable to understand why the District Judge did not give full effect to that admission. I must express my disapproval of the conduct of the vakil concerned in putting forward such a contention in the appellate Court after having invited the plaintiff not to prove the documents by the witnesses whom he had in attendance. On the question of law raised by Mr. Sitaram Rao, I agree with my learned brother that it should be referred to a Full Bench.

(8) [1918] 48 I. C. 289.

We have been much pressed with the language used by their Lordships of the Privy Council in the case reported as *Sahu Ram Chandra* v. *Bhup Singh* (1) and we have felt the same difficulty as was felt by the learned Chief Justice in *Peda Venkanna* v. *Sreenivasa Deekshatulu* (5). In that case the learned Chief Justice, applying the observation of Lord Halsbury in *Quinn* v. *Leathem* (6), declined to apply their Lordships' judgment to any proposition beyond that which arose in the case. The point actually decided was that a mortgage transaction by a father would bind his sons' shares during his lifetime only when the debt forming the consideration for the document was antecedent. No question is raised in this case before us which is at variance with that ruling.

We are asked however to apply the words on p. 447 (of *I.L.R.* 39 *All.*) "The exception being allowed, it appears to their Lordships to apply, and to apply to the case where the father's debts have been incurred irrespective of the credit obtainable from immovable assets that are joint family property", and to say that each prior mortgage in this case is wholly invalid as consideration for the later mortgage because its security depended on the joint family property. This proposition seems to me to entail a contradiction between their Lordships' decision and the supposed result of the dictum. Their Lordships clearly say that an existing antecedent debt not secured on a family property is good consideration for a mortgage of the family property. Clearly therefore if no further transaction was entered into, the mortgage would be binding on the family. It seems to me to be impossible to argue that, if subsequently the father finds it necessary to borrow another sum of money without security and then some time later creates a mortgage on the family property both for the old mortgage debt and the unsecured loan, that mortgage debt is not good consideration as against the sons on the ground that it was not incurred wholly apart from the ownership of the joint estate. I cannot understand how a debt that was once binding ceases to be binding by renewal.

My learned brother has raised the point that apart from the security, there is a personal liability in every mortgage and that therefore even though as a mortgage the antecedent debt might be bad, still as long as the personal remedy was not barred, the debt is a good antecedent debt apart from the mortgage security and can thus form consideration for the new mortgage binding on the sons. Speaking for myself, this distinction seems to me to be too artificial, but it has, if I may say so, the merit of meeting the difficulty raised on an extreme construction of their Lordships' language. I therefore agree with my learned brother that this do form part of our reference.

Opinion.

Wallis, C. J.—This reference raises the question whether the rule as to the validity of a father's alienation for an antecedent debt is inapplicable where the antecedent debt itself has been contracted on the security of the family property, as held in *Badagala Jogi Naidu* v. *Bendalam Papiah Naidu* (8), on the authority of certain observations of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1). The question is of great importance owing to the far-reaching consequences of our decision and has received our anxious consideration. The appeal to the Privy Council was filed to challenge the decision of the majority of the Allahabad High Court in *Chandra Deo Singh* v. *Mata Prasad* (9), dissenting from the view taken in *Khalilul Rahman* v. *Gobind Pershad* (10) and *Chidambara Mudaliar* v. *Koothaperumal* (2) and agreeing with the later Madras decision in *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (3), that there must be an antecedent debt to support the father's alienation. In their judgment disposing of this most controverted question their Lordships frequently referred with approval to the exhaustive judgment of Sir John Stanley, C. J., in the case first mentioned, and, even as will be shown, adopted his enunciation of the true rule as to antecedency in terms which, it is to be noted, do not contain the further restriction now contended for. We have next to consider the observations relied on in the judgment and the context in which they occur. Their Lordships in the course of their judgment had pointed out that the rule validating an alienation by the father for an antecedent debt of his own which was neither illegal nor

(9) [1909] 31 All. 176=1 I. C. 479.
(10) [1893] 20 Cal. 328.

immoral was an exception to the general rule of the Mitakshara which should not be extended, and, after referring to their earlier decisions and setting out the well known passage in *Nanomi Babuasin* v. *Modhun Mohun* (4) in which it is laid down that the sons cannot set up their rights against the father's alienation fo an antecedent debt, they proceeded tor observe: "In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the saie or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply, to the case where the father's debts have been incurred irrespective of the credit obtainable from immovable assets which do not personally belong to him but are joint family property. In their view of the rights of a father and his creditors, if the principle were extended further, then the exception would be made so wide as in effect to extinguish the sound and wholesome principle itself, namely, that no manager, guardian, or trustee can be entitled for his own purposes to dispose of the estate which is under his charge. In short, it may be said that the rule of this part of the Mitakshara law is that the joint family estate is in this position: under his management he can neither obtain money for his own purposes for it, nor can he obtain money for his own purposes upon it. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve. This would be equivalent to sanctioning a plain and, it might be, a deliberate breach of trust. The Mitakshara law does not warrant or legalize any such transaction. The limits of the principle of the exception have been thus set forth because in their Lordships' opinion they form a guide to the settlement of the conflict of authority in India on the subject of antecedent debt."

It is very important to observe that their Lordships expressly say that they are only laying down the true principle for their guidance in the decision of the point before them, and this, I think, goes to show that they did not intend to decide anything else, as for instance, the application of that principle to cases which were not before them. If they intended to go further their observations were made obiter and are not binding on us as authority. In the rest of their judgment they strictly confined themselves to the decision of the question before them, the necessity that the debt should be antecedent, and in answering this question they adopted the language of Sir John Stanley in *Chandra Deo Singh* v. *Mata Prasad* (9):

"The true rule is that a son cannot impeach an alienation of ancestral joint family property made by the father, for which the consideration is an antecedent debt of the father not tainted with immorality or the object of which is to pay such a debt . . . the doctrine has no application to a case in which no antecedent debt of the father, that is, a debt antecedent to the alienation in question, is concerned as the consideration or object of the alienation."

As already observed, there is no mention in this rule of the further restriction now contended for. Their Lordships went on to deal with the argument that the antecedency might be only of an hour or a day or a year, and observed that there must, to give true effect to the doctrine of antecedency in time, be also real dissociation in fact, and that the Courts would not be slow to deny effect to the mortgage where the antecedency was found to be unreal and to be merely a cover for what was essentially a breach of trust. These observations were strictly germane to the question as to the necessity of a real antecedency in fact, but they do not cover the further proposition that the antecedent debt must be one which was not incurred on the security of the joint family property. In the passage already cited their Lordships did, in my opinion, lay down that in principle there should be such a further restriction, and they proceeded to decide the only question before them in accordance with the principle so laid down. They do not refer to any earlier case in which this further restriction had been laid down or even suggested, and possibly they were led to state the principle in these terms for the purpose in hand with reference to the considerations urged by Sir John Stanley in contesting the opinion expressed by Boddam and Bhashyam

Aiyangar, JJ. in *Chidambara Mudaliar* v. *Kootha perumal* (2), that to insist on the debt being antecedent would not really afford any protection to the son. Those learned Judges observed in *Chidambara Mudaliar* v. *Kootha perumal* (2):

"On principle it is difficult to make any distinction between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred, for in either case the debt is binding upon the son, and the enforcement of the security exonerates the son from the burden of the father's debt. Such a distinction does not really afford any protection to the son: for his share in the mortgaged property can, as a general rule, be seized and brought to sale, even in the latter case, for the recovery of the debt as a personal debt due by the father (though also secured by a mortgage), unless such share has been validly alienated in favour of a third party, since the date of the mortgage but prior to its attachment."

The learned Judges who overruled this decision in *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (3) did not apparently differ in principle from this statement but considered themselves bound by authority to hold that the debt must in fact be antecedent. It was however contested by Sir John Stanley in *Chandra Deo Singh* v. *Mata Prasad* (9), in the judgment already mentioned, at p. 202 (of 31 *All.*).

"This observation is plausible, but it is capable, I think, of ready refutation. The remedy of the creditor on the basis of the son's pious duty is not co-extensive with his remedy on foot of a binding security. In principle the statement is opposed to the rule of the Mitakshara. In practice it would not be correct, inasmuch as the observance of the rule of the Mitakshara does afford some protection to the interests of sons. The greed which exists for the acquisition of landed property in this province is well known. Money-lenders are ever ready to advance money to thriftless or extravagant landowners on the security of their landed property with a view to the ultimate acquisition of the property. Interest is allowed to accumulate until the mortgage debt has reached such dimensions that it is unlikely that the owner can redeem. Then a suit for sale is instituted on foot of the security, the mortgagee gets leave to bid and buys and the family loses its ancestral property. Money-lenders are chary of making large advances to landowners on personal security. Now if in negotiations for a loan on a mortgage, lenders are obliged to make inquiry and satisfy themselves that the loan is required to meet a legal necessity, this will afford some protection to the other members of the co-parcenary body. If a father in a joint Mitakshara family can borrow money on the security of the joint ancestral estate to satisfy any extravagant whim or fancy he may form, it is obvious that the rule of the Mitakshara is a dead letter and that the other members of the family are robbed of all protection."

Their Lordships, I cannot help thinking, were influenced by these forcible observations in laying down the principle in the way they did. It is however clear, I think, that Sir John Stanley did not intend to lay down that there was any necessity to show that the debt was not only antecedent but also not incurred on the security of the family property, because he does not lay down any such restriction in formulating the rule, and because he refers with approval to the decision of the Full Court in *Badri Prasad* v. *Madan Lal* (11). In that case the mortgage in question was executed in satisfaction of a prior mortgage debt incurred by the father to the same mortgagee. It was contended the alienation was bad because the mortgage was effected in discharge of the mortgagee's own prior debt and was therefore not an antecedent debt within the meaning of the rule. Sir John Edge, C. J., with whom the other Judges concurred, rejected this contention, and, after citing a Calcutta ruling that the purchase money itself which was the consideration for a conveyance could not be said to be an antecedent debt—the point now decided by their Lordships—added: "I know of no other restriction of the term 'antecedent debt'." This statement is equally true of the other Courts and of the legal profession and the public in India. The doctrine of the father's power of alienation for his own debt having been repeatedly enunciated for over 60 years, ever since its recognition by the Privy Council in *Hunoomanpersaud Panday* v. *Mt. Babooee Munraj* (12), without any such restriction have been suggested, it has been assumed not to exist.

The only question was whether it was necessary that there should be any antecedent debt at all, and numberless transactions have taken place on that footing which, as has been represented to us, it would involve great hardship to disturb. Observations in judgments must be read with reference to the context and to the pre-existing law, and the very recent decision in *Nachiyappa Goundan* v. *Rangasami Goundan*, as yet unreported contains an express warning against deducing from particular expressions in their Lordships' judgments novel pro-

(11) [1893] 15 All. 75 (F. B.).
(12) [1854-57] 6 M. I. A. 393=2 Suth. 29=1 Sar. 552 (P. C.).

positions unsupported either by principles or authority, and against construing decisions putting an end to a conflict of authority on a particular question as unsettling what till then had been treated as settled. However sound in principle, and however applicable to this Presidency with reference to the son's shares, if not to the father's, the suggested restriction might be if the matter were res integra, it would certainly be a novel proposition unsupported by any previous authority to lay down at the present time that an alienation for an antecedent debt not otherwise open to objection was invalid because the antecedent debt was incurred on the security of the joint family property. Having regard to their Lordships' express statement that the enunciation of the principle in these terms was intended as a guide to the decision of the controverted question before them, I do not think we should be warranted in extending its application to a case which was not before them and involves considerations which are not referred to in their judgment, especially when such an application of the principle would have the effect of disturbing what has long been regarded as settled law, and would give rise to great uncertainty as to existing titles.

I would answer the first question in the affirmative. It is unnecessary to answer the second question.

Oldfield, J.—I entirely agree.

Sadasiva Aiyar, J.—In the reference to the Full Bench I said that their Lordships of the Privy Council in some passages of their judgment in *Sahu Ram Chandra* v. *Bhup Singh* (1) used language which, if widely interpreted, would make a mortgage debt which was genuinely antecedent to the alienation in suit not an antecedent debt capable of supporting such an alienation by the father as against the son's share. Having regard however (a) to the context, (b) to the particular question which their Lordships had and intended to decide and (c) the language used by them in several passages; both before and after the widely worded passages, I was inclined to hold that their Lordships were considering even in these passages only the case where the so-called antecedent debt was really and substantially the mortgage debt sued on. For instance, in the passage

" the exception * * * appears to their Lordships to apply only to the case where the father's debts have been incurred irrespective of the credit obtainable from immovable assets which are joint family property",

their Lordships were approving of the exception which allows a decree for sale to be passed in the suit brought for a mortgage debt of the father if incurred for discharging the father's antecedent debts, and they disapproved its extension to a case where the mortgage deed sued on was executed for a so-called antecedent personal debt which was really incurred on the "credit obtainable" from the family lands and which antecedent debt was therefore at once or soon afterwards merged in the mortgage alienation sued upon. The question whether genuinely antecedent debts might be or might not be themselves mortgage debts, and whether they ought to be only simple debts, was not, in my opinion, decided or intended to be decided by their Lordships. I did not and do not think that their Lordships intended to adopt all the reasoning given in Sir John Stanley's C. J's judgment in *Chandra Deo Singh* v. *Mata Prasad* (9) They, no doubt fully approved of the dicta of the learned Chief Justice quoted at pp. 446 and 449 (of 39 *All.*), but those dicta do not deal with the question whether a really antecedent mortgage debt was one which could support a later alienation against the sons. Having heard full arguments again sitting in the Full Bench and having had the advantage of studying the judgment of my Lord the Chief Justice just now pronounced and concurred in by Oldfield, J., I must frankly admit that I have felt much diffidence as to the soundness of my view as to the real meaning of their Lordships' language in the disputed passages. While I had to respectfully differ in my referring order from the opinions of two learned Judges of this Court [Spencer and Krishnan, JJ., in *Badagala Jogi Naidu* v. *Bendalan Papiah Naidu* (8)] as to the interpretation of those passages, I now find that my opinion is also opposed to the opinions of my Lord and Oldfield, J., besides the opinions of two learned Judges of the Allahabad High Court (Tudball and Rafique, JJ.) in *Brij Narain Rai* v. *Mangla Prasad* (13). However after the best consideration I have been able to give to the question, I shall adhere to the view I have already expressed.

(13) [1919] 41 All. 235=50 I. C. 101.

I have fortified my mind to arrive at this conclusion by the following further considerations: (a) The opinion of Sir John Edge, C. J. [who took part in the Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh* (1)] as found in the judgment in *Badri Prasad* v. *Madan Lal* (11) referred to in my Lord's judgment supports my view of the law: (b) since *Hunoomanpersaud Panday* v. *Mt Babooee Munraj* (12), the uniform course of decisions, so far as I know in all the High Courts, has been to treat a really antecedent mortgage debt on the same level with a really antecedent simple debt for the purpose of supporting a subsequent alienation against the son's share: (c) their Lordships have omitted in *Sahu Ram Chandra* v. *Bhup Singh* (1) to expressly refer to and overrule this settled law: (d) the unsettlement of numerous titles to large estates and the great uncertainty in the law which would result if we decide the question: (1) referred to the Full Bench in the negative is also a matter for serious thought: (e) the old Hindu law enacted (see Yagnavalkaya II, 50, and Colebrook's Digest, Vol. I, p. 190, which quotes Katyayana's text) that it was the pious duty of the sons to pay their father's debt (e-1) even with interest (but the interest amount should not exceed the principal amount), (e 2) even if it was barred by limitation according to modern Statutes (e-3) and even if no ancestral assets were inherited by the sons, provided the sons were capable of bearing the burden.

The obligation was restricted afterwards as regards (e-2) and (e-3) by statutory enactment and judicial decisions, but judicial decisions have explained and expanded the nature and legal results of the obligation as regards (e-1): (1) by not restricting the amount of interest allowable to to the creditor to the amount of the principal, (2) by making the future pious duty a present legal liability, and (3) by making a voluntary alienation by the father for such antecedent debt binding on the sons' shares under the Mitakshara law, (under the order Hindu law of Manu the sons had no interest or shares at all during their father's lifetime); and (4) by making involuntary alienations by Court sales in execution of a decree against the father alone to affect the sons' shares also: and (f) in the old Hindu law texts relating to the son's pious obligation which form the foundation on which the present law has been broadened from precedent to precedent, *there is no distinction made between a mortgage debt and a personal debt of the father*. In the result I concur in answering the first question referred to this Full Bench in the affirmative.

Coutts-Trotter, J.—I have had the advantage of perusing the opinion just pronounced by my Lord, and I entirely concur in it.

Seshagiri Aiyar, J.—My answer to the first question is in the affirmative. No cases have been quoted before us in which it has been directly held that a debt secured by a mortgage could not constitute an antecedent debt. Mr. Sitarama Rao naturally relied upon the observations of Lord Shaw at p. 447 (of *I. L. R. 39 All*) in *Sahu Ram Chandra* v. *Bhup Singh* (1) which is as follows:

"Except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate."

With reference to this sentence, it was contended that there was a distinct pronuncement that if a debt was advanced on the security of the property in the possession or control of the manager of a Hindu family, such a debt would have been incurred in breach of trust and that consequently it cannot constitute an antecedent debt. It was further argued that there was an essential difference between a simple loan and a loan charging the family property. The sentence in the judgment,

"under his management he can neither obtain money for his own purposes for it, nor can he obtain money for his own purposes upon it."

was relied on for this argument. I cannot say that these contentions are entirely unfounded Before dealing with these sentences, I think it expedient to consider the judgment as a whole. The case before the Board was one in which a suit was brought upon a mortgage document. This deed was not a renewal of an old document. The question for consideration before the Board was whether the loan advanced was contemporaneous with or was antecedent to the mortgage sued on. In considering this question their Lordships of the Judicial Committee had before them the rulings

of the various High Courts in which they point out:

"there was a conflict which occurs, not merely between the Courts of one district in India and another, but also between decisions pronounced in Calcutta itself, in Allahabad itself, and in Madras itself.

This conflict they wanted to put an end to. If we examine the case which were cited before them as typical of the conflict, it would be seen that in not one of them was the question, whether a subsequent mortgage superseding an earlier mortgage could constitute an antecedent debt ever raised or decided. The point at issue in them was whether there should not be a debt really antecedent to the one on which the suit was brought or whether it was enough if a short time had elapsed between the execution of the document and the granting of the loan. Nor do I find any reference in the argument of the learned counsel before the Judicial Committee to this point. Under these circumstances I do not think that the language relied on should be regarded as a considered pronouncement upon the matter which we have to decide.

Further, if we analyze the judgment of Lord Shaw it is clear that the proposition contended for by the learned vakil would be to some extent inconsistent with the general principles enunciated by the noble Lord. The judgment first traces the rights of interdiction of the subordinate members of a Hindu family to the well-known text of Mitakshara (Ch. 1, S. 1, pl. 27). Then it proceeds to point out that the Mitakshara has enunciated a rule in favour of the managing co-parceners. The reason of the rule is stated to be that wherever there is a family necessity it is

"one binding upon the co-parceners as a whole and that consequently the consent of all of them can be implied even though they may not be consulted individually."

The judgment then considers the exception to the general rule, which is stated to have

"arisen from the necessity of protecting the rights of third persons, say, the purchasers of the property who have taken their title for onerous consideration and in good faith."

Although in the previous sentence it was stated that:

"The exception should be very carefully guarded and should not be extended,"

it is clear that the aim of the exception, in the opinion of the Board, was to safeguard the rights of bona fide lenders, and not of the subordinate members of the Hindu family. Then we have a discussion as to how this exception should be worked. The observations of Knight Bruce, L. J., *Hunoomanpersaud Panday* v. *Mt. Babooee Munraj* (12) are quoted as showing that if

"the fact of the advance is proved, the presumption of law is prima facie to support the charge and the onus of disproving it rests on the heir."

Up to this point there is no discussion as to whether the debt should be a simple debt or a debt secured upon the charge on property. After this, the particular facts of the case are examined and the rules deduced by Sir James Colvile in *Suraj Bansi Koer* v. *Sheo Persad Singh* (14) and *Girdhari Lall* v. *Kantoo Lall* (15) are stated. Then follows an approval of the comment by Sir John Stanley in *Chandra Deo Singh* v. *Mata Prasad* (9) on the above two decisions. If we turn to the judgment of the learned Chief Justice of the Allahabad High Court which has secured the approval of the Judicial Committee, it would be clear that there was no intention in that case to differentiate between simple debts and mortgage debts. On the other hand the sentence at the bottom of page 207 (of 31 *All*) is in favour of holding that a mortgage is as much within the competency of the manager as a simple debt. Then the judgment of the Judicial Committee proceeds to define what an antecedent debt is. It is in this part of the judgment that the observation relied on by Mr. Sitarama Rao occurs. But the quotation from Lord Hobhouse'e judgment in *Nanomi Babuasin* v. *Modhun Mohan* (4), on which the rule is based, does not make any distinction between mortgage debts and money debts; and the final deduction of the Board does not warrant any such distinction being drawn between the two classes of debts. The sentences relied on, namely:

"in short, it may be said that the rule of this part of the Mitakshara Law is that the joint family, estate is in this position: under his management he can neither obtain money for his own purposes for it nor can he obtain money for his own purposes upon it. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve,"

should be read as referring to the creation of the first obligation and not to the merger of the first debt in a subsequent mortgage debt. That was the only matter which was directly discussed, and this and the other observations must be

(14) [1880] 5 Cal. 148=6 I. A. 88 (P. C.).
(15) [1873-74]14 B. L. R. 187=1 I A. 321(P. C.).

taken to have been made with reference to the enforcibility of a debt which starts with a mortgage and is not subsequently absorbed in any other transaction of a similar or a different kind. The rule finally laid down, namely that "there must be antecedency in time" and "real dissociation in fact", would equally apply to a simple and to a mortgage debt. I have very closely read the judgment of the Board, and in my opinion the particular passage on which so much stress was laid should not be construed in the way in which the learned vakil asked us to construe it. In this connexion I may be permitted to draw attention to what Lord Haldane said in *Cornelius* v. *Phillips* (16):

"Dicta by Judges, however eminent, ought not to be cited as establishing authoritatively propositions of law unless these dicta really form integral parts of the train of reasoning directed to the real question decided. They may, if they occur merely at large, be valuable for edification, but they are not binding."

Mr Sitarama Rao contended that the Judicial Committee have set to themselves the task of laying down the law and it is not open to us to minimize its effect by saying that the sentences relied on are mere obiter dicta. The answer is that their Lordships had not before them this aspect of the case at all. Ever since *Hunoomanpersaud Panday* v. *Mt Babooee Munraj* (12) in which the rule as to antecedent debt was outlined, numerous cases have been decided in this Presidency and elsewhere, where it was assumed as unquestionable that there is no distinction between a simple and a mortgage debt. It would unsettle vested rights and throw open the flood gates of litigation, if their Lordships are to be understood as laying down the law as contended for by the learned vakil. There must be some semblance of discussion in the judgment appealed against, in the argument of counsel or in the cases quoted at the Bar to warrant us in imputing such an unexpected departure from accepted notions on the subject to their Lordships. The Judicial Committee are in the habit of cautioning Court in India to apply the old decisions to transactions founded on an exploded view of law and to suggesting that as and from a particular date the new pronouncement should be accepted as regulating similar transactions. In *Pattabiramier* v. *Venkata Rao* (17) and *Thambuswami Pillai* v. *Sriramulu Naidu* (18) relating to the construction of mortgages by conditional sale, this hint was given. Again in dealing with rights of alienation which a co-parcener has in respect of his own share, the Board, while saying that the Madras view was not right, refused to interfere with it on the principle of stare decisis. There is no indication of such an attitude in the present case. The truth is that their Lordships did not intend to overrule the principle which had gained uncontested currency all these years. I cannot therefore but regard the view taken in *Brij Narain Rai* v. *Mangla Prasad* (13) and by Spencer and Krishnan JJ., in this Court as attempts to be meticulously literal at the expense of the spirit of the pronouncement.

I may draw attention to the fact that the Judicial Committee have held in *Girdhari Lall* v. *Kantoo Lall* (15) that where family property has been sold away under a mortgage decree, the sons can recover it back only on showing that the debt was illegal or immoral. The same conclusion has been stated in cases where the property passed out of the family by sale under a money decree. No distinction is drawn regarding the rights of the sons in these two classes of cases. If it was breach of trust on the part of the manager to have mortgaged the property, why should the suing co-parcener show that there was immorality or illegality? If the property passed out of the family in violation of a trust, the son should, on pleading, without more, that the decree under which the sale was held was founded on a mortgage, be decreed possession of at least his share. There is a consideration which is specially applicable to Madras and which would also lead to the same result. In the judgment under consideration, the Board had to consider the rule of the Mitakshara as administered in Allahabad. They had not before them the doctrine which has been uniformly accepted in this Presidency that for a debt of the father which is neither illegal nor immoral, his share in the family property would be liable. This view has obtained the sanction of the Judicial Committee on the principle of stare decisis. It would follow from this that if a father mortgages property for a debt which is not tainted with ille-

(16) [1918] A. C. 199=87 L. J. K. B. 246.
(17) [1871] 13 M. I. A. 560 L. R. (P. C.).
(18) [1907] 17 M. L. J. 300.

gality or immorality, although not binding on the sons as not being for family benefit or necessity, it would be enforcible against the sons on the doctrine of their pious obligation to discharge their father's debt. This would furnish an additional ground for holding that a mortgage debt, instead of being in a worse position than a simple debt, is in some respects in a more favourable position. There is one observation in the judgment which I have so largely quoted from, which lends support to my view. Almost the last sentence in the judgment is:

"Wherever such antecedency is found to be unreal and is merely a cover for what is essentially a breach of trust, the Courts will not be slow to deny effect to a mortgage so brought into existence."

There is no qualification here that the illusory character would only affect a simple debt. What the Courts in India are asked to do is to find out whether the previous loan was real or illusory, and not whether it is a simple debt or a mortgage debt. For all these reasons I am of opinion that *Badagala Jogi Naidu* v. *Bendalam Papiah Naidu* (8) was wrongly decided. It is not necessary to express any opinion upon the second question referred to us.

S N./R.K. *Answered in the affirmative.*

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ABDUR RAHIM AND SESHAGIRI AIYAR, J.J.

Cheruthazath Abdulla Haji —Defendant—Appellant.

v.

Cheriyandi Ibrayan Kutti and *others* —Plaintiff and Defendants—Respondents.

Appeal Suit No. 138 of 1917, Decided on 9th April 1918.

(a) Civil P. C. (1908), O. 21, R. 59—Suit by unsuccessful claimant for declaration of his title as mortgagee from judgment-debtors and for cancellation of order dismissing his claim as fraud on creditors mortgage not previously avioded—Judgment-debtor cannot resist suit on ground that mortgage was fraud on creditors—T. P. Act (1882), S. 53.

Where an unsuccessful intervenor in claim proceedings institutes a suit under O. 21, R. 63, Civil P. C., for declaration of his title as mortgagee from the judgment-debtor and for the cancellation of the summary order dismissing his claim as a fraud on creditors, it is not open to the judgment-creditor to resist the plaintiff's suit on the ground that the mortgage to the plaintiff was a fraud on the creditors of the mortgagor, unless the mortgage has been previously avoided by the creditor in a properly instituted suit.

Section 53, T. P. Act, cannot be pleaded merely as a defence: a suit has to be instituted by the creditor whose rights are effected by the transaction to have it set aside. Until then no defence founded on the section can be pleaded: 43 *I. C.* 651, and 34 *I. C.* 778; *Foll.* [P 88 C 2 P 89 C 1]

(b) Transfer of Property Act (1882), S. 53—All transactions whether sham or intended to create title are within mischief of S. 53 if their effect is to defeat or defraud creditors—Sham transaction — Suit to cancel order passed adversely in execution proceedings—Defendant can plead that plaintiff cannot maintain suit he being only screen for real owner—Civil P. C. (1908), O. 21, R. 63.

Per *Seshagiri Aiyar*, *J*—All transactions, whether they are sham or are intended to secure some interest in the property, are within the mischief of S. 53 if their effect is to defeat or defraud creditors. In some of them there may be no intention at all that the transferee should have any interest in the property. Such transactions are generally known as sham or colourable transactions. In other cases, e. g., gifts to relations or sales for inadequate consideration, there may be an intention to transfer the property, but the effect of the transfer would be to defeat or delay creditors. Both classes of cases are within the purview of S. 53. In the case of sham transactions the defendant can plead in a suit by a person seeking to cancel an order passed adversely to him in an execution proceeding, that the plaintiff has no locus standi to maintain the suit as he is only as screen for the real owner [P 89 C 2]

K. P. M. Menon—for Appellant.

Narayana Aiyar—for Respondents.

Abdur Rahim, J.—Defendants 1 and 2 were doing some business and got into embarrassed circumstances about the date of the transaction in question. That transaction is a mortgage of Rs. 5,000 executed by defendant 2 on certain properties belonging to him in favour of the plaintiff, respondent, 1 before us. Defendant 5 in the suit, the appellant in this appeal, is a purchaser of some of the properties at a sale held in execution of decrees obtained against defendant 2 by defendants 3 and 4. The plaintiff preferred a claim before the executing Court and that Court held in favour of the appellant. The finding of the executing Court was that the mortgage was a colourable transaction intended to save defendants 2,s private properties in the calamity that was in view. The plaintiff has filed the present suit in order to have it declared that the mortgage is a valid and binding transaction and that the sale to defendant 5 is valid only subject to this mortgage. The order of the Court executing the decree would have the effect under the Civil Procedure Code of concluding the rights of the parties if no suit was instituted. The main ques-

tion which was tried before the learned District Judge was set forth in issues 4, 5 and 6. I think, all taken together, they were meant to raise the question whether the mortgage in question was invalid, having been executed to defeat or delay the creditors of defendant 2. That is the exact language of issue 4. Issue 5 raises a more particular question, whether the plaintiff was a transferee in good faith and for consideration. Issue 6 says: "Whether the kanom deed is valid and binding on defendants 3 and 4?" The evidence bearing on the point is fully treated in the judgment of the Acting District Judge and his conclusion is, whatever motives might have led the plaintiff into the transaction, the mortgage was not void for want of consideration. He seems inclined to find that at least Rs. 2,800 were paid for Ex. A, if not more. But it is not necessary to express any opinion on the question of fact whether any consideration passed between the parties and if so, what was the amount advanced by the plaintiff. The whole case of the contesting defendant was that the transaction was entered into for the purpose of defrauding the creditors of defendant 2 and was invalid on that ground. That is what is expressly stated in paras. 3 and 4, of the written statement of defendant 3 and defendant 5's written statement also is to the same effect. The Issues, as I have already stated also raise the same question, that is, in effect, whether the transaction was one which came within the purview of S. 53, T. P. Act. No doubt the District Judge, in para. 9 of his judgment, states:

"The form of these issues (issues 5 and 6) appears to be due to the fact that, when they were framed, it was not clear that, as decided in *Palaniandi Chetti* v. *Appavu Chettiar* (1), the question, whether the mortgage was voidable under S. 53, T. P. Act, did not arise and the only question was, whether it was void."

If the transaction came within the purview of S. 53 at all, then whether it was called void or voidable would not make any difference, if by "void" is meant, as apparently it was intended by the parties to mean, a transaction for which there was no consideration. S. 53, T. P. Act, says:

"Every transfer of immovable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed. Where the effect of any transfer of immovable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid."

Now the evidence on which the learned counsel for the appellant relied would, if believed, show that it was a transaction, the object of which was to defeat the creditors of defendant 2. Defendant 2 was in embarrassed circumstances at the time, the plaintiff was a close relation of his, and if the allegations of defendant 5 are well founded it might well be that the transaction was entered into with the intention of defeating the creditors of defendant 2. That was the case put forward by the appellant. But then Mr. Menon has argued for the appellant that the transaction was a "sham" and that if it is a sham, it does not come within the purview of S. 53, T. P. Act. He says that it was merely a piece of paper got up by the parties and there was no intention to give effect to it at all in any way. No doubt if it was only a paper got up simply for amusement's sake S. 53 will not apply. But that is not the case of Mr. Menon's client. His case is that there was a very serious intention in fact for executing Ex. A, and that was to defeat defendant 2's creditors. It is clear that effect was intended to be given to it, if not between defendant 2 and the plaintiff, at least so far as the claims of defendant 2's creditors are concerned, and that is just the case which is covered by S. 53, T. P. Act. Whether we call that a sham transaction or void, it does not make the slightest difference. The legislature calls it voidable, because until it is set aside it has certain legal consequences.

If that was the nature of the transaction as was the case of the defence, the Full Bench ruling of this Court reported in *Subramania Ayyar* v. *Muthia Chettiar* (2), to which my learned brother was a party, stands in the way of the appellant. It decides:

"Where an unsuccessful intervenor in claim proceedings institutes a suit under O. 21, R. 63, Civil P. C., for declaration of his title as vendee from the judgment-debtor and for cancellation of the summary order dismissing his claim it is not open to the judgment-creditor (defendant) to resist the plaintiff's suit on the ground that the sale to the plaintiff was a fraud on the creditors

(1) [1916] 34 I. C. 778.

(2) [1918] 41 Mad. 612=43 I. C. 651 (F. B.)

of the vendor, unless the transfer had been previously avoided by the creditor in a properly instituted suit;"

that is to say, S. 53 cannot be pleaded merely as a defence: a suit has to be instituted by the creditor whose rights are affected by the transaction to have that transaction set aside. Until then, no defence founded on S. 53 can be pleaded. That is exactly this case, except that here we are concerned with a mortgage instead of a sale which, it is not suggested, can make any difference. The Full Bench decision followed another decision of my learned brother sitting in a Division Bench reported in *Palaniandi Chetti* v. *Appavu Chettiar* (1). Mr. Menon strongy urged upon us that the Full Bench ruling required reconsideration, and has referred to several decisions bearing upon the question which he says were not placed before the Full Bench. One of the cases directly bearing on the point is a decision of the Calcutta High Court reported in *Abdul Kadar* v. *Ali Miah* (3). There it was held that "voidable at the option" does not mean that there must be a suit instituted in order to set aside the transaction; it is open to a person who has a right to avoid a transaction within the meaning of S. 53 to avoid it by any act manifesting his intention, and it need not necessarily be done by a suit. He has also referred to the ruling of the Privy Council in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (4) and has relied on the observation contained in a passage of the judgment of their Lordships at p. 333 where they say that, when a transaction is voidable, it may be avoided at the option of the party affected by it.

The ruling in *Muthukumara Chetti* v. *Anthony Udayar* (5) of a Division Bench of this Court is to a similar effect. Then Mr. Menon points out that there had been a number of decisions of this Court which were directly opposed to the ruling of the Full Bench in *Subramania Ayyar* v. *Muthia Chettiar* (2). Some of those cases are referred to in the judgment of my learned brother in *Palaniandi Chetti* v. *Appavu Chettiar* (1). It is also pointed out that the language of S. 53, T. P. Act, does not in any way imply that a suit has to be instituted to set aside the transaction if it is sought to be avoided by the creditor or creditors affected by it. No doubt the view of the law propounded in the Full Bench decision may lead to complications and difficulties, as in this case. Supposing the transaction to have been designed to defeat creditors, the appellant who is prejudicially affected by it cannot plead this as a defence; the respondent-plaintiff's suit has to be decreed and the order of the executing Court nullified, the appellant being obliged to institute a suit to have the transaction set aside, although the order of the executing Court is in his favour. In fact there is great force in Mr. Menon's argument that in such cases the proceedings before the executing Court would become more or less illusory. I must say that if the matter were res integra, I should have been inclined very seriously to consider the whole question. But my learned brother, who has been a party to both the cases cited above, adheres to his view, and I feel myself entirely bound by the Full Bench decision.

The appeal must therefore be dismissed with costs of respondent 1.

Seshagiri Aiyar, J.—I entirely agree with my learned brother that in the circumstances of this case the transaction must be deemed to be one in which the parties intended that an interest should be secured to the plaintiff in the property mortgaged to him. Defendant 5, in his written statement, apparently understood the transaction in that light. Therefore it is not open to the learned counsel for the appellant now to say that this was a case of a sham transaction altogether. I think it however desirable to remove certain misconceptions regarding the effect of the Full Bench decision in *Subramania Aiyar* v. *Muthia Chettiar* (2). All transactions, whether they are sham or are intended to secure some interest in the property, are within the mischief of S. 53, T. P. Act, if their effect is to defeat or defraud creditors. In some of them there may be no intention at all that the transferee should have any interest in the property. Such transactions are generally known as sham or colourable transactions. In other cases, e. g. gifts to relations or sales for inadequate consideration, there may be an intention to transfer the property, but the effect of the transfer would be to defeat or delay creditors. Therefore

(3) [1912] 14 I. C. 715.
(4) [1907] 34 Cal. 329=34 I. C. 87. (P. C.).
(5) A. I. R. 1915 Mad. 296 = 24 I. C. 120= 38 Mad. 367.

both classes of cases are within the purview of S. 53, T. P. Act. The essential difference between a sham transaction and the transaction of the other class which I have just now mentioned as affecting the position of the defendant in a suit is this: in the case of a sham transaction, where there is no intention to transfer property, the defendant can answer a person who comes into Court to set aside the adverse order passed in execution proceedings:

"You have no locus standi to bring the suit, because you have no interest in the property as nothing has been secured to you by the transfer. You are only a screen for the real owner and therefore you have no right to bring the suit."

That is the reason which actuated me at any rate when I consented to an issue being remitted in the case in *Palaniandi Chetti* v. *Appavu Chettiar* (1). We wanted to ascertain in that case whether the plaintiff who brought the suit had any interest which enabled him to contest the position of the defendant. I think it necessary to draw attention to this aspect of the case, because a great many misconceptions have grown round the Full Bench decision in *Subramania Ayyar* v. *Muthia Chettiar* (2) and round the decision in *Palaniandi Chetti* v *Appavu Chettiar* (1). Now Mr. Menon has asked us to reconsider the decision in the Full Bench case. He has quoted a large number of cases and he says he has not quoted the whole list of cases bearing on the point. Let us take it that he has quoted the best of those he has collected. I shall first take *Abdul Kadar* v. *Ali Miah* (3), a decision of two Judges of the Calcutta High Court, which is directly in point. It is permissible to point out that the learned Judges seem to have ignored the observations of Mookerji, J., in *Hakim Lal* v. *Mooshar Sahu* (6), which decision was confirmed by the Privy Council in *Musahar Sahu* v. *Lala Hakim Lal* (7); they seem to have ignored also the decision in *Chatterput Singh* v. *Maharaj Bahadur* (8). They have not referred to the opinion of Telang, J., in *Burjorji Dorabji Patel* v. *Dhunbai* (9) which directly touches this point, and to another decision of Sir Lawrence Jenkins, C. J., a very high authority, in *Ishwar Timappa* v. *Devar Venkappa Shanbog* (10), in which the learned Judge has held that, without bringing a suit, it is not open to a defendant to plead that the transaction is invalid. No doubt there are some cases in Madras the other way, but the point we are now discussing was not directly raised in them. Mr. Menon has asked us to say that because of these decisions the matter should be referred to a Full Bench of five Judges. It is clear that a matter which has not been considered directly should not be regarded as an authority. Take the latest decision of the Judicial Committee. The Judicial Committee had been allowing appeals under the Land Acquisition Act for any number of years, and when their attention was drawn to S. 54, Land Acquisition Act, they put an end to the practice and refused to allow further appeals under the Act for a number of years, the view apparently being that if the matter was not considered directly, the decision should not be regarded as binding on Courts. It is only where the matter has been debated by counsel at the Bar, and where a considered judgment has been given, that counsel is entitled to say that that decision has not been considered. For these reasons I am of opinion that nothing that has been said this evening by Mr. Menon has in any way shaken my opinion regarding the soundness of the decisions in *Palaniandi Chetti* v. *Appavu Chettiar* (1) and in *Subramania Ayyar* v. *Muthia Chettiar* (2). I adhere to them. In my opinion there will be no difficulty in giving effect to them.

There is one matter to which my learned brother has drawn attention. It is a very serious matter, and I think it requires further consideration. For example, the person in whose favour an order has been passed is in the unfortunate position of not being able to defend that order in the suit. No doubt, that is a serious position. But there are other difficulties the other way. Any number of persons may raise similar defences in different suits by a person to whom property has been transferred. They may be in different Courts. There may be different decisions, one holding that the transaction is an honest one, another that it is a sham one and a third that it is for

(6) [1907] 34 Cal. 999.
(7) A. I. R. 1915 P. C. 115=32 I. C. 343=43 I. A. 104=43 Cal. 521 (P. C.).
(8) [1905] 32 Cal. 198=32 I. A. 1 (P. C.).
(9) [1892] 16 Bom. 1.
(10) [1903] 27 Bom. 148.

inadequate consideration. In order to avoid multiplicity of proceedings, and in order to avoid possible divergence of judicial opinion, it has been ruled by Mookerjee, J., in *Hakim Lal* v. *Mushahar Sahu* (6), following *Chatterput Singh* v. *Maharaj Bahadur* (8), that there should be one suit like an administration suit in which the matter should be directly put in issue, and it should be open to appeal and second appeal. No doubt the difficulties pointed out by my learned brother are of a very serious character, but the other difficulties outweigh them. I am therefore of opinion that the decisions to which I was a party should be adhered to. I agree in the order proposed by my learned brother.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1919 Madras 91

ABDUR RAHIM AND OLDFIELD, JJ.

Sivasubramania Mudaliar and *others* —Appellants.

v.

Lakshmanaier and *others* — Respondents.

Civil Appeal No. 342 of 1917, Decided on 12th December 1918, against decree of Sub-Judge, Tinnevelly, in Original Suit No. 66 of 1914.

*** Civil P C. (5 of 1908), S. 97—Appeal against preliminary decree can be proceeded with even after final decree specially if latter is in conformity with preliminary decree.**

An appeal against a preliminary decree can be maintained in spite of the fact that a final decree has been passed in pursuance of the preliminary decree, especially where the final decree is in accordance with the preliminary decree and does not in any way modify it or supresede it: *A.I.R.* 1915 *Mad.* 197; *A. I. R.* 1914 *Mad.* 473; 18 *I. C.* 730; 48 *I.C.* 7; *A.I.R.* 1914 *All.* 380 *Foll* 21 *I. C.* 516; 27 *I. C.* 135; 1 *I. C.* 413; 33 *I. C.* 146 *Dist.*; 16 *I. C.* 380, *not Foll.* [P 91 C 1 P 92 C 1]

K. R. Guruswami Aiyar and *A. Subrama Aiyar* —for Appellants.

K. S. Srinivasa Aiyangar—for Respondents.

Judgment.—A preliminary objection is taken by Mr. K. Srinivasa Aiyangar to the effect that the appeal being filed against the preliminary decree alone, while before the presentation of the appeal a final decree had also been passed, it is unsustainable. The question is covered by a number of decisions of this Court. It was first considered in *Lakshmi* v. *Marudevi* (1) and it was ruled that, under such circumstances an appeal against a preliminary order would be sustainable in spite of the fact that a final order had been passed in pursuance of the preliminary order. This ruling was followed in *Ramien* v. *Veerappudian* (2), *Kuppusami Aiyar* v. *Regmah Boi Ammani* (3) and *Cunniah Mudaly* v. *Rangasami Mudaly* (4). No doubt there is a decision *Subramania Chettyar* v. *Palachakrapani Chettyar* (5) which so far as it goes seems to take a somewhat different view. That is a decision of Sundara Aiyar, and Sadasiva Aiyar JJ. There the learned Judges do not discuss the previous decisions, though to the ruling in *Lakshmi* v. *Marudevi* (1) Sundara Aiyar, J., was himself a party. The same view of the law was taken in the Allahabad High Court in *Kanhaiya Lal* v. *Tribeni Sahai* (6), where a Full Bench decided, overruling some of the previous Division Bench rulings, that the fact that a final decree had been passed does not in any way affect the validity of an appeal against the preliminary decree. We think that the reasoning in *Kuppusamy Aiyar* v. *Regmah Boi Ammani* (3) and that in *Kanhaiya Lal* v. *Tribeni Sahai* (6) is based upon a correct view of the provisions of S. 97, Civil P. C., which requires that an appeal must be filed from the preliminary decree, that otherwise its correctness cannot be disputed afterwards in the appeal preferred from the final decree.

It can hardly be said that the final decree is that which follows the preliminary decree. It is not like the decree of an appellate Court superseding the decree of the lower Court which it reverses. A different view has prevailed in *Khirodamoyi Dasi* v. *Adhar Chandra Ghose* (7), *Sadhu Charan Datta* v. *Hara Nath Datta* (8) and *Mackenzie* v. *Narsing Sahai* (9) and also apparently in *Dattatraya Ramachandra* v. *Ajmuddin Fakruddin* (10). There may be cases such as in *Khirodamoyi Dasi* v. *Adhar Chandra Ghose* (7), where the final decree altogether dismisses the suit for non-

(1) A. I. R. 1915 Mad. 197=12 I. C. 664=37 Mad. 29.

(2) A. I. R. 1914 Mad. 473=24 I. C. 394=37 Mad. 455.

(3) [1913] 18 I. C. 730.

(4) [1918] 48 I. C. 7.

(5) [1912] 16 I. C. 380.

(6) A. I. R. 1914 All. 380=24 I. C. 827=36 All. 532 (F.B.).

(7) [1913] 21 I. C. 516.

(8) [1915] 27 I. C. 135.

(9) [1909] 36 Cal 782=1 I. C. 413.

(10) [1916] 33 I. C. 146.

prosecution; then different considerations may possibly arise. But so far as the present question is concerned, that is where the final decree is in accordance with the preliminary decree and does not in any way supersede it or modify it, supposing that is allowable, we think the weight of reasoning is in favour of the view which has almost unanimously prevailed in this Court. The preliminary objection will therefore be overruled.

We do not think that there is any substance in any of the arguments urged in this appeal against the decree of the learned Subordinate Judge. The most important question is whether there were separate payments of rent amounting to about Rs. 10,000 in addition to those entered in Sch. F to the plaint. The Subordinate Judge finds, we think quite rightly that there is really no evidence worth considering in support of the defence allegation that there were payments amounting to Rs. 10,000 over and above those for which the plaintiffs have given credit in their plaint. No receipt or vouchers were produced by the defendants nor any accounts, and the only documentary evidence with respect to payments is that furnished by the plaintiffs' accounts and the entries made on Ex. A on 22nd April 1914. The evidence on the side of the defence consists merely of very general statements of two of the defendants. They are not even able to specify the dates or the amounts of the different payments, if there were any such. There can be no doubt whatever that the finding of the Subordinate Judge on this point is correct, namely that there were no payments other than those with which the defendants have been credited.

That being found against the defendants, there is hardly any substance in the question raised regarding appropriation whether certain payments which were entered on Ex. A were made towards the rent due on the lands covered by Ex. B, that is the usufructuary mortgage. The evidence on this point on the plaintiffs' side seems to be more reliable than that on the side of the defendants. The case of the plaintiffs is that all these payments, including those in question, were entered on Ex. A, because the defendants had agreed to execute a mortgage for the bulk of the amount due on that date, that is Rs. 50,000, and the plaintiffs agreed to release some of the lands included in Ex. A from encumbrances. It was on the condition that such a document would be executed that all the payments were entered on Ex. A. This story seems to be corroborated by Ex. M, a letter written by plaintiff 1 to plaintiff 2, and accords more with the probabilities of the case than the version of the defendants. The payments though covering several years, were all made on one date. The defendants tried to make out that the entries in question were made for the purpose of appropriating the payments towards the discharge of Ex. A itself and none of the payments were with respect to Ex. B for rent, which according to them had been paid separately. They being unable to prove any separate payments, their version fails. Nor can the evidence in support of this story be said to be satisfactory. The Subordinate Judge, we think has also rightly found this issue in favour of the plaintiffs.

As regards interest, it has been rightly held by the trial Judge that the alleged agreement not being registered could not be used to prove that the rate of interest mentioned in the mortgagedeed was not the rate which the defendants are liable to pay. The learned vakil for the appellants tried to argue that there had been a remission of the higher rate of interest, but no such case was put forward in the lower Court and cannot therefore be entertained in the appeal for the first time. The last objection urged before us is with respect to Ex. C, the last of the mortgages for Rs. 8,000 intended for the benefit of plaintiff 4. But we think that the Subordinate Judge has correctly found that it was executed in his name for the benefit of plaintiffs 1 to 3 as well as himself. It was then argued that the rent for the Andu year 1086 was barred. This would be so but for the acknowledgment alleged to be contained in Ex. E. We have no doubt that Ex. E, though couched in general terms amounts in law to an acknowledgment. And it is also clear that defendant 22 in writing acted on behalf of the entire family, that is defendants 1 to 6. In the result the appeal is dismissed with costs of respondents 1 to 4.

S.N./R.K. *Appeal dismisse* ·

A. I. R. 1919 Madras 93 (1)

WALLIS, C. J. AND AYLING, J.

Mallampalli Somayya and *another*—Plaintiffs—Appellants.

v.

Mallampalli Annapurnamma—Defendant—Respondent.

Civil Appeal No. 122 of 1918, Decided on 26th February 1919, from decree of Sub-Judge, Kistna, in Original Suit No. 50 of 1917.

Specific Relief Act (1 of 1877), S. 42—Reversioner can sue for declaration of title and for will not being genuine on which widow claims authority to adopt.

Where a Hindu widow sets up a power to adopt conferred on her under an alleged will, it is open to a reversioner to sue for a declaration that he is a reversioner of the deceased and that the will is not genuine : 47 *I. C.* 702, *Foll.*; 12 *I. C.* 176, *not Foll.* [P 93 C 1]

V. Suryanayana—for Appellants.

V. Ramadoss—for Respondents.

Wallis, C. J.—The Subordinate Judge has proceeded upon the authority of the decision in *Sreepada Venkataramana* v. *Sreepada Ramalakshmamma* (1), but this case has been dissented from in *Padmanabjudu* v. *Buchamma* (2), which I prefer to follow. I am unable to agree with the observation in the former case that S. 42, Specific Relief Act, does not authorize such a suit as this. The effect of the widow's setting up a will giving her power to adopt is, in my opinion, to challenge the absolute right of the plaintiff to succeed on her death if he survives her, and to convert him, in the language of English law, from an heir-apparent into an heir-presumptive. The rule that Courts in India will not entertain a suit by the plaintiff for declaration that he is a nearer reversioner than the defendant is not, in my opinion, based on the view that such a suit does not come within the terms of S. 42, but on the settled practice of the Court in the exercise of its discretion under the section, and has been so treated by Lord Parker of Waddington in *Saudagar Singh* v. *Pardip Narayan Singh* (3). Where a will giving authority to adopt is being set up by a widow, it is expedient that the question should be settled at once, and not left open until the best evidence has disappeared, and a suit such as this may therefore be regarded as in the nature of a suit quia timet. I would allow the appeal, reverse the decree, and remand the suit for disposal according to law.

Costs to abide.

Ayling, J.—I agree in the order proposed and adhere to my opinion expressed in *Padmanabhjudu* v. *Buchamma* (2).

S.N./R.K. *Appeal allowed.*

(1) [1911] 35 Mad. 592=12 I. C. 176.
(2) [1918] 47 I. C. 702.
(3) A. I. R. 1917 P. C. 196=45 Cal. 510=43 I. C. 484.

A. I. R. 1919 Madras 93 (2)

KUMARASWAMI SASTRI, J.

Chilukuri Narasimhacharyulu Garu—Plaintiff—Petitioner.

v.

Zamindar of Bobbili and *others*—Defendants—Opposite Parties.

Civil Revn. Petn. No. 567 of 1918, Decided on 7th March 1919, from decree of Dist. Judge, Vizagapatam, in Misc. Appeal No. 14 of 1917.

(a) Court-fees Act (1870), S. 12—Valuation determined for deciding question of pecuniary jurisdiction—S. 12 does not apply.

Section 12 has no application where the valuation is made by the Court for the purpose of determining the question whether the suit is within the pecuniary limits of the Court's jurisdiction. [P 94 C 1]

(b) Civil P. C. (1908), O 43, R. 1 a)—On determining valuation plaint returned—Appeal lies.

Where on the basis of valuation by Court for jurisdiction a plaint is returned for presentation to the proper Court an appeal lies against the order under O. 43, R. 1 (a). [P 93 C 2]

V. Suryanarayana—for Petitioner.

T. V. Venkatarama Aiyar and *Y. Suryanarayana*—for Opposite Parties.

Judgment.—The plaintiff who is the appellant, valued the lands referred to in the plaint at Rs. 100 and filed the suit in the District Munsif's Court. Objection was taken as to jurisdiction on the ground that the lands were greatly undervalued and that their proper value was beyond the Court's pecuniary jurisdiction. The District Munsif found on the evidence that the lands were worth Rs. 4,000 and ordered the plaint to be returned for presentation to the proper Court.

This order returning the plaint is appealable under O. 43, R. 1, Cl. (a), and an appeal was filed in the District Court. The District Judge, relying on S. 12, Cl. 1, Court-fees Act, held that no appeal lay as the decision of the District Munsif as to the valuation was final. I am of opinion that the decision of the District Judge cannot be supported. As was pointed

out in *Peari Shah* v. *Surja Mal* (1) S. 12, Court-fees Act, has no application where the valuation is made by the Court for the purpose of determining the question whether the suit is within the pecuniary limits of the Court's jurisdiction. All the authorities have been reviewed by Mookerjee and Holmwood, JJ., and I entirely agree with the decision which is in accordance with the view taken by this Court in *Annamalai Chetti* v. *Cloete* (2) and *Kanaran* v. *Komappan* (3).

I set aside the decree of the lower Court and direct it to dispose of the appeal according to law. Respondents will pay appellant's costs.

S.N./R.K. *Decree set aside.*

(1) [1912] 16 I. C. 575,
(2) [1882] 4 Mad, 204.
(3) [1891] 14 Mad. 169.

A. I. R. 1919 Madras 94
Full Bench

WALLIS, C. J., AYLING AND SADASIVA AIYAR, JJ.

Amrutam Venkatappa and *others* — Plaintiffs—Appellants.

v.

Vavila Jalayya—Defendant—Respondent.

Second Appeal No. 54 of 1918, Decided on 7th April 1919, against decree of Dist. Judge, Guntur, in Appeal Suit No. 396 of 1916.

Civil P. C. (5 of 1908), S. 66—Subsequent agreement by auction purchaser to convey property is valid—Suit for specific performance is not barred—Mere mention in plaint that auction purchase was benami does not bring it within S. 66.

Section 66, does not debar a person from maintaining a suit for specific performance of an agreement by the auction-purchaser subsequent to the purchase to convey the property to him. The transaction is not benami and the mere allegation in the plaint that it was a benami transaction does not bring it within the mischief of the section. [P 95 C 1]

T. Prakasam—for Appellants.

V. Nageswara Aiyar for *V. Lakshminarayana*—for Respondent.

Order of Reference.

Sheshagiri Aiyar and Phillips, JJ.—The facts found are: Plaintiff and the defendant agreed that at the Court auction the property in suit should be purchased in the name of the defendant and that one-half of it should be conveyed to the plaintiff after obtaining the certificate of sale: some money was paid before the Court auction, and apparently plaintiff was put in possession of the half-share. In September 1907 a promissory note for the balance of the purchase money due from plaintiff was executed. Nearly 5 years afterwards, the promissory note was discharged and Ex. A was executed to the plaintiff in which it was provided that the defendant should execute a conveyance for the half-share whenever plaintiff demanded it. This suit is to enforce that agreement. In the plaint it is stated that the half-share intended to be conveyed was purchased in the name of the defendant benami for the plaintiff. The question for consideration is whether the suit is within the mischief of S. 66, Civil P. C. There is some difference between the language of S. 317 of the old Code; and that of S. 66 of the new Code: but we do not think there is any material alteration in the principle of the section. In this Court, the decisions have not been uniform on the question. In *Kumara* v. *Srinivasa* (1), *Sankunni Nayar* v. *Narayanan Nambudri* (2) and *Kumbalinga Pillai* v. *Ariaputra Padiachi* (3) suits under similar circumstances were held not barred by S. 317. On the other hand in *Subramania Pillai* v. *Gopalarama Subramaniam* (4) the decision was the other way. Recently, Coutts-Trotter and Srinivasa Iyengar, JJ., had to consider the question in Appeal Suits Nos. 167 and 215 of 1914. *Chidambaram Chettiar* v. *Subramania Aiyar* (5). Apparently, in the view taken by Coutts-Trotter, J., such a suit would not be affected by S. 66 of the Code. There is also the dictum of the Judicial Committee in *Ganga Sahai* v. *Kesri* (6) that the object of the section is to prevent judgment-debtors from getting property purchased in the names of third parties benami for themselves. The language of the section seems to be wider: However as the question is one of some importance, we have resolved to ask the opinion of a Full Bench on the following question:

"When the plaintiff alleges that the auction-purchaser is a benamidar for him and sues to enforce specifically a subsequent agreement executed by the certified purchaser to convey the property, is S. 66 a bar to such a suit ?"

Opinion.—We do not think that this is a suit against the auction-purchaser on

(1) [1888] 11 Mad. 213.
(2) [1894] 17 Mad. 282=4 M. L. J. 64.
(3) [1895] 18 Mad. 436=5 M. L. J. 200.
(4) [1915] 29 I. C. 138.
(5) [1916] 32 I. C. 434.
(6) A. I. R. 1915 P. C. 81=37 All. 545=42 I. A. 177=30 I. C. 265 (P. C.).

the ground that the purchase was made on behalf of the plaintiff within the meaning of S. 66, Civil P. C. The finding is that the defendant agreed that the property should be purchased in the name of the defendant and that one-half of it should be conveyed by the defendant to the plaintiff after the sale certificate had been obtained. This in our opinion is not a benami transaction at all. The mere fact that the plaintiff alleges in the plaint that the auction-purchaser was a benamidar for him has not, in our opinion, the effect of debarring the plaintiff under S. 66, Civil P. C., from maintaining his suit for specific performance of an agreement by the auction-purchaser subsequent to the purchase to convey the property to the plaintiff. Such an agreement is not inconsistent with the auction-purchaser's own title, but rather the reverse. We answer the question in the negative.

S.N./R.K. *Answered in the negative.*

A. I. R. 1919 Madras 95

OLDFIELD AND PHILLIPS, JJ.

Venkataramier — Defendant — Appellant.

v.

Gopalan and *another* — Plaintiffs — Respondents.

Second Appeal No. 1498 of 1917, Decided on 12th August 1918, against decree of Dist. Judge, Tanjore, in Appeal Suit No. 680 of 1916.

(a) Hindu Law—Adoption—First adopted son dying while infant—Second adoption is valid.

The adoption by a widow of a deceased Hindu co-parcener, after the death of a prior adopted son while an infant and unmarried, is valid and the second adopted son inherits to both the joint and separate properties of his adoptive father. [P 97 C 1]

(b) Hindu Law—Adoption—Power to adopt comes to end when estate vests in full owner capable of continuing line of succession.

The power to adopt comes to an end when the estate is vested in a person who is a full owner and fully capable of himself continuing the line of succession, and when once an estate is so vested, even though the last full owner has not taken steps to provide for its devolution after his death but has allowed it to devolve by process of law on a collateral, he has by his act or omission divested the succession and therefore the widow of his father cannot step in to divest the new heir in whom the property has vested: *A. I. R.* 1915 *Mad.* 274; 26 *Bom.* 526; *A. I. R.* 1918 *P. C.* 74; 21 *I. C.* 107; 18 *Cal.* 385 and 10 *M. I. A.* 379, *Foll*; 1 *Mad.* 174 and 21 *I. C.* 107, *Dist.* [P 98 C 1, 2]

(c) Hindu Law—Adoption—Existence of co-parcener is no obstacle to widow's exercising power to adopt.

Per *Oldfield, J.*—The existence of a co-parcener otherwise competent to take by survivorship is no obstacle as to the widow's exercise of the power of adoption as recognized: 10 *M. I. A.* 279 (*P.C.*) and *A. I. R.* 1918 *P. C.* 74. [P 97 C 2]

(d) Hindu Law—Adoption—Theory that adoption should be to last male holder does not apply to joint family.

Per *Phillips, J.*—The theory that an adoption should be to the last male holder is not applicable to joint Hindu families living in co-parcenary. [P 99 C 1, 2]

S. Varadachariar for *A. Krishnaswami Aiyar* and *S. Aravamudu Iyengar*—for Appellant.

K. Bashyam Iyengar, *S. Panchapagesa Sastri* and *K. Sankara Sastri*—for Respondents.

Oldfield, J.—One Ramasami Sastri died, leaving joint and separate property. Subsequently his widow under an authority given by him adopted two boys in succession, the second, now plaintiff-respondent, after the death of the first at the age of four. The question is, whether plaintiff is entitled against defendant 1, here appellant, the undivided brother of Ramasami Sastri, to a share in the joint property by partition and to the latter's separate property by inheritance. It is conceded that the widow would not be debarred merely by the failure of the first adoption from making a second; and it is not disputed that authority would be in plaintiff's favour, if there were only separate property. The question is whether he is entitled to a share in the joint property. Considerations of convenience and symmetry are on his side, since it would be anomalous that his adoption should be recognized to enable him to inherit one description of property and not to entitle him to partition of the other. It is not however necessary to resort to those considerations in order to find ground for a decision in his favour.

At p. 251, Mayne's Hindu Law, and Usage, Edn. 8, the rules deducible from the authorities regarding divestiture of estates in consequence of adoption are stated. But it is better to attempt to reach the principle, on which such rules may be founded, if only because the learned author's references to the divesting of estates are not always strictly applicable to joint family property, such as is now in dispute. That principle has been formulated differently on each side. Defendant 1 contends that the widow can adopt after the estate of a deceased adopted son or other person entitled has intervened between the death of her hus-

band and the date of the adoption, only if she has herself succeeded in the absence of a successor to such son or person; plaintiff, that the principle is, as stated by Chandavarkar, J., in *Ramkrishna* v. *Shamarao* (1), that

"where a Hindu dies leaving a widow and a son and that son dies leaving a natural born or an adopted son or leaving no son, but his own widow to continue the line by means of adoption, the power of the former widow is etxinguished and can never afterwads be revived."

And this must, it will be seen, be extended to cases, in which the son did not actually leave a widow or give his widow authority, but died after reaching an age, at which he was capable of doing either. Shortly, the decisive consideration is on the one view the existence at the date of the disputed adoption of some one, other than the adopting widow, immediately entitled to the estate; on the other the previous extinction of the widow's power in consequence of other possibilities of the continuance of the line having arisen. In the present case on the one hand defendant 1 is such a person; but on the other, the first adopted son having died at the age of four, no such possibilities are in question and the widow's power is still exercisable.

The point does not fall to be decided on any text; and the doubt regarding it arises from the alleged ambiguity of the earliest authority on it, *Chundrabullee's* case (*Mt. Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*) (2). The question arose there between the son adopted by the widow of and the son's widow of one Gour Kishore, no co-parcener being in question. The material part of the judgment consists first in reference to the extinction of the widow's power, to the son's marriage, to his having lived to an age which enabled him to perform ceremonies for his father's benefit, or to adopt a son; and his failure to actually beget or adopt a son is explicitly treated as immaterial. All this supports plaintiff's argument. But there follows a reference, on which defendant 1 relies, to the facts that the son's widow had acquired a right to the estate and that in her absence Gour Kishore's widow would by the adoption have divested no estate but her own. And defendant's contention is no doubt reconcilable with the description of the decision in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (3) as not governing a

"case, in which the adoption was made in derogation of the adoptive mother's estate", but deciding that "the son having died leaving a widow, in whom the inheritance had vested, the mother could not defeat the estate so vested by making an adoption."

The arguments addressed to us traced the current of authority in the High Courts, which have dealt with these alternative principles, Madras, Calcutta, Bombay, and showed that its direction has varied, particularly in the lastmentioned. But it is unnecessary to go through the cases, because all doubt has now been set at rest by the recent judgment of the Privy Council in *Madana Mohana Ananga Bheema Deo* v. *Purushothama Ananga Bheema Deo* (4), in plaintiff's favour. There the succession to an impartible zamindari was in dispute between a second adopted son and a reversioner, the first adopted son having died leaving a widow, who was not a party. Reference was made to *Chundrabullee's* case (*Mt. Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*) (2). The dictum of Chandavarkar, J., was explicitly adopted; and it was held, as the sole ground of decision, that the widow's power came to an end, when the son she first adopted died after attaining full legal capacity to continue the line, either by the birth of a natural born son or by the adoption to him of a son by his own widow. And this, it was stated explicitly, in no degree depended on the fact that there was no evidence as to whether the widow had or had not authority to make such an adoption.

It is then, however, argued that this result, the adoption of the rule proposed by plaintiff, which was all that was necessary in the case under disposal, does not in the present case negative the necessity for the application of that, for which defendant 1 contends, as a further test of the validity of the adoption. The question, it is said, to follow the words of Batchelor, J., in *Bhimabai Krishnappa Desai* v. *Tayappa Murarrao* (5), is not only whether the widow has power to adopt, but further whether, "given

(1) [1902] 26 Bom. 526.
(2) [1863-66] 10 M. I. A. 279=1 Suth. 574=2 Sar. 111 (P. C.).
(3) [1876] 1 Mad. 174=4 I. A. 1=3 Sar. 669=3 Suth. 353 (P. C.).
(4) A. I. R. 1918 P. C. 74=46 I. C. 481=41 Mad. 855=45 I. A. 156 (P. C.).
(5) [1913] 37 Bom. 598=21 I. C. 107.

that the adoption does divest another heir's vested estate, the adoption is valid." The latter question the Privy Council no doubt had not to consider. But its reference to two other cases besides *Chundrabullee's* (2) indicates its attitude. In *Padmakumari Debi Chowdhrani* v. *Court of Wards* (6), Chundrabullee's adoption again came under consideration, the argument being that it might be valid, when it was relied on subsequently and for other purposes; and their Lordships explained their previous decision in words. which they quoted later in *Thayammal* v. *Venkatarama* (7) with reference to the ceremonial competence of the last male holder of the estate and on the consequent determination of the widow's power. This is the more significant, because in the judgments of the High Court under appeal, *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee* (8), that reference had been directly challenged as due to inadvertence and the challenge was met by no suggestion that the decision was reached also on another ground. It is not possible in these circumstances to follow Batchelor, J., in the case above referred to and to treat any rule based on the fact that no estate but the widow's own was divested as the "summary and culmination" of the judgment in *Chundrabullee's* case *Mt. Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhary* (2). Such a rule, if it is not authorized by that judgment, cannot be founded on the short description of it given in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (3); and we have been shown no alternative source from which it can be derived.

Some argument has been attempted with reference to the principle that an adoption by the widow cannot divest an estate, which has vested, as the estate had done in *Madana Mohana Ananga Bheema Deo* v. *Purushothama Ananga Bheema Deo* (9), in the person entitled by the ordinary rules of succession; and it is further argued that divestiture of joint family property stands in any case on a different footing from that of impartible property. As regards the latter the case cited is sufficient authority, since it contrasts the divesting on the occasion of a previous adoption by the same widow with that in question in it and explains the former on the ground that, so long as the widow's power was operative, the person divested had only a temporary right to enter, which operated merely to prevent the succession falling into abeyance. See also *Surendra Nandan* v. *Sailaja Kant* (10), a case decided with reference to joint family property and therefore relevant to defendant 1's second contention just referred to.

As regards that contention, it would serve no good purpose to follow the argument through the various authorities cited, since in this Court the reference obiter by White, C. J., in *Sinnachami* v. *Ramasamy Chettiar* (11) to the absence of authority to show that the principle of *Chundrabullee's* case *Mt. Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhary*, (2) did not apply in the case of a joint. Hindu family and the full judgment of Seshagiri Aiyar, J., in *Madana Mohana Ananga Bheema Deo* v. *Purushothama Ananga Bheema Deo* (9) from which White, C. J., did not dissent and in which I respectfully concur, seem to me to place the point beyond doubt. True, the learned Judge was dealing in the latter case with the rather different question whether impartible property could be divested by an adoption not made to the last male holder. But it was a part of his argument that the question would have been answered similarly in the affirmative, if joint family property had been in dispute, because impartible property is merely joint family property subject to an exception as to enjoyment. The learned Judge's conclusion was apparently not assailed before the Privy Council and may be accepted as the law; and I cannot find and we have not been shown anything in the rule in the form, with which we are concerned, which makes the exception, to which he referred, material. It follows from the considerations referred to by him that the existence of a co-parcener otherwise competent to take by survivorship is no obstacle to the widow's exercise of the power of adoption recognized in *Chun-*

(6) [1882] 8 Cal. 302=8 I. A. 229=4 Sar. 285 (P. C.).
(7) [1887] 10 Mad. 205=14 I. A. 67=5 Sar. 10 (P. C.).
(8) [1880] 5 Cal. 615.
(9) A.I.R 1915 Mad. 274=38 Mad. 1105.
(10) [1891] 18 Cal. 385.
(11) [1911] 13 I. C. 7.

drabullee's case *Mt. Bhooban Moyee Debia* v. *Ram Kishore Acharj Chowdhary*, (2) and in *Madana Mohana Ananga Bheema Deo* v. *Purushotama Ananga Bheema Deo* (4).

The result is that the second appeal must be dismissed with costs.

Phillips, J.—In this case the appellant, defendant 1 is the undivided brother of one Ramaswami Sastri and he appeals against the decree obtained by the plaintiff, the adopted son of Ramaswami Sastri, for his share in the family property. After Ramaswami Sastri's death his widow adopted a boy who died at the age of 4 and she afterwards adopted the plaintiff. The factum of adoption is not disputed, nor is it disputed that she had authority to make a second adoption provided it was not otherwise invalid in law. The sole question that has been argued before us is as to the validity of the plaintiff's adoption. The pleader for the appellant, relying on the case of *Mt. Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhary* (2), contends that a second adoption, which is not to the last male holder, cannot be allowed to divest the undivided brother of the estate which vested in him on the death of thelast male holder. It is not disputed that the the adoption of the first son was valid, although it equally divested the brother of the estate. The argument is that when the adoption is not to the last male holder its validity has to be determined on different principles to those which we should follow in considering an adoption to the last male holder. In *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo* (12) the Privy Council upheld the validity of an adoption so as to oust a brother of the adoptive father in an impartible zamindari, and in *Bachoo* v. *Mankorebai* (13) the widow of one deceased brother was allowed to adopt a son after the death of another brother who left a posthumous son. It cannot therefore be disputed that a widow has power in an undivided family to adopt a son to the prejudice of the surviving members of the family, and it is difficult to see on what principle one can differentiate such an adoption when it is made to the last male holder of an undivided share from an adoption made to the last male holder but one, even if it can really be said that the share of a son in an undivided family is identical with the share of his deceased father. If in an undivided family the share of a deceased member vests in the survivor, the latter would be divested equally in both cases and to say that such a divestment is to be allowed in one case and not in the other, does not seem to be based on any particular principle. The leading case on the validity of such adoptions is *Mt. Bhoobun Mayee Debia* v. *Ram Kishore Acharj Chowdhry* (2) and it was there held generally that when a son had succeeded to the ancestral properly as heir and had full power of disposition over it and might have alienated it or might have adopted a son to succeed to it if he had no male issue of his body, then it is not open to his father's widow to make an adoption merely because the son died without male issue and without making an adoption, because her authority to adopt had come to an end. In that case the son had left a widow and it was held that she could not be divested by an adoption to her father-in-law when a natural born brother of her husband would not have divested her of her estate.

The argument for the appellant in this case has been based almost entirely on the question of devolution of property, and it has been contended that the validity of an adoption depends entirely on its effect on the devolution of the property belonging to the father to whom the adoption was made. This overlooks the other aspect of adoption, namely, that a son is adopted in order to perform certain ceremonies for his father and in order to continue his father's line for his father's benefit, and the principle underlying the decision in *Mt. Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (2) has been stated in *Ramkrishna* v. *Shamrao* (1) by Chandavarkar, J., on p. 532 to be as follows:

> "Where a Hindu dies leaving a widow and a son, and that son dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived."

This principle was approved by a recent Privy Council decision in *Madana Mohana Ananga Bheema Deo* v. *Purushothama Ananga Bheema Deo* (4) and

(12) [1876] 1 Mad. 69=3 I. A. 154=3 Sar. 583 =3 Suth. 263 (P.C.).

(13) [1905] 29 Bom 51.

there their Lordships say that the authority to adopt conferred on the father's widow came to an end when the son she originally adopted died after attaining full legal capacity to continue the line either by the birth of a natural born son or by the adoption to him of a son by his own widow, and their Lordships observe further that they do not base their decision on the power of the son's widow to adopt, for they say that even in its absence the succession of Brojo Kishore (i. e., the son) and his dying after attaining full legal capacity to continue the line would in themselves have been sufficient to bring the limiting principle into operation.

It would seem therefore that the principle in these cases is that the power to adopt comes to an end when the estate is vested in a person, who is a full owner and fully capable of himself continuing the line of succession and that when once an estate is so vested even though the last full owner has not taken steps to provide for its devolution after his death, but has allowed it to devolve by process of law on a collateral, he has by his act or omission divested the succession and therefore ths widow of his father cannot step in to divest the new heir in whom the property has vested. There is a case in *Bhimabai Krishnappa Desai* v. *Tayappa Murarrao* (5), where a widow adopted a son who died unmarried. She then adopted another boy, which was held to be invalid because under the Bombay Hereditary Offices Act a reversioner had succeeded to the property on the death of the first adopted son, but that decision appears to rest upon the peculiar nature of the property in the case as otherwise it would be opposed to the case in *Vellenki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (3), where the Privy Council held that a widow could adopt a son on the death of her natural born son under age and unmarried. Nearly all of these cases deal with separate property and the question whether a second adoption can be made in an undivided family has not been definitely decided in any reported case. But the point has been considered in *Madana Mohan Ananga Bheema Deo* v. *Purushothama Ananga Bheema Deo* (9), where Seshagiri Aiyar, J., is of opinion that the theory that an adoption should be to the last male holder is not applicable to joint Hindu families living in co-parcenary. The late Sir Arnold White, C. J., was inclined to take a different view but was not prepared to assert it definitely and left the question open. In considering the case of an undivided Hindu family one point for consideration is whether the surviving member can be said to be divested of the share of the deceased member by the adoption of a son to him.

The exact interest in the family property of any particular member of an undivided family cannot be ascertained with any accuracy until the time of partition actually arrives. Any member's share is apt to be increased or decreased according as the number of members in the family is in creased or decreased and this point was considered in *Bachoo* v. *Mankorebai* (13), where it was held by Russell, J., that the survivor was not the sole absolute proprietor or full owner of the estate of his deceased brother ; and we see that in no decision has the principle, that when the adoption is not to the last full owner of the estate the question of divesting the heir comes into play, been applied to undivided property. If a person who takes an estate by survivorship is not the full owner—and it is difficult to look upon him as such, considering the fact that other members of the family may be born who will take an interest in the estate—the principle of adoption to any one not the last full owner would not apply to undivided families as pointed out by Seshagiri Aiyar, J., in *Madana Mohana Ananga Bheema Deo* v. *Purushothama Ananga Bheema Deo* (9). The present case is further complicated by the fact that plaintiff's adoptive father had self-acquired properties as well as ancestral property. So far as the former are concerned the adoption would be valid in accordance with the decision in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (3) and the point is conceded in argument ; but if the contentions for appellant are accepted the adoption would not be valid in respect of the ancestral property. In this view plaintiff would take the separate property as his father's son, but in respect of the ancestral property would not be his father's son. This reductio ad absurdum is, I think, an additional reason for holding that the principle contended for by appellant is not sound.

In this view I think the plaintiff's adoption in the present case must be held to be valid, for the first adopted son died as an infant at the age of 4 and unmarried, and in the words of the Privy Council had not attained "full legal capacity to continue the line." Therefore the adoption of a second son had merely the effect of continuing the line of the last full owner and did not disturb any new line of the inheritance. The circumstance requisite to determine the widow's power of adoption as laid down in *Madana Mohana Ananga Bheema Deo* v. *Purushothama Ananga Bheema Deo* (4) had not come into existence, and the adoption is therefore valid. The second appeal is dismissed with costs.

S.N./R.K, *Appeal dismissed.*

A. I. R. 1919 Madras 100 (1)

KUMARASWAMI SASTRI, J.

M. Sankaram Iyer—Plaintiff—Petitioner.

v.

Thiraviya Nadan—Defendant—Opposite Party.

Civil Revn. Petn. No. 569 of 1918, Decided on 7th March 1919, against the decree of Sub-Judge, Tinnevelly, in S. C. S. No. 1694 of 1917.

Limitation Act (9 of 1908), S. 20—Pro-note barred by time—Payments pleaded—Pro-note and hypothecation debt only existing—Pro-note of earlier date—Payment appropriated generally—No special appropriation need be proved to extend time—Contract Act (9 of 1872), Ss. 59, 60 and 61.

In a suit on a pro-note which was barred on the face of it, the plaintiff alleged two different payments by defendant as saving the bar. The only debts due by the defendant on the dates of the payments were the suit note and another hypothecation bond. The note was the earlier of the two. The plaintiff had appropriated the payments generally towards defendant's debts:

Held: that no special appropriation towards the suit note was necessary and that the suit was in time. 14 *I. C.* 580 and 8 *I. C.* 81, *Foll.*

[P 100 C 2]

S. Ramaswamy Aiyar—for Petitioner.

M. Govindarajulu Naidu—Opposite Party.

Judgment.—The Subordinate Judge disbelieves the plea of discharge. He finds the two payments alleged by the plaintiff to be true, but dismissed the suit on the ground that it was barred by limitation as the plaintiff did not make a special appropriation towards the defendant's accounts. The only transactions outstanding when the payments were made were the promissory note and the hypothecation. The note was the earlier of the two. If the appropriation was generally towards the sum due on both transactions, both will be saved. See *Soumia Narayana Iyengar* v. *Alagirisawmy Iyengar* (1) and *Hingu Miya* v. *Heramba Chandra Chakravarti* (2) I set aside the decree of the lower Court and pass a decree for plaintiff for the amount claimed. The respondent will pay the petitioner's costs in this and the lower Court.

S.N./R.K. *Decree set aside.*

(1) [1912] 14 I. C. 580.
(2) [1910] 8 I. C. 81.

A. I. R. 1919 Madras 100 (2)

PHILLIPS AND KUMARASWAMI SASTRI, JJ.

T. V. Vedavyasa Ayyar—Defendant—Appellant.

v.

Madura Hindu Sabha Nidhi Co. Ltd. and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1252 of 1917, Decided on 27th August 1918, against the decree of Dist. Judge, Madura, in Appeal Suit No. 273 of 1915.

Civil P. C. (1908), Ss. 11 and 47—Form 7 App. D—Mortgage decree in favour of mortgagee—Prior and puisne mortgages—Direction to puisne mortgagee to share in surplus sale proceeds—Private sale and satisfaction of decree—Suit by puisne mortgagee to enforce his mortgage is not barred.

The rights of a puisne mortgagee under a decree drawn up according to Form 7, Appendix D, Civil P. C., is contingent on the property being brought to sale for nonpayment of the sum found due to mortgagee 1, plaintiff, and the decree cannot be read as a decree directing the mortgagor to redeem each of the puisne encumbrancers within the time limited for redeeming mortgagee 1 and to entitle the puisne encumbrancer, on default, to bring the property to sale for nonpayment, not of the sum decreed to mortgagee 1, but to each of them. The utmost that the puisne mortgagee can claim is that, if mortgagee 1 for some reason or other does not apply for sale in spite of the fact that he has not been paid, the puisne mortgagee can apply for sale in order to work out his right to share in the surplus, if any. The puisne mortgagee cannot be treated as a decree-holder entitled to bring the property to sale in default of payment of the sum declared to be due to him. [P 102 C 2]

Plaintiff brought the present suit to enforce a mortgage in his favour by defendants 1 and 2. The latter had executed an earlier mortgage in favour of *N. N.* sued defendants 1 and 2 and also the present plaintiff as the puisne mortgagee and obtained a decree in Form 7, Appendix D, Civil P. C. Under that decree the property was to be sold and the present plaintiff was to share the surplus sale proceeds if any. One of the items was brought to sale in execution of the said decree but on the plaintiff satisfying *N.*'s decree by pri-

vate sale, the Court sale was set aside. The plaintiff's mortgage not having been satisfied, the present suit was filed impleading defendant 12 who was the alienee from defendants 1 and 2. It was objected (1) that the plaintiff's right was only to execute the decree in the former suit and that the present suit was barred under S. 47, and (2) that the suit was barred as res judicata:

Held: that the suit was not barred either under the provisions of S. 11 or S. 47: 12 *I. C.* 432 and *Platt* v. *Mendel*, (1884) 27 *Ch. D.* 246, *Dist.*

[P 103 C 1]

K. S. Jayarama Aiyar and *T. L. Venkatrama Aiyar*—for Appellant.

C. V. Ananiha Krishna Aiyar and *P. S. Narayanaswami Aiyar*—for Respondents.

Kumaraswami Sastri, J.—Defendant 12 is the appellant. Defendants 1 and 2 mortgaged certain items of property to one Naga Aiyar, who filed Original Suit No. 61 of 1910 on the file of the Court of the Principal District Munsif of Madura to recover the sum due on his mortgage. He impleaded the puisne mortgagees, one of whom was the present plaintiff Nidhi. A decree was passed in Form 7, Appendix D, Civil P. C. The amounts due to the plaintiff in the suit and the puisne mortgagee defendant were declared, but the sale of the mortgaged properties was ordered only in case the defendant did not pay the amount found due to the plaintiff, and the only right given to the puisne mortgagees was to share in the surplus, if any, arising out of the sale. One of the items of the property was brought to sale in execution of the decree, but the plaintiff decree-holder was satisfied as the amount due was paid under O. 21, R. 89, Civil P. C., and the sale set aside. The property was sold by private sale to the appellant As he did not pay the amount found in Original Suit No. 61 of 1910 to be due to respondent 1, herein, he sued for the recovery of the amount due to him as his mortgagor. Various defences were raised, the chief of which were (1) that the remedy of the plaintiff was by executing the decree in Original Suit No. 61 of 1910 and not by separate suit, and (2) that the second suit was barred, the matter being res judicata. The Subordinate Judge overruled the objections raised and passed a decree which was confirmed by the District Judge.

I am of opinion that the decision of the lower Courts is right. No doubt the present plaintiff Nidhi was party to Original Suit No. 61 of 1910 as a puisne encumbrancer and the amount due to it was ascertained. The decree however did not direct redemption of the subsequent mortgagees and expressly authorized sale only in case the amount due to mortgagee 1 was not paid within the time limited. The only right given to the puisne encumbrancers was the right to redeem mortgage 1 and on sale to share in the surplus sale proceeds in order of priority. In *Sarat Chandra Roy* v. *Nahapiet* (1) the effect of a decree drawn up under Form 7, Appendix D, of the Code was considered, and Pugh, J., was of opinion that there was no right conferred on mortgagee 2 to get any relief at all if the mortgagor satisfied mortgagee 1's claim. He observed:

"In my view therefore under the Code, mortgagee 2 is there simply for the purpose as indicated by Brett and Mookerjee, JJ., in *Mackintosh* v. *Watkins* (2) of receiving any surplus sale proceeds or of redeeming, and that he cannot take any independent action and treat the decree as in other respects in his favour."

Referring to *Kissory Mohun Roy* v. *Kally Churn Ghose* (3) the learned Judge distinguished the case on the ground that it related to a decree passed as on the original side of the High Court; and in *Mackintosh* v. *Watkins* (2) Brett, J., took the view that the practice and procedure followed in the original side was not to govern decrees passed by Courts in the mofussil, which were governed by the Civil P. C., and T. P. Act. In *Mackintosh* v. *Watkins* (2) it was held by Brett and Mookerjee, JJ., that in a suit by a mortgagee 1 impleading the mortgagor and the puisne mortgagees, the mortgagor cannot be called upon to redeem the subsequent mortgagee defendants and that they are not entitled to have the property sold for the nonpayment of the sums due to them. Brett, J., observed that the object of impleading the puisne mortgagee was to enable the property to be sold free from his encumbrance, and

" not to enable him to practically obtain a decree against the principal defendant without bringing a suit properly framed for the purpose."

The learned Judge was also of opinion that such a procedure would be opposed to the provisions of Ch. 3, Court-fees Act. Mookerjee, J., was of opiuion that Ss. 86 to 89, T. P. Act

(1) [1910] 37 Cal. 907=8 I. C. 1142.
(2) [1905] 1 C. L. J. 31.
(3) [1895] 32 Cal. 100.

"do not provide that the mortgagor may be called upon by the decree nisi to pay to a puisne encumbrancer, who has been joined as a party defendant, what may be found due to him upon his mortgage; the mortgagor therefore cannot incur the liability to have his property sold by reason of nonpayment of the dues of the subsequent encumbrancer."

He held that if the mortgagor defendant pays to the plaintiff mortgagee what may have been found due to him, the property was not liable to be sold under the decree in the suit at the instance of the second mortgage. In *Sarurjigar Begam* v. *Baroda Kant Mitter* (4) the same learned Judge was of opinion that if the amount due to the first mortgagee was paid, there can be so sale of the mortgaged properties and the puisne encumbrancers would obtain no relief in the suit.

It is contended for the appellant that in a mortgage suit when puisne encumbrancers are made parties defendants there is a decree in favour of each of the mortgagees which can be executed by him, and reliance has been placed on *Govinda Taragan* v. *Veeran* (5) and the unreportod decision in Appeal Against Appellate Order No. 87 of 1907. I do not think these decisions support the broad propositions contended for. The former case related to a suit for redemption of a mortgage, and it was held that para. 2, S. 93, T. P. Act did not take away the right from the plaintiff mortgagor to apply for a sale. The learned Judges after discussing the right of the mortgagor and mortgagee, observe that in some cases provisions for sale may be as much for the benefit of the mortgagor as for the benefit of the mortgagee and that:

"Where the decree is imperative there is no reason why the decree should not be regarded as passed for the benefit of all the parties to the suit."

They thought there was no reason for holding that any of the parties to the suit, who would be benefited by the sale, cannot apply for the enforcement of the decree. I should be observed that the suit was between mortgagor and mortgagee and no question arose as to the rights of puisne encumbrancers. The decree was for redemption, and the only question was whether it was open to the plaintiff in a redemption suit to apply for sale under Ss. 92 and 93, T. P. Act. In the present case there is nothing in the decree directing the mortgagor to pay off the subsequent mortgagees. The decree no doubt declared the amount due to them, but this was only with the view of enabling them to share in the surplus should the property be sold owing to nonpayment of the sum due to the plaintiff who was the first mortgagee. The right of the subsequent mortgagees under the decree drawn up according to Form 1, Appendix D, Civil P. C., is contingent on the property being brought to sale for nonpayment of the sum found due to the plaintiff mortgagee, and the decree cannot be read as a decree directing the mortgagor to redeem each of the puisne encumbrancers within the time limited for redeeming the first mortgagee and to entitle the puisne encumbrancer on default to bring the property to sale for nonpayment not of the sum decreed due to the first mortgagee, but each of them.

The utmost that can be said is that if the first mortgagee for some reason or other does not apply for sale in spite of the fact that he has not been paid, the other mortgagees can apply for sale in order to work out the rights to share in the surplus, if any. This is quite different from their applying to sell the property to discharge the amount declared due to each of them. If the mortgagor pays off the amount for which alone a sale in default of payment was directed, it is difficult to see how under the express terms of the decree, each puisne encumbrancer can come forward and ask for sale. No time is fixed in the decree for redeeming them. There is no direction in the decree directing the mortgagee to pay them any amount and the right to share, which is dependent on there being a sale, and a surplus after paying off the plaintiff mortgagee, cannot be enforced if for any reason the sale cannot take place at the instance of the plaintiff. Reference has been made to the English practice as set out in *Platt* v. *Mendel* (6) and Daniel's Chancery Practice, but it is unnecessary to consider whether having regard to the provisions of the Transfer of Property Act, Courts in India can pass a decree directing plaintiff to redeem each of the puisne mortgagees, and direct a sale at the instance of each of them in case of his failure to do so. No such decree has been

(4) [1910] 37 Cal. 526=5 I. C. 539.
(5) [1913] 36 Mad. 32=12 I. C. 432.
(6) [1984] 27 Ch. D. 246.

passed in the present case. In Appeal Against Appellate Order No. 87 of 1917 the submortgagee applied to enforce the decree in favour of his mortgagor who was the mortgagee from the owner of the property. All that was held was that he was entitled to apply for execution and to work out his rights by the sale of the property. The sale was to be for the amount directed in the decree to be paid by the original mortgagor to the mortgagee who in turn submortgaged the property to the defendant. There is nothing in the judgment which suggests that puisne mortgagees should be treated as decree-holders entitled to bring property to sale, in default of payment of the sum declared to be due to them though the decree contains no direction that they should be redeemed or that property should be sold in default of payment of the sums declared to be due to the puisne mortgagees. The submortgagee is an assignee of the original mortgagee and his being allowed to work out his rights, doing what his mortgagor could have done, would not confer similar rights on third parties claiming in their own right.

As respondent 1 was not entitled to execute the decree in Original Suit No. 61 of 1910, S. 47, Civil P. C., has no application. As regards the question of res judicata the present suit is beyond the pecuniary limits of the jurisdiction of the District Munsif. Original Suit No. 61 of 1910, which was on the file of the District Munsif's Court, cannot render the present suit as res judicata. Moreover, as pointed out in *Debendra Nath Sen* v. *Mirza Abdul Samed* (7), a suit by a puisne mortgagee, who is a party to a prior suit by another mortgagee can only be barred if the puisne mortgagee is in a position to have his claim satisfied from the surplus sale proceeds realized in execution of the decree in the prior suit. The second appeal fails and is dismissed with costs.

Phillips, J.—I agree.

S.N./R.K. *Appeal dismissed.*

(7) [1909] 1 I. C. 264.

A. I. R. 1919 Madras 103

SESHAGIRI AIYAR AND MOORE, JJ.

Akula Achiah — Defendant 2— Petitioner.

v.

(Challapalli) Lakshminarasimham — Plaintiff—Opposite Party.

Civil Revn. Petn. No. 706 of 1918, Decided on 6th August 1919, against order of Dist. Munsif, Bezwada, in Civil Misc. Petn. No. 2760 of 1917.

Provincial Small Cause Courts Act (1887), S. 17—Provision is not mandatory— Deposit need not accompany application if made before hearing there is sufficient compliance.

When an application is made under S. 17 to set aside an ex parte decree, the deposit required by the section need not be made at the time of presenting the application. The provisions of the section not being mandatory, it would be sufficient compliance therewith if the amount is deposited before the application is heard.

[P 103 C 2]

S. Swaminadhan—for Petitioner.

T. Ramachandra Rao — for Opposite Party.

Judgment.—In this case an ex parte decree was passed on 27th July 1917. The defendant, alleging that he did not become aware of the decree till 26th August 1917, and that the summons was not served on him personally, applied to set aside the ex parte decree. This was on 29th August 1917. It is conceded that along with the petition the amount of the decree was not deposited. It is said that it was deposited before the application was heard. We express no opinion as to whether this deposit after the time allowed for the application is valid or not. The only question before us is whether the provision in S. 17, Act 9 of 1887 is directory or mandatory. Parker and Wilkinson, JJ., held in *Ramasami* v. *Kurisu* (1) that it was not mandatory. Miller J. in *Suryanarayana* v. *Ramanna* (2) did not dissent from this view. So this decision of Parker and Wilkinson, JJ., has stood unchallenged in this Court for nearly thirty years, and we feel no doubt that the practice regarding the receipt of the deposit amount in the mofussil Courts has been in consonance with that ruling.

We would therefore have followed the ruling without assigning reasons, had it not been for the fact that Ayling, J., in the admission Court and Krishnan, J., in the final Court sitting as a single Judge,

(1) [1890] 13 Mad. 178.
(2) [1910] 34 Mad. 88=6 I. C. 400.

have questioned the correctness of *Ramasami* v. *Kurisu* (1). If we may say so, the language of S. 17, Mofussil Small Cause Courts Act, does not seem to lend itself to the interpretation placed on it in *Ramasami* v. *Kurisu* (1). In *Jogir Ahir* v. *Bishen Dayal Singh* (3), *Jagannath* v. *Chet Ram* (4) and *Somabhai* v. *Wadilal* (5) the ruling of this Court has not been accepted as good law. But the interpretation is not without precedent. In regard to cases under the Pensions Act, which by Ss. 4 to 6 require a certificate of the Collector before the plaint is filed it has been held that the production of the certificate before judgment would cure the defect. The same view was taken of the requirements of Ss. 92 and 93, Civil P. C., relating to the sanction of the Advocate-General or the Collector. Reference may also be made to suits for which the production of a succession certificate is necessary. These classes of of cases supply an analogy for the liberal interpretation placed on the section in *Ramasami* v. *Kurisu* (1).

Further the policy of the legislature in demanding payment is to enable the successful decree-holder to take cut immediate execution. The relief in a small cause suit being expected to be a speedy and a summary one, the legislature demands that the successful plaintiff should not be put off for a further period by not making the decree amount available to him for immediate execution. Therefore although if the case had come before us for the first time, we would have taken the view which the plain language of S. 17 suggests, having regard to the fact that the decision now questioned has been law in this Presidency for nearly 30 years, that there is nothing opposed to justice in the interpretation placed on the section by two learned Judges of this Court and that there are analogies which may justify the view taken in *Ramasami* v. *Kurisu* (1), we think it unnecessary to refer the matter for the consideration of a Full Bench.

We must reverse the order of the lower Court and remit the application for disposal in the light of the above observations. Costs will abide.

S.N./R.K. *Case remanded.*

(3) [1891] 18 Cal. 83.
(4) [1906] 28 All. 470.
(5) [1907] 9 Bom. L. R. 883.

* A. I. R. 1919 Madras 104

SESHAGIRI AIYAR, J.

Kunhi Koya Haji—Plaintiff—Petitioner.

v.

Panikka Vittil Assan Bava Haji and *others*—Defendants—Opposite Parties.

Civil Revn. Petn. No. 444 of 1918. Decided on 10th October 1918, against decree of Sub-Judge, South Malabar, in S. C. S. No. 317 of 1917.

*** Stamp Act (2 of 1899), S. 19—Unstamped pro-note validly executed outside British India—It is admissibile in British Indian Court without affixing stamp—Suit is maintainable.**

If a promissory note executed outside British India is valid according to the law of the place where it was executed, it can ordinarily be sued upon in India and is admissible in a British Indian Court without affixing any Indian stamp on it. If any stamp is necessary, it is sufficient if, at the time of the decree, an Indian stamp is affixed to it: 8 *M. L. J.* 182 and 22 *Mad.* 337, *Foll.* [P 104 C 2]

V. Mahadeva Ayyar and *G. R Sivaramakrishna Ayyar*—for Petitioner.

K. P. Kesava Menon—for Opposite Parties.

Judgment.—The suit is based upon the promissory notes executed at Mecca in favour of the plaintiff. The Subordinate Judge has held that they are inadmissible in evidence. He has not referred to any authorities in support of his possession. Apparently what he had in mind was S. 19, Stamp Act. It was pointed out in *Simulu Ebrahim Rowthan* v *Abdul Rahiman Mahomed* (1) and *Mohamad Rowthan* v. *Mohamed Husin Rowthan* (2) that it is not necessary before suit to affix a British stamp on documents executed outside British India unless it be for the purposes of acceptance, payment, endorsement, transfer or negotiation. It is argued for the respondents that filing a suit comes under one of these categories. I am unable to agree with this suggestion. If a document is valid according to the law of the place where it was executed, it can ordinarily be sued upon in India without affixing any Indian stamp on the document. Probably the suggestion of Shephard, J., in *Simulu Ebrahim Rowthan* v. *Abdul Rahiman Mahomed* (1) may be accepted, namely that if any stamp is necessary it would be sufficient if at the time of the decree an Indian stamp was affixed to the document. I

(1) [1898] 8 M. L. J. 182.
(2) [1899] 22 Mad. 337.

am not sure whether, under the law prevailing in Mecca, a promissory note like this without any stamp on it could have been sued upon. But the position taken up by the Subordinate Judge is certainly untenable. It is opposed to the decisions I have referred to. I must, therefore reverse his decision and remand the suit for disposal in the light of the above observations. Costs hitherto incurred will follow the event.

S.N./R.K. *Case remanded.*

A. I. R. 1919 Madras 105

SADASIVA AIYAR AND NAPIER, JJ.

Ammani Ammal – Appellant.

v.

Ramaswami Naidu and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1000 of 1917, Decided on 10th January 1919. from decree of Temporary Sub-Judge, Tanjore.

(a) Transfer of Property Act (4 of 1882), S. 54—Transferee from stranger is not entitled in suit by true owner, to refund of portion of consideration used to pay debts of true owner—Principles of equity has no application nor Specific Relief Act (1 of 1877), S. 41.

Where property is sold by a person having no title to it, and the true owner or any one deriving title from him afterwards sues to recover possession the purchaser is not entitled to be reimbursed for the simple debts of the true owner which he has paid out of the sale consideration before surrendering the property.

[P 106 C 2 P 107 C 2]

The right cannot be supported either on the general principles of equity or under the statutory provision contained in S. 41, Specific Relief Act, and the Court will not make an order for compensation where the property has been sold by a stranger as his own property, even though the true owner has benefited thereby: 28 *I. C.* 865; 36 *I. C.* 865; *A. I. R.* 1914 *P. C.* 92; 43 *I. C.* 908 and 30 *Cal.* 539 (*P. C.*), *Expl.* and *Dist.* [P 107 C 2 P 109 C 1]

(b) Transfer of Property Act (4 of 1882), Ss. 54 and 68—Purchaser from trespasser redeeming mortgage by true owner is entitled to be subrogated and can claim amount before surrendering property to owner.

Where however the purchaser has released the property from a mortgage debt binding on it, he is entitled to be subrogated to the rights of the mortgagee and to claim to be reimbursed for the amount paid by him, before he can be directed to deliver the property to the true owner.

[P 107 C 1 P 109 C 1]

(c) Specific Relief Act (1 of 1877), Ss. 39 and 41—In suit for possession by owner against purchaser from trespasser deed need not be set aside.

In the suit by the real owner, the plaintiff need not pray for the cancellation of the documents. [P 107 C 2]

(d) Transfer of Property Act (4 of 1882), S. 68—Purchaser in good faith paying amount to vendor without title to redeem mortgage binding on estate becomes equitable assginee of mortgage.

Where a person buys property in good faith and for the purpose of clearing a mortgage on that property pays money to the vendor to be so applied then even if the vendor had no title, still as the mortgage was binding on the estate the vendee becomes an equitable assignee of the mortgagee. [P 109 C 1]

C. A. Sheshagiri Sastri— for Appellant.

T. V. Muthu Krishnier—for Respondents.

Sadasiva Aiyar, J. — Defendant 1 is the appellant before us. The plaintiff brought a suit for possession of certain properties which had been bequeathed to him by his elder brother Abboy Naidu (when the plaintiff was a minor) under a will dated 4th August 1901. The plaintiff's mother, asserting a title in herself to the property, sold it to defendant 1 in February 1904 under Ex. 6 for a sum of Rs. 3,400. The title she asserted against her deceased son Abboy Naidu (in whose name the title-deeds stood) and against Abboy Naidu's brother and legatee, the minor plaintiff, was based upon her contention that though the property was purchased in Abboy Naidu's name, Abboy Naidu was a benamidar for herself (his mother). The plaintiff, of course, denied that Abboy Naidu was a benamidar for his mother and he sued upon his title derived from Abboy Naidu. He also prayed in his plaint for the cancellation, if necessary, of the deed of February 1904 executed by his mother. I might at once say that not only is no such cancellation necessary but that the plaintiff has no legal cause of action to get the relief of the cancellation of a document which was not executed and which does not even purport to have been executed by himself or by anybody from whom he traces his title. The lower appellate Court has found on the facts in the plaintiff's favour and, on his title so found, given a decree for him. The contentions argued before us in second appeal were that the plaintiff in any event should have been ordered to pay the amounts of the debts binding on Abboy Naidu and, therefore on his legatae (the plaintiff) and paid by defendant 1 as purchaser under Ex. 6 before the plaintiff recovers the properties; secondly, that so far at least as a mortgage debt binding on the

plaintiff was paid by her, she was entitled to be subrogated to the rights of mortgagee and that the plaintiff ought to be made to pay the amounts due to her as such mortgagee by right of subrogation before recovering the properties.

So far as the debts other than the mortgage debt are concerned the learned vakil for the appellant, Mr. Seshagiri Sastri, put forward his contention under three heads: The first head may be formulated thus: though the plaintiff's mother purported to execute the deed in her own right alleging herself to be the sole owner, defendant, 1 as a bona fide purchaser for value, is entitled to treat the sale deed as having been executed by the plaintiff's mother as his guardian and in that view the plaintiff is bound to reimburse so much of the purchase money as went to discharge the debts binding upon the plaintiff. Having heard full arguments, I do not think that any case quoted on the appellant's behalf supports her contention. On the other hand, the decision of their Lordships of the Privy Council in *Balwant Singh* v. *R. Clancy* (1) directly held that where a person who was the de jure manager of an undivided family purported to create a mortgage as if he was the full owner denying the right of the junior member of the family, the alienee cannot under either the ordinary principles of equity or under the statutory provision (S. 41, Specific Relief Act) claim to be reimbursed the portion of the consideration which went to discharge the debts binding on the junior member of the family. As regards the decisions of this Court in *Sabapathy Chetty* v. *Ponnusawmy Chetty* (2) and *Audimula Mudali* v. *Alamalammal* (3), the alienations were by a Hindu father who for certain purposes has got all the powers of a full owner and in whom the interest of a full legal owner is vested for many purposes notwithstanding that he might have undivided sons. The decisions in those cases seem to have gone on the particular facts of those cases and the Court came to the conclusion on the evidence that there was nothing to prevent the Court from holding that the father (alienor) intended also to make the disputed alienation in a capacity which would have given him an interest sufficient to affect the rights of his son also, and that in the case of a bona fide purchaser for value such an inference should if possible, be drawn from the facts and circumstances of those particular cases. In this case it seems to me it is impossible on the evidence and on the pleadings to hold that the plaintiff's mother could have intended to act in any other capacity than that of herself being the full owner.

Further in those cases, the documents of alienation were not mere waste papers conveying no title or interest whatever in the property alienated as in this case, but did affect, at least, the part-ownership right of the alienor. In the case of *Bijraj Nopani* v. *Sreemutty Pura Sundary Dasee* (4) the document was executed (along with others) by a person who was the full legal owner, who had the right to convey the full legal ownership and who intended to convey such full rights. It was under those circumstances held that the erroneous description of the origin and incidents of his title in the sale deed did not prevent the alienee from obtaining a valid title to the rights of a full owner. I do not think that that case has any bearing upon the question we are now considering. As regards the English cases of salvage quoted by the appellant's learned vakil, they were cases where a person who was not the owner of goods paid freight and other similar charges and the jury were held justified in estimating damages to allow such charges to be deducted in favour of the wrongdoer, where the plaintiff's action was brought for damages in trover or where the defendant had an option to return the goods or to pay damages Those cases also have no bearing on the question now under consideration. On the other hand there is a case in *Nathu* v. *Balwantrao* (5) which is a direct authority on this point; and respectfully concurring in that decision. I would hold that defendant 1 has no right to recover any sums which she paid to discharge Abboy Naidu's debts and which were not charged upon any immovable property. As stated by the Privy Coun-

(1) [1912] 34 All. 296=14 I. C. 629=39 I. A. 109 (P. C.).
(2) [1915] 28 I. C. 365.
(3) [1916] 36 I. C. 365.
(4) A. I. R. 1914 P. C. 92=24 I. C. 296=42 Cal. 56=41 I. A. 189 (P. C.).
(5) [1903] 27 Bom. 390.

eil in *Ram Tuhul Sing* v. *Biseswar Lall Sahoo* (6), quoted in the above case :

"It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit, there must be an obligation, express or implied, to repay."

Then we have left for consideration the other point based upon the allegation that defendant 1 has released the property from the mortgage charge created by Abboy Naidu by payment of certain sums of money to the mortgage. I think that if defendant 1 in good faith purchased the property from the plaintiff's mother and as such purchaser felt herself bound to pay a mortgage charge created by the real owner, which charge the plaintiff was himself under an obligation to meet, she is entitled to be subrogated to the rights of the mortgagee in so far as her money went to discharge that mortgage. I think I need refer only to the two decisions of this Court in *Syamalarayudu* v. *Subbarayudu* (7) and *Cnama Swami* v. *Padala Anandu* (8) in support of this proposition. The lower Courts however have not gone into that question, namely, whether defendant 1, after her purchase paid any money to the mortgagee mentioned in Ex. 6 in payment of the mortgage dated 19th April 1899. Before finally disposing of this appeal it is therefore necessary to obtain a finding from the lower appellate Court on the following issue on the evidence on record: Did defendant 1 pay any amount to the mortgagee under the mortgage deed of 1899 for the purpose of discharging the encumbrance on the plaint properties and if so, what are the amounts and dates of such payments? The finding will be submitted within four weeks from the date of the recipt of the records and ten days will be allowed for objections.

Napier, J.—I agree. The first point taken by the appellant is that we should not accept the finding of the lower appellate Court that the plaintiff's mother purported only to convey her own interest and totally ignored any interest in the plaintiff ; and reliance is placed on the decision in *Audimula Mudali* v. *Alamalammal* (2), where the Court stated as follows :

"In our opinion Courts should incline to the view that the transferor alienated the property in the capacity most beneficial to the bona fide purchaser."

This doctrine may be properly applicable for the purpose of ascertaining on the evidence what the intention of the transferor is, but where, as in a case like this, the transferor deliberately claimed that the person in whom the title stood was only a benamidar for her and that the property was her own absolute property, it is impossible to find any ambiguity and thereby give any scope for the application of this doctrine. We must deal with this case on the footing that a stranger having no interest in any property, but making a claim against the titles which were vested in another person sold that property to a third person. It is now further argued that as part of the proceeds of the purchase money went to discharge the debts which would have been binding on the vendor if the title had vested in her and were in fact debts which were binding on the true owner, the true owner cannot recover the property without making compensation for the discharge of those debts. It is sought to support this proposition on two grounds: one, that it is covered by the language of the Specific Relief Act, Ss. 39 and 41; the other that there is an equity which the Courts should apply. With regard to the claim under the Specific Relief Act, reference to the chapter shows that this claim only arises in suits for cancellation of instruments, S. 41 being :

"On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require."

This is undoubtedly an application of the English doctrine of the Chancery Courts that he who seeks equity must do equity ; and the first point we have to be satisfied on is whether there was any necessity for the plaintiff in this case to seek equity. As my learned brother pointed out, all that the plaintiff said in this suit was that if it was necessary to have the document cancelled the Court should do it. To my mind it is clear that there is no necessity to have this document cancelled. The illustrations to S. 39 indicate that it is only where a party cannot get his legal remedy without first having the document set aside that he comes within the section. This is a suit by the true owner to recover possession

(6) [1874] 2 I. A. 131=3 Sar. 477 (P. C.).
(7) [1898] 21 Mad. 143.
(8) [1908] 31 Mad. 439.

of the property. The title adverse to him is not one procured from him or from any one under whom he claims or from any one who purported to convey an interest of his. It seems to me therefore that there can be no necessity for him to apply to have the document cancelled and further that the Court would have no jurisdiction to do so. But it is urged on us that in a case reported as *Mallacheruvu Raghavayya* v. *Mallacheruvu Subbayya* (9), where the suit was to recover possession of property, the Court held that they were empowered to give compensation under this section. The case is Second Appeal No. 803 of 1916.

In that case however the plaintiff who brought the suit to recover the property himself executed a sale deed of certain lands to defendant 2 jointly with his undivided brother defendant 1. At the time of the conveyance he was a minor. The Court then considered the question as to whether he represented he was of age and found that was not proved. So in that case there was in existence a document from the true owner which on the face of it conveyed the property. In those circumstances, although the suit was one for recovery of property, the learned Judges thought that the document must be set aside first and that therefore the doctrine applied. It is therefore no authority for the contentions in this case. I am therefore clearly of opinion that this doctrine does not apply.

It is next argued that the equitable doctrine entitles us to give relief, and reliance is placed on the case of *Mohori Bibee* v. *Dharmodas Ghose* (10), a decision of the Privy Council. In that case a minor had executed a mortgage in favour of one Brahmo Datt to secure the payment of Rs. 20,000. A suit was brought on the mortgage. On the day the mortgage was executed the minor signed a declaration that he was of age. Two months after the execution of this mortgage he by his mother as guardian brought a suit against the mortgagee praying for a declaration that the mortgage was void and inoperative and that it should be delivered up and cancelled. Their Lordships of the Privy Council dealt with the question as to whether compensation should be given under two heads, on which it was argued, viz., the Specific Relief Act and the equitable right. Their Lordships appear to have recognized the possibility of the application of S. 41, Specific Relief Act, to the case. But they say that the lower Courts saw no reason for ordering the return of the money and they themselves would not interfere. They then consider the application of the purely equitable doctrine and state the proposition:

"It was also contended that one who seeks equity must do equity."

Now it must be noted that in this case there was no question but that the plaintiff was seeking equity, namely for directing the mortgage to be delivered up and cancelled. And then referring to the decision of the Court of appeal in *Thurston* v. *Nottingham Permanent Benefit Building Society* (11) they quoted the language of Rome, L. J., which is as follows:

"The short answer is that a Court of equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the legislature has declared to be void."

So that apart from the Statute they held that even where a minor has received a benefit under a void mortgage, he cannot be compelled by any principle of equity to give compensation. The fundamental doctrine was stated in the judgment of the Privy Council in a case which is quoted in *Nathu* v. *Balwantrao* (5), which is *Ram Tuhul Sing* v. *Biseswar Lall Sahoo* (6). The doctrine is as follows;

"It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit, there must be an obligation, expressed or implied, to repay. It is well settled that there is no such obligation in the case of a voluntary payment by *A* of *B*'s debt."

We have therefore to find some obligation on the part of the plaintiff in the case to repay the amounts which have been paid by defendant 1 in discharge of his debts. It is well settled that there is no such broad obligation under the Contract Act; and it rests on defendant 1 to find some doctrine which will enable her to ask the Court to make the order. The language here is a very specific and definite warning to Courts that they must not use their powers simply to avoid hardships. The question in which this

(9) [1918] 43 I. C. 908.
(10) [1903] 30 Cal. 539=30 I. A. 114=8 Sar. 374 (P. C.).
(11) [1902] 1 Ch. 1.

very point arose was decided by the Privy Council in *Balwant Singh* v. *R. Clancy* (1). There undoubtedly a person sought to be charged had been largely benefited by money lent by a bank to his brother for the discharge of debts binding on the family. The brother had however borrowed the money claiming to be a Rajah owning an impartible zamindari. The Privy Council decided that the money was borrowed by him in that capacity and in no other, and that it is not open to the Courts to find that because he was the manager of a joint family, the borrowing could be attributed to that capacity; and the claim of the bank to make his younger brother liable in respect of debts which had been cleared from the joint family property, being the debts of his father, was negatived. It seems to me that we cannot make any order for compensation in this case without directly disregarding the decision in *Balwant Singh* v. *R. Clancy* (1). I am therefore of opinion that there is no doctrine which will empower a Court to make an order for compensation where the property has been sold by a stranger as the stranger's property even though the true owner has benefited. That is the broad proposition. There is however another doctrine which may affect some payments in this case, and that is one analogous to the doctrine of salvage. It is dealt with in the case of *Syamalaragudu* v. *Subbarayudu* (7) and *Chama Swami* v. *Padala Anandu* (8) and the doctrine comes tot his; that where a person buys property in good faith and for the purpose of clearing a mortgage on that property pays money to the vendor to be so applied then even if the vendor had no title still as the mortgage was binding on the estate, the vendee becomes an equitable assignee of the mortgage. This doctrine has been applied in those two cases and although some doubts have been thrown upon it in *Shiam Lal* v. *Ram Piari* (12), it seems to me that it is founded on right principles and I think that we should follow the decisions of our Court. I agree therefore with the order of my learned brother remanding an issue for trial.

(In compliance with order contained in the above judgment, the Temporary Subordinate Judge of Tanjore submitted the following:)

(12) [1909] 32 All. 25=64 I. C. 70.

Finding.—The High Court in its order dated 13th September 1918, in Second Appeal No. 1000 of 1917, has directed submission of a finding on the following issue on the evidence already on record,

"Did defendant 1 pay any amount to the mortgagee under the mortgage-deed of 1899 for the purpose of discharging the encumbrance on the plaint properties, and if so, what are the amounts and dates of such payments?"

The mortgage bond referred to in the suit is marked Ex. F, and is dated 19th April 1899. Ex. 6, dated 1st February 1904, is the sale deed taken by Ammani Ammal for Rs. 3,400, of which Rs. 2,400 was said to have been paid in cash and Rs. 1.000 retained by her, a security bond having been given for that amount. The vendee, Ammani Ammal, was examined as P. W. 1 and she says that prior to the execution of Ex. 6 another sale deed had been executed which could not be registered because of the several mistakes it had, and Ex. 6 was subsequently executed and registered. Rs. 2,400 is said to have been paid on the day of the infructuous prior sale deed, but not under the subsequent sale deed, Ex. 6 She does not know whether the mortgage deed was discharged by the mortgagor Poongol Ammal, or not, and what amount, if at all was paid towards it. But the mortgagee, Ramaswami Nayudu, filed a suit registered as Original Suit No. 264 of 1904, on the file of the Mayavaram District Munsif's Court, for the amount due under the mortgage bond Ex. F, and the suit was compromised, adjustment of the claim having been certified. Ammani Ammal says that, with a view to bring about the compromise she paid Rs. 200 to Poongol Ammal and obtained a receipt, Ex. 1-B, on 6th October 1905, in token of the discharge of the mortgage claim. The receipt shows that the full amount due under the mortgage bond had been paid to the mortgagee Ramaswami Nayudu, who was examined as plaintiff's witness 4 in this suit. His version is that, subsequent to the institution of the suit, accounts were settled between him and Poongal Ammal, that he had to pay her Rs. 360 towards the amount of rent due under Ex. E, and towards the price of two head of cattle purchased by him from Poongol Ammal, and that Rs. 283 was paid to him by defendant 1 through the mortgagor, Poongol Ammal. It was on settlement of his claim as evi-

denced by Ex. 1-B, he withdrew the suit.

The other persons that refer to the sale deed are D. W. 2 Vaithinatha Ayyar, and D. W. 3, Kumaraswami Pillai. D. W. 2 wrote the first abortive sale deed and speaks to money having been paid in his presence though he does not remember how much was paid. D. W. 3 who attested Ex. 6 did not see any cash paid in his presence but he was told by the vendor that she had received consideration and he attested the document on that assurance. These are all the facts relevant to the issue that could be culled from the evidence on record with regard to the mortgage deed and its discharge.

The question therefore to be determind is whether any consideration was paid under the sale deed, Ex. 6. and if so how much of it went towards the distharge of the mortgage deed, Ex. F, and if no amount, paid towards Ex. 6 or towards tha prior abortive saledeed, went towards discharge of the mortgage deed, whether any amount was subsequently paid towards such discharge, and how much.

It is clear that no consideration was paid at the time of the execution of Ex. 6, the sale deed. The evidence of Ammani Ammal and Vaithinatha Ayyar, D. W. 2, tends to show that Rs. 2,400 was paid under the prior infructuous sale deed and a security bond was executed for the balance of Rs. 1,000. The vendee Ammani Ammal herself had to get some money under Ex. 4, a pro-note executed to her by Poongol Ammal, and the amount due thereunder was deducted from the Rs. 2,400 paid at the execution of the first sale deed, and only the balance was paid to the vendor. The evidence as to the execution of Ex. 4, the truth of the debt evidenced by it, and the necessity for Poongol Ammal to borrow that money on the occasion of settling the maintenance claim of Sitalakshimi Ammal is convincing, and I need not dwell upon it. The facts that there was a debt due to Ammani Ammal herself, that a sale deed was first executed to her and latterly it had to be renewed by Ex. 6, and that a security bond had to be executed for Rs. 1,000, all go to show that the sale must have been a genuine transaction supported by consideration. There is absolutely no reason why Poongol Ammal should have executed a nominal sale deed to Ammani Ammal without receiving any consideration for it. Consideration must therefore have passed under the document antecedent to Ex. 6 and we have to see whether any portion of that consideration went towards the discharge of the mortgage deed. There is no evidence on that point, Ammani Ammal herself not knowing anything about it. The fact that the mortgagee had to institute a suit in that very year, about eight months after, shows that the mortgage deed was not discharged and that Ammani Ammal did not take care to see that the money paid by her actually went in discharge of the mortgage debt. We are therefore not practically concerned with the amount paid at the time of the execution of the prior abortive sale deed.

The next point we have to consider is whether Ammani Ammal paid anything to bring about the withdrawal of Original Suit No. 264 of 1904 on the file of the Kumbakonam Court by payment of any cash. She says she paid Rs. 200 as a present to Poongol Ammal to bring about the compromise; and the mortgagee himself who actually took the money and executed Ex. 1-B in token of the discharge of the encumbrance says that Ammani Ammal paid Rs. 285 to Poongol Ammal, who paid that amount into his hands. Ex. 1-B does not mention the amount specifically, but says that the entire amount due was paid in cash. Whatever may be the truth of the statement that Rs. 360 was set off against the amount due from the mortgagee, there is no doubt that Rs. 285 was paid for the withdrawal of the suit; and as the other amount of Rs. 360 referred to by Ramaswami Nayudu must properly belong to the plaintiff in the suit, having regard to the recognition of his present claim by this Court, it need not be taken into consideration. Defendant 1 herself says that Rs. 200 was paid by her, whereas the mortgagee says that Rs. 285 was paid by her towards consideration for the adjustment of the maintenance suit. The transaction took place ten years before the date of the deposition, and a woman of the position, of Ammani Ammal cannot be expected to remember the fact so vividly as Ramasami Nayudu, P. W. 4, who is a man of business and who has actually received the amount. I therefore believe that defendant 1 must have paid Rs. 285 on 6th October 1905 to wards

discharge of the encumbrance, and find that defendant 1 paid Rs. 285 to the mortgagee under the mortgage deed of 1899 for the purpose of discharging the encumbrance on the plaint properties, and that amount was paid on the date of Ex. 1-B, 6th October 1905. The mortgage deed carried interest at 9 per cent.

This second appeal coming on for final hearing after the return of the finding of the lower appellate Court upon the issue referred by this Court for trial, the Court delivered the following.

Judgment.—We accept the finding. The lower Court's decree will be modified by directing that Rs. 285 and interest from date of plaint shall be set off against the supplemental decree for mesne profits directed to be passed by the lower appellate Court's decree. The appellant will pay respondents' costs of this second appeal.

S.N./R.K. *Decree modified.*

A. I. R. 1919 Madras 111

OLDFIELD, J.

Valliammai Nadathi—Petitioner.

v.

Aseervada Nadar—Opposite Party.

Civil Revn. Petn. No. 435 of 1917, Decided on 11th October 1918, to revise order and decree of Sub-Judge., Tuticorin, in Misc. Petn. No. 69 of 1917 and Sm. C. S. No. 961 of 1916.

(a) Civil P. C. (5 of 1908), O. 47, Rr. 1 and 7.—Grant of review for sufficient cause—Correctness is to be presumed.

Where a review is granted for sufficient cause the control to be exercised by an appellate or revisional Court need not be strict, and when the Court has applied its mind to the circumstances, such control may be exercised with reference to every presumption in favour of its having done so correctly. [P 112 C 1]

(b) Civil P. C. (5 of 1908), O. 47, Rr. 1 and 7 —Discovery of fresh evidence—No sufficient ground for granting review.

The simple fact that fresh evidence will alter or is expected to alter a decision already arrived at is ordinarily not a sufficient cause for granting a review. [P 112 C 1]

(c) Civil P. C. (5 of 1908), O. 47, R. 7.—Order is not applicable to small causes—Exercise of discretion is not limited under Provincial Small Casue Courts Act (9 of 1887), S. 25.

Although O. 47, R. 7, is not applicable to Small Cause Courts, its provisions do not limit the discretion which the High Court possesses under S. 25, Provincial Small Cause Courts Act, and should not be used except for substantial reasons: 36 *I. C.* 437 and 40 *I. C.* 79, *Expl.* and *Dist.* [P 112 C 1]

M. D. Devadas—for Petitioner.

T. V. Venkatrama Ayyar—for Opposite Party.

Judgment.—The facts in this case were of an ordinary character. Defendant's defence was not established because his evidence on certain points was deficient. On this account the lower Court at the first trial found against him. He afterwards applied for a review on the ground of discovery of fresh documentary evidence. The present petition is against the order granting it and decision passed on that evidence is in his favour. The only ground on which the review was asked for was that the fresh evidence could not be discovered earlier in spite of the use of due diligence. The lower Court did not find directly whether this was so. But, as in dealing with costs it said that defendant had not used due diligence, it presumably intended to find against him; and, as he adduced nothing on the point except a general assertion in his affidavit, there is no reason for rejecting this finding. It has mentioned no other reason for allowing the review.

I am asked however, with reference to *Meduru Brahmayya* v. *Vedulu Yellamma* (1), to assume that the lower Court had sufficient reason independently of anything on which defendant relied before it; and it is argued that, as such assumption is obligatory with reference to the authority cited, there can be no question of revision in connexion with this or any other case, in which the review has not been granted in consequence of a discovery of fresh evidence or contravention of R. 2. It may be conceded that with reference to a review granted for sufficient cause, the control to be exercised by an appellate or revisional Court need not be strict and, when the lower Court has evidently applied its mind to the circumstances, may be exercised with reference to every presumption in favour of its having done so correctly. But I do not think that the learned Judges meant more in the case cited, for if their decision is to justify defendant's contention here, it must mean that any Court is at liberty arbitrarily to hold a new trial of a case which it has decided or that its action cannot be scrutinized by superior authority, whether it has or has not considered whether such suffi-

(1) [1916] 36 I. C. 437.

cient cause is available, since it is a presumption of law that it has done so. I cannot think that the learned Judges contemplated any such result. It may be observed that in any case their decision was given on O. 47, R. 7, Civil P. C., which is not applicable to Small Cause Courts and, though I should be inclined to follow the principles of that rule generally in dealing with Small Cause Court revision work, I do not think that they can be relied on as limiting the discretion, which the High Court possesses under S. 25, Act 9 of 1887, and which should not, in my opinion, be used except for substantial reason. Lastly, it is urged that the lower Court did in fact allege sufficient cause, when it observed that its decision was altered by the evidence newly admitted; and *Bhagela Kuer* v. *Abdul Rahman* (2) is relied on. I am not prepared to dissent from that dicision. But the principle involved must, in my opinion, be applied with reference to the circumstances of the case, the gravity of the consequence of not applying it and the character of the party's default. For otherwise it would mean that review could be claimed in every case, since ex-hypothesi the new evidence will alter or is expected to alter the result; and there would be no sort of finality in litigation. The present case presents, as I have said, no special features; and, in their absence, the lower Court, in my opinion, committed a material irregularity in allowing a review in the present case, simply because the fresh evidence would result in altering its decision, if that in fact was its reason.

The lower Court rejected the reason, for which the defendant asked for a review, and granted one either without any sufficient reason or, if it had one, without exercising any judicial discretion in respect of it. Its order, in these circumstances, cannot be sustained and must be set aside, its decree, dated 15th December 1916, being restored whth costs throughout, including those in the revision petition.

S.N./R.K. *Petition allowed.*

(2) [1917] 40 I. C. 79.

A. I. R. 1919 Madras 112

OLDFIELD AND SESHAGIRI AIYAR, JJ.

Rallabandi Veeramma—Petitioner—Appellant.

v.

Rallabandi Subba Rao and *another*—Respondents.

Appeal No. 261 of 1918, Decided on 28th January 1919, against order of Dist. Judge, Godaveri, in I. A. No. 275 of 1918.

Civil P. C. (5 of 1908), O. 9, R. 9—Application for probate dismissed for default—Application for restoration is maintainable—Probate and Administration Act (5 of 1881), S. 83.

Order 9, R 9, Civil P. C., is applicable to the dismissal of an application for probate which has, under S 83, Probate and Administration Act, been treated as a suit The applicability of the latter portion of R. 9 is not conditional on that of the former. [P 112 C 2]

P. Somasundaram—for Appellant.

A. Venkatachellam—for Respondents.

Judgment.—The question is whether O. 9, R. 9, Civil P. C., is applicable to the dismissal of an application for probate which has under S. 83, Probate and Administration Act, 5 of 1881, been treated as a suit. That section directs that the proceedings shall take, as nearly as may be, the form of a suit according to the provisions of Civil P. C. S. 55 of the same Act also applies these provisions to proceedings in relation to the grant of probate so far as the circumstances of the case admit. And we cannot find anything in the latter part of O. 9, R. 9, which is the relevant provision in the present connexion, which cannot be conveniently applied. Respondents however argue, firstly, that that part of the rule can be applied only when the first part debarring the plaintiff from a second suit can be applied also, and they rely on *Ramani Debi* v. *Kumud Bandhu* (1) for the position that it cannot. The decision met with some criticism in the referring order of Beaman, J., *Kalyanchand Lalchand* v. *Sitabai Dhanasa* (2), but we do not think it necessary at present to consider whether it is correct. For we can see no reason for treating the applicability of the latter portion of O. 9, R. 9, as conditional on that of the former or refusing effect to S. 55, Probate and Administration Act, on account of it. We therefore set aside the decision under

(1) [1910] 7 I. C. 126.
(2) A. I. R. 1914 Bom. 8=23 I. C. 325=38 Bom. 309 (F. B.).

appeal and remand the petition for re-admission and disposal on its merits. Costs to date will abide the result and be provided for in the order to be passed.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 113

ABDUL RAHIM AND NAPIER, JJ.

Duddampuri Venkatrayudu and *others*—Defendants—Appellants.

v.

Bikkina Subbarayudu and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 747 of 1916, Decided on 22nd March 1918, against the decree of Sub-Judge, Cocanada, in Appeal Suit No. 204 of 1911.

(a) Madras Estates Land Act (1908), Ss. 8 and 6—Effect of merger is that occupancy right ceases to exist—Whomsoever landholder thereafter lets land to, is not as tenant of occupancy raiyat but as raiyat of raiyati land—"Entire interests" are intended to exclude only such interests as those of mortgagee—Sub-tenant of occupancy raiyat is not raiyat.

The effect of an union or merger mentioned in S. 8 (1) is that the occupancy right ceases to exist; there is only melvaram left to the landholder, but the land still retains its character of raiyati land and is removed from the operation of contracts. Whomsoever the landholder thereafter lets the land to, he comes in not as a tenant of an occupancy raiyat but as a raiyat of raiyati lands within the meaning of S. 6 (1) of the Act. 11 *I. C.* 545, *Expln.* [P 116 C 1]

The words 'entire interests' in S. 8 (1) of the Act are intended to exclude only such interests as those of a mortgagee. A sub-tenant of anoccupancy raiyat is not a raiyat. [P 114 C 2; P 116 C 1]

Per *Napier J.*—Occupancy raiyats in an inam who are entitled to collect the rent of a portion of an estate by virtue of a transfer from the owner come within the definition of landholders under the Estates Land Act, inasmuch as they are persons owning part of an estate. [P 117 C 1]

The words 'entire estates' were inserted in S. 8 of the Act to apply where a mortgagee of the melvaram interest of the landholder acquired the rights of an occupancy tenant in a holding. In such a case he would not be prevented from holding the land as an occupancy raiyat by the fact that he had an interest in the melvaram. It provides for the converse of that dealt with in sub-S. 6, explanation, the object of that explanation and S. 8 being to prevent the loss of the rights of occupancy by a tenant purchasing the landlord's interest and to prevent the loss of the rights of occupancy by a landlord acquiring the interest of an occupancy tenant. [P 117 C 2]

(b) Madras Estates Land Act (1908), S. 8—Land part of estate—Lessor found to be landholder—Claiming of other rights by him is immaterial (obiter.)

Obiter.—Where the land is admittedly part of an estate and the lessor is found to be a landholder within the meaning of sub-S (5), S. 8 of the Act it is immaterial what other rights he may claim in the land, if there is a person holding for the purpose of agriculture raiyati land in that estate on condition of paying to such landholder the rent which is legally due on it. [P 119 C 2]

(c) Madras Estates Land Act (1908), S. 3, (2) (d)—Sub-S. 2 (d) has reference to grants recognized and confirmed by Government.

Section 3, sub-S. 2 (d), which excepts inams in which the melvaram and kudivaram are vested in the same person, has reference to grants recognized and confirmed by Government and it can be argued that in all other cases in which there is a person coming within the definition of a landholder and a person coming within the definition of a raiyat, such raiyat is given occupancy rights by the Act. [P 119 C 2]

V. Ramesam—for Appellants.

Narayanamurti and *P. Somasundaram*—for Respondents.

Abdur Rahim, J.—This second appeal is by defendant 3 in the suit. The plaintiff-respondent 1 as found by both the lower Courts is purchaser of the rights of defendants 1 and 2 in the lands in question amounting to 18 odd acres, and he seeks to recover possession of the property from defendant 3. The lands were granted as a 'Nimebadi' Inam by the Rajah of Pittapur more than 100 years ago, but after the permanent settlement, to the ancestors of defendants 1 and 2, and both the District Munsif and the Subordinate Judge agree that the grant must be taken to have been of the melvaram alone.

The point for determination before us is whether defendant 3 is entitled to the benefit of S. 6, Madras Estates Land Act, and that depends upon the further question (a) whether the possession of defendant 3 on the date of the passing of the Act was or was not in the character of a mortgagee and if it was not, (b) whether defendant 3 had possession of the land as raiyat or merely as a sub-tenant of the inamdars. The land consists of 12 acres wet and 6 acres dry and it is found by both the Courts to be raiyati land, that is, cultivable land in an estate other than private land. With reference to the first question, defendant 3's connexion with the lands began on 27th February 1896, when defendants 1 and 2 borrowed money from him on a simple mortgage bond and let him into possession under a lease for 8 years (Ex. A.) In 1899 the inamdars borrowed an additional amount and executed a consolidated usufructuary mortgage (Ex. C); in 1900 they obtained from the defendant 3 a further loan and for this amount executed another usufructuary

mortgage (Ex. D) and on the same date as Ex. D, defendants 1 and 2 granted a lease for 8 years (Ex. MM). If the dealings had stopped here, the question whether defendant 3's possession of the land was in the character of a raiyat or a mortgagee would, in my opinion, be one of considerable difficulty. But on 6th July 1904, defendants 1 and 2 paid off all that was due to defendant 3 and got back the mortgage deed. (See Receipt Ex. F.)

On the same day however they executed Ex. G, by which the lease Ex. MM. was kept in force. Therefore since 1904 the defendant 3's possession was that of a lessee and this is supported by the fact that in 1910 defendants 1 and 2 sued and recovered decrees for rent from defendant 3. This question was one of mixed law and fact and depended entirely on the effect of the above transactions. The Subordinate Judge, in holding against defendant 3 on this point, overlooked the fact that the mortgages were paid off in 1904 and he remained in possession wholly as lessee by virtue of Exs. G and MM. If defendant 3's possession were as in *Bengal Indigo Company* v. *Roghobur Das* (1) in part at least, not that of cultivator's only, but that of creditor's operating repayment of the debt due to them by means of the security, it would raise a question requiring serious consideration how far the judgment of the Privy Council could be distinguished on the basis of the provisions of the Madras Estates Land Act. If as I hold defendant 3 was not in possession as mortgagee on the date Madras Estates Land Act came into force, was he in possession as a raiyat?

"Raiyat" means a person who holds for the purpose of agriculture raiyati land in an estate on condition of paying to the landholder the rent which is legally due upon it. Now, that the land is raiyati land in an estate is conceded and that the plaintiff is a "landholder" is also conceded: see *Upadrasta Venkata* v. *Devi Sitaramudu* (2) and *Kanti Venkanna* v. *Cheliani Rama Row Garu* (3). There can be no doubt that defendant 3 holds the land on condition of paying to the plaintiff for its use and occupation some thing which will be "rent,"

"if the land is held by the former for the purpose of agriculture, a common requisite in the definitions both of raiyat and of rent."

The Subordinate Judge holds that a sub-tenant of an occupany raiyat is not a "raiyat" within the meaning of the law and in this, he is right. By S. 10 the rights of an occupancy raiyat are heritable and transferable and S. 19 contemplates a raiyat having tenants under him without forfeiting his right as a raiyat. A raiyat holds the land directly under a "landholder" or may be, under an ijaradar or farmer of rents; therefore a raiyat's tenant cannot have the status of a "raiyat." This is also evident from the whole scheme of the Act, which I shall presently examine in connexion with the next and the most important question in the case, whether defendants 1 and 2 combined in them the status both of a "landholder" and a "raiyat" and if so, what would be the result?

The grant itself is not forthcoming and it is not proved that by the grant both the melvaram and the kudivaram passed to the ancestors of defendants 1 and 2. Nor is there any direct evidence to show either that at the time of the grant the ancestors of defendants 1 and 2 were in possession of the lands as cultivating raiyats or acquired the kudivaram interest after the grant. It is not shown that they ever cultivated the lands themselves or through farm-servants. The lands were in fact always cultivated by tenants and the fact that defendants 1 and 2 and their ancestors were high caste Vaishnavites related to the priests of the Rajah of Pittapur and resided away from the village where the lands are situate, would tend to support the District Munsif's inference that their possession and enjoyment were in the character of landholders. The lower appellate Court on the other hand relies upon the facts that defendants 1 and 2 and their predecessors-in-title have been leasing the land for definite periods, changing the tenants from time to time and varying the rent at their pleasure and that defendant 3's ancestors had no connexion with the land, for his conclusion that the former owned the kudivaram as well as the melvaram. The above facts taken together, to my mind, lead to the conclusion, not that there were no raiyats on

(1) [1897] 24 Cal. 272=23 I. A. 158=7 Sar. 94 (P. C.)
(2) A. I. R. 1915 Mad. 727=24 I. C. 224=38 Mad. 891.
(3) [1915] 38 Mad. 1155=26 I.C. 510.

the land who had a permanent right of occupancy at the time the inam was granted to the ancestors of defendants 1 and 2, but that either no such right was insisted on against them or it must be taken to have been relinquished. It is observed by Wallis, C.J., in *Zamindar of Chellapalli* v. *Rajalapati Somayya* (4):

"In this connexion it is to be borne in mind that numerous instances have come before the Courts in which subsequent to the decision of *Chockalinga Pillai* v. *Vythealinga Pandara Sunnady* (5), zamindars succeeded in inserting in pattas and muchilikas terms negativing the existence of occupancy right and that one mode of effecting this purpose was to deal with the land as kambattam or home-farm land, even though it had never been cultivated by the zamindar himself and there was no intention of so cultivating it."

The mere fact that defendant 3, had not acquired occupancy right before this Act came into force, would not help the plaintiff. For it would not follow therefrom either that the plaintiff possessed the kudivaram or that defendant 3 could not acquire a permanent occupancy right by virtue of S. 6.

Now must the occupancy right always inhere in some one or other; if it is not in the tenant in actual occupation must it be presumed to belong to the landholder? This was so laid down by Miller, J., in *Ponnuswamy Padayachi* v. *Karupudayan* (6) with respect to "old waste," but Sadasiva Aiyar and Seshagiri Aiyar, JJ., dissented from this proposition in *Upadrasta Venkata* v. *Devi Sitaramudu* (2). It may be presumed that Miller, J., would have a fortiori applied the proposition in the case of ordinary cultivable raiyati land and I am not sure that Sadasiva Aiyar, J.'s dissent is not limited to the case of waste land. The answer has to be sought in the true interpretation and effect of S. 8, Madras Estates Land Act. That Act, whose object is to declare and amend the law relating to the holding of land in estates in this presidency, divides lands in a zamindari into two main classes (1) 'private' or home-farm land and (2) ryoti land including what is called 'old waste'. A zamindar or landholder may enjoy his 'private land' in any way he chooses and the Act does not interfere with his right to make any contracts he likes with reference to its possession and enjoyment. The 'private' lands of a zamindar are not capable of being added to, except by acquisition through especial proceedings instituted before the Collector in the nature of proceedings under the Land Acquisition Act. He can, on the other hand, if he so chooses, by contract or grant convert 'private' land into 'raiyati'. His power to deal with what is called 'old waste' is in certain respects larger than with respect to raiyati land. But in 'raiyati land' proper, which forms the bulk of the land in a zamindari, the rights are divided between two clases of persons, the zamindar or 'landholder' to be more accurate, who is ordinarily entitled only to collect a 'fair or equitable rent,' and persons who are entitled to direct occupation and possession of the land for purposes of cultivation, that is, the raiyats, on the condition of their paying such rent to the landholder. This is in accordance with the rulings of this Court in *Vencata Mahalakshmamma* v. *Ramojagi* (7), *Venkatanarasimha Naidu* v. *Dandamudi Kotayya* (8) and *Cheekati Zamindar* v. *Ranasooru Dhora* (9), which expounded the law as it existed before the Act. The Act has taken every precaution to uphold the two distinct interests in raiyati land, that is, the landholder's right to collect rent or 'melvaram' as it is called, and the raiyats' right to occupation for purposes of cultivation or 'kudivaram'.

The next question arises, what happens if the landholder acquires the occupancy right as well? Shephard and Subramania Aiyar, JJ., held in *Cheekati Zamindar* v. *Ranasooru Dhora* (9) before the passing of the Act that even in such a case a raiyat who is admitted to possession of the land must be presumed to hold it on the same terms as an ordinary raiyat in a zamindari, viz., that he or his heirs would be prima facie entitled to occupy the land for purposes of cultivation so long as they were willing to pay just or customary rent. Such a raiyat was not to be treated as a tenant from year to year except that where there was an express contract the rights of the parties would be governed by such a contract. The Act however has gone further in favour of the raiyat except in the case of acquisition of kudivaram interest by an inamdar falling within the descrip-

(4) [1916] 39 Mad. 341=27 I.C. 77.
(5) [1870] 6 M.H.C.R. 164.
(6) A. I. R. 1915 Mad. 705=24 I. C. 217=38 Mad. 843.
(7) [1893] 16 Mad. 271.
(8) [1897] 20 Mad. 299.
(9) [1900] 23 Mad. 318.

S. N. DAR, B. A. LL. B.
Vakil High Court,

tion of Cl. (d), sub-S. 2, S. 3, i. e., an inamdar whose grant has been confirmed or recognized by the British Government, which is not the case here. S. 8 (1) enacts:

"Whenever before or after the commencement of this Act the entire interests of the landholder and the occupancy raiyat in any land in the holding have become united by transfer, succession or otherwise in the same person, such person shall have no right to hold the land as a raiyat but shall is hold it as a landholder".

Then sub-S. (3) says:

"the merger of the occupancy right under sub-Ss. (1) and (2) shall not have the effect of converting the raiyati land into private land."

The effect of such an union therefore shortly is that the occupancy right ceases to exist; there is only the melvaram left in the landholder, but the land still retains its character of raiyati land and is removed, generally speaking, from the operation of contracts. Thus, whomsoever the landholder thereafter lets the land to, he comes in not as a tenant of an occupancy raiyat but as a raiyat of raiyati land within the meaning of S. 6 (1). The lower appellate Court holds that S. 8 (1) does not apply, because in its opinion defendants 1 and 2 could not be said to hold the 'entire interests' of the landholder as they were the grantees of a portion only of the melvaram. But the mere fact that defendants 1 and 2 as inamdars have to pay something by way of quit rent to the zamindar cannot make their interests in the land as landholders anything less than the 'entire interests', since the raiyat has to pay rent to defendants 1 and 2 alone as 'landholders.' The words 'entire interests' were apparently intended to exclude such interests as those of a mortgagee. The Subordinate Judge has also relied on *Marapu Tharalu* v. *Telukula Neelakanta Behara* (10), which lays down that the ruling in *Cheekati Zamindar* v. *Ranasoora Dhora* (9) as to the presumption that raiyats of zamindari have a permanent occupancy right does not apply to the tenants of inamdars. But he overlooks the fact that the above case was not governed by the Madras Estates Land Act. My conclusion therefore is that even if defendants 1 and 2 had acquired the kudivaram right by succession, transfer, surrender or otherwise, by virtue of S. 8 (1) they retained the land only as landholders and defendant 3 having been in possession of it as a raiyat at the passing of the Act, acquired occupancy right therein under S. 6.

(10) [1907] 30 Mad. 502.

The decree of the Subordinate Judge will therefore be reversed and the appeal will be remanded to him for enquiry as to the amount of rent due to the plaintiff from the date of the suit to the end of June 1917 and he will pass a decree for such amount. Respondent 1 will pay the appellants' costs of this appeal and each party will bear his own costs in the lower Courts.

Napier, J. — The appellant is defendant 3 in this suit which was brought by the plaintiff to recover possession of the plaint lands and mesne profits from defendant 3. The plaintiff is a purchaser from defendants 1 and 2, and defendant 3 the present appellant, held the land under defendants 1 and 2 and now claims a permanent right of occupancy under the Madras Estates Land Act. The lower appellate Court, after the framing of fresh issues on remand, stated the points for consideration as follows :

"Whether defendants 1 and 2 had melvaram as well as kudivaram rights in the plaint lands and were to be treated as landholders or raiyats within the Act ; whether defendant 3 acquired the rights of permanent occupancy in the plaint lands under the Act,"

and decided both contentions against the appellant. Its finding on the second point was that defendant 3 held the lands as usufructuary mortgagee, and as such was not a raiyat within the meaning of the Act. It further held that defendants 1 and 2 had both warams in the suit lands and were thus raiyats within the meaning of the Act. I will deal with the latter finding first. The process by which the lower appellate Court arrived at this finding is as follows : It found that the plaint lands were a post settlement Nimebadi grant from the Rajah of Pittapur to the ancestors of defendants 1 and 2, that by that grant the latter were not created tenants of jerayati lands but that the grant was one of a portion of the melvaram and that therefore they were landholders within the meaning of the Estates Land Act as contended by defendant 3. It then proceeded to consider the question whether they were also kudivaram raiyats, and then found that the suit lands had been in the possession of defendants 1 and 2 for the last one hundred years or more and had been leased out by them periodically to cultivating tenants, the tenants and the

amount of rent varying from time to time, and that therefore prior to the Act no cultivating tenant had any permanent right of occupancy. On this finding, the Court assumed that the permanent right of occupancy was in defendants 1 and 2, and that therefore defendant 3, the tenant in possession at the date of the passing of the Act, could not acquire those rights. The logical result of such a proposition as this would be to render the provisions of the Madras Estates Land Act absolutely nugatory ; for if the fact that the cultivating tenants had not at the date of the Act a permanent right of occupancy showed that a permanent right of occupancy existed in their lessor, then obviously no tenant could acquire such a right under the Act. During the course of the argument we asked the learned vakil for the respondent for authority for that proposition, and he was constrained to admit that so far as the zamindar himself was concerned, no Court had ever held that the absence of occupancy rights in the tenants necessarily indicated that the occupancy right was in the zamindar and thus deprived the tenants of the benefit of the Act. He contended however that the position of defendants 1 and 2 was different from that of the zamindar, first, on the ground that they were not inamdars as found by the lower appellate Court, but ordinary jerayati tenants.

With regard to this contention which was not very strongly pressed, I do not think it necessary to say more than that the name and history of this tenure clearly proves it to be, as found by both the lower Courts, as inam. He relied however most strongly on the reasoning of the lower appellate Court above set out, contending that the fact that the lessors were inamdars and not a zamindar made all the difference, and that they were rightly held to have the permanent occupancy right. There can be no question that defendants 1 and 2 come within the definition of landholder, inasmuch as they are persons owning a part of an estate in that they are entitled to collect the rent of a portion of an estate by virtue of a transfer from the owner. This was found by the lower appellate Court and is not disputed by the plaintiff. Coming to the kudivaram interest, there is no finding by the lower appellate Court as to when this was acquired by defendants 1 and 2. But the Court seems to assume that the fact that they were leasing the lands to their tenants at pleasure indicates that they owned those rights. It was contended by the appellant that even if this was so, S. 8 of the Act would prevent the inamdar holding the dual position, the section being as follows:

> "Whenever before or after the commencement of this Act, the entire interests of the landholder and the occupancy raiyat in any land in the holding have become united by transfer, succession or otherwise in the same person, such person shall have no right to hold the land as a raiyat but shall hold it as a landholder."

The Subordinate Judge held however that the entire interest had not become united, taking the view that the word "landholder" meant the whole interest of the zamindar; and that, as the inam was only a portion of an estate subject to the payment of kattubadi to the zamindar, there was no union of the entire interest of the landholder and of the occupancy raiyat. The lower appellate Court has fallen into an error here. We are not concerned with the interest of the zamindar. The word "landholder" in the section has reference to the person claiming the interest, and it has never been disputed, and indeed has been specifically found by the Court, that defendants 1 and 2 were landholders within the meaning of the Act. In so far as this holding is concerned, defendants 1 and 2, as inamdars, held the entire interest of a landholder's right. The object of the section was to prevent the extinction of existing rights of permanent occupancy. Such rights were, of course, well recognized before the Act, the object of the Act being to make them universal. The word "entire" was inserted in the Act to apply where a mortgagee of the melvaram interest of the landholder acquired the rights of an occupancy tenant in a holding. In such a case he would not be prevented from holding the land as an occupancy raiyat by the fact that he had an interest in the melvaram. It provides for the converse case of that dealt with in sub-S. 6, explanation, the object of that explanation and S. 8 being to prevent the loss of the rights of occupancy by a tenant purchasing the landlord's interest and to prevent the loss of rights of occupancy by a landlord acquiring the

interest of an occupancy tenant: vide *Muthu Reddi* v. *Muthu Venkatapathi Reddi* (11).

There still remains however the question: "Were defendants 1 and 2 ever occupancy tenants with a permanent right of occupancy?" As far as I am aware, the only section in the Act which specifically deals with the kudivaram right is S. 3 (2), Cl. (d), describing one class of estate:

"Any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof provided that the grant has been made, confirmed or recognized by the British Government."

This has reference to inams granted by the State or persons who claim the right to make grants prior to the permanent settlement, which grants have been confirmed by the Inam Commission, and was meant to exempt cases where a revenue inam had been granted to persons already in occupation and cultivation of the land. It is not contended that this land comes within the exception indicated by this clause, this being a part of the class of estates covered by Cl. (a). The District Munsif, in finding that the inam was only of revenue, relies strongly on the fact that the ancestors of defendants 1 and 2 were Gnatis of the family Gurus of the Rajah, and states it to be highly improbable that they ever cultivated their holdings themselves. He further finds that no such cultivation by them has been proved, this finding of non-cultivation not being disputed here. The lower appellate Court considers this as immaterial, because defendants 1 and 2 had been in possession for the last 100 years or more and were leasing out lands periodically to changing tenants, this latter fact negativing tenants' occupying rights. This may be so and it is not argued before us that the tenants had occupancy rights before the Act, all that is contended being that the absence of occupancy rights in the tenants does not indicate occupancy rights in the landlords, defendants 1 and 2, so as to debar any cultivating tenant from acquiring occupancy rights under the Act. The learned Judge relies on a decision in *Gullapalli Bhadrayya* v. *Gullapalli Venkataratnam* (12). The point for decision in that case was, not whether the inamdar was a raiyat himself, but whether the tenants had occupancy rights at the date of the suit, the suit being prior to the Estates Land Act. The Court held that the presumption was that the inam grant was only of the melavaram right, the zamindar himself presumably only having that right, and that the fact that the inamdar was ejecting the tenants did not prove the absence of occupancy right in the tenants. The claim there went far beyond that claimed here, and the case does not support the learned Judge's view.

To my mind the true test is cultivation. This was the view taken by Sadasiva Aiyar, J., in an elaborate judgment in *Upadrasta Venkata* v. *Devi Sitaramudu* (2), a case decided by him and Seshagiri Aiyar, J. He was dealing with waste lands in an inam and said as follows:

"The inamdar, so far as the waste lands are concerned, cannot be considered to have the kudivaram right in them, though he could create kudivaram interest in a waste land by letting it to a cultivator and could have (before the Estates Land Act) converted it into a private land by cultivating it through his home-farm servants and thus got the kudivaram right vested in himself. Till he does either of these things, the lands would lie waste, owned by the inamdar . . . . . but he could not be said to have the kudivaram right in it, kudivaram implying direct contact by cultivation with the soil,"

and on p. 897 (*of* 38 *Mad.*) the learned Judge says:

"When the inamdar afterwards granted the lands for cultivation without giving the cultivators permanent occupancy rights and when he changed the cultivators from time to time, it cannot be said that thereby the inamdar himself got any permanent occupancy or kudivaram right in the land, as there is no evidence to prove that he let them expressly as his private or as home-farm lands. The occupancy right, that is, the right to occupay and cultivate, was enjoyed by cultivating tenants from time to time though they did not get a permanent occupancy right thereby."

I have pointed out in a case reported as *Tallapragada Subba Row* v. *Gopisetti Narayanaswami Naidu* (13) that to allow a person other than the cultivating tenant to intervene between the landholder and the cultivating tenant on a claim of kudivaram right would be to frustrate the whole object of the Act, and for the purpose of arriving at the definition of the word "Raiyat" by construing the rent section, I said that if a tenant is taking from the lands

(11) [1916] 37 I. C. 1.
(12) [1911] 11 I. C. 545.
(13) [1916] 36 I. C. 727.

its kudivaram interest and paying the melvaram to the landholder, then, whether he cultivates the land himself or is compelled by circumstances to have it cultivated for him, he is so paying money for the purpose of agriculture; and applying that test, I declined to accept the proposition that a person who had brought at public auction an interest in certain lanka lands from the zamindar for five years and let it to cultivators, was a raiyat within the meaning of the Act. It seems clear to me that defendants 1 and 2, the inamdars, are not paying rent to the zamindar and it seems to me therefore to follow that they cannot be raiyats. If they are not raiyats but have this kudivaram interest, the result would be that no persons cultivating that land could ever acquire a permanent right of occupancy and that the object of the Act, namely, to grant permanent rights of occupancy to persons cultivating ryoti land, would, in this case, also be frustrated.

It is argued by Mr. P. Narayanamurthy that this view is incorrect, Miller, J., having taken a different view in an earlier case. The case is reported as *Ponusawmy Padayachi* v. *Karupudayan* (6). The learned Judge said that on the fact being found that the tenant had no occupancy right, the presumption arises that the occupancy right was either granted to, or acquired by, the inamdar. I am unable to see why any such presumption should be made. Unless the idea of the right to cultivate is to be essential to kudivaram right, I do not see what meaning is to be given to that phrase and what difference there is in essence between such a right and melvaram right. The earlier cases, in which the analogy between a zamindari raiyat and a Government raiyat was traced by the late Muthusawami Iyer, J., and Subramania Iyer, J., laid stress on the position of the zamindar as the owner of the melvaram corresponding to the Government ownership of the melvaram in raiyatwari land and the position of the zamindari tenant as holding the right to cultivate just as the raiyatwari tenant has his right to hold and cultivate. To create a permanent right of occupancy under the name of kudivaram right in inamdars to whom the melvaram alone has been granted, simply on the ground that they have been shown to have been letting the land to cultivating tenants for many years, is to give to them a right which does not naturally arise out of the relative positions of the parties and is unknown where the zamindar alone is concerned. In his case the fact that he has been proved to have let the tenants into possession from the commencement, was, prior to the Act, sufficient to establish that the tenants had then no permanent right of occupancy, but it has never been suggested that these facts vested a permanent right of occupancy in him, created him a ryot and thus prevented the ryots from acquiring occupancy right under the Act. I do not see why the fact that he has assigned a part of his melvaram rights to inamdars who are not shown ever to have cultivated the lands themselves should put them in any better position than he himself would have been. From the date of the inam, they would as a matter of course, exercise the rights that had previously been vested in the zamindar, such rights including the letting of the lands to cultivators, and I can see nothing proved to have been done by them beyond what they would thus have been entitled to do.

In this view I am of opinion that defendants 1 and 2 had not kudivaram interest in the land in the sense that they had a permanent right of occupancy. I am further strongly inclined to hold, though I do not think it necessary to decide the point, that where the land is admittedly part of an estate and the lessor is found to be a landholder within the meaning of sub-S. 5, it is immaterial what other rights he may claim in the land, if there is a person holding for the purpose of agricultural raiyati land in that estate on condition of paying to such landholder the rent which is legally due on it. As pointed earlier in the course of my judgment, S. 3, sub-S. 2 (d), which excepts inams in which the melvaram and kudivaram are vested in the same person, has reference to grants recognized and confirmed by Government and it can certainly be argued that all other cases in which there is a person coming within the definition of a landholder and a person coming within the definition of a raiyat, such raiyat is given occupancy rights by the Act.

It remains now to consider the decision of the lower appellate Court that defendant 3, being only a usufructuary mort-

gagee, could not be a raiyat within the meaning of the Act. The learned Judge gives no authority for this proposition, but it is sought to be supported in this Court on two cases from Calcutta and one of the High Court of Allahabad. The case of *Bengal Indigo Company* v. *Raghobur Das* (1) was a decision of the Privy Council confirming the decision of the Calcutta High Court on the construction of a zarpeshgi lease and turned on the language of the Bengal Rent Law, Act 10 of 1859, and the Bengal Tenancy Act 8 of 1885. S. 5 of the latter Act provides that in determining whether a tenant is a tenure holder or a raiyat, the Court shall have regard to the purpose for which the right of tenancy was originally acquired, and their Lordships of the Privy Council held that the leases in question were not mere contracts for the cultivation of the land let, but that they were also intended to constitute and did constitute a real and valid security to the tenant for the principal sums which he had advanced and interest thereon. The tenants' possession under them was, in part at least, not that of cultivators only, but that of creditors operating repayment of the debt due to them by means of security. We are asked under an entirely different Act to apply the decision of the Board to the facts of this case. The first answer is that we have not got those words in the sections of our Act, sub-S. 15, S. 3 defining a raiyat as a person who holds for the purpose of agriculture raiyati land on condition of paying to the landholder the rent which is legally due upon it; and it is the policy of this Act which we are to enforce and not the policy of the Bengal Tenancy Act. I am certainly prepared to accept the proposition that a mortgage of the land by a landholder to a person who was not in any sense of the word a cultivator, the income to be derived from the land being applied in discharge of the interest on the mortgage would not create the mortgagee a raiyat. This is in accordance with the view which I had taken of the case above referred to and my reasoning in this judgment, for such a procedure could be utilized by a landlord to prevent permanent right of occupancy being acquired by the actual cultivating tenant.

But where a person has bona fide taken the land for cultivation and is cultivating it, the fact that he has advanced money to his landlord and sets off his rent against the interest due from the landlord cannot, in the absence of the words in the Bengal Act, prevent such cultivating tenant becoming an occupancy raiyat under the Act The case of *Altaf Ali Khan* v. *Lalta Prasad* (14) did not turn on any question of the right of occupancy and is therefore of no assistance to us. The history of this tenure is as follows: Defendant 3 was admitted by defendants 1 and 2 to the land in the year 1896, and on the same day he advanced money on a mortgage bond to defendant 2. The tenancy was created by exchange of patta and muchilika for eight years, the tenant taking 20 acres of land agreeing to pay a cist of Rs. 210 per year for the purposes of cultivation. He agrees to pay the kattubadi cist and the local cess payable by defendants 1 and 2 out of the first crop realized by him, to pay Rs. 30 in cash to defendants 1 and 2 and credit the balance of cist towards the complete discharge of the interest due on the mortgage deed. Three years later the landlord borrowed a further sum of Rs. 500, the original sum having been Rs. 500, on a mortgage. This document recites that the mortgagee is in possession under the cowle of 1896, Ex. A, and makes the following provision for the discharge of the interest. The future cist due is to be credited towards the interest due on the whole sum of Rs. 1,000, the balance being taken towards the principal. The document is called a mortgage deed with possession.

The effect of this mortgage is to cancel the provision in Ex. A under which a certain amount was to be paid in cash and to provide for a discharge of both principal and interest from the rent. The next document, dated 21st August 1900, (Ex. D) recites that Rs. 100 is due on the mortgage Ex. C, that the landlord has borrowed another Rs. 100 and provides for the repayment of principal and interest in nine years. At the same time the landlord gave a patta and the tenant executed a muchilika Ex. MM for the lands, reducing the cist of Rs. 210 agreed by Ex. A to Rs. 150. Then come Exs. F and G executed on 6th July 1904, just prior to the date when the lease under Ex A would expire. Ex. F is a receipt

(14) [1897] 19 All. 486.

in full discharge of the amounts due on the mortgages. Ex. G is a muchilika by defendant 3 under which he agreed to pay a cist of Rs. 188 for the 20 acres with the addition of another 6 acres of garden land for a single year and after the expiry of that year, he should continue to hold under the muchilika of 1900, Ex. MM. It is not disputed that the patta and muchilika evidenced by Ex. MM were in force at the date of the Act, and it is further in evidence that defendants 1 and 2 treated defendant 3 as their tenant, for they brought a suit against him to recover the amount of Rs. 336 due under Ex. MM. This is proved by Ex. L. Defendant 3 set up that present defendants 1 and 2, the plaintiffs in that suit, had agreed to sell the land, and Mr. P. Narayanamurti contends that Ex. F of 1904, which purported to acknowledge receipt of the whole of the mortgage money due, was a nominal document in connexion with this sale. The District Munsif held that as there had been no registered sale deed, the sale was not complete and that therefore the relation of landlord and tenant still subsisted as contended by defendants 1 and 2 in that suit.

This is the history of the transactions between the parties and I can find nothing in these documents which supports the finding of the District Judge, that defendant 3's tenancy under Ex. A merged in his right as a usufructuary mortgagee under Ex. C and that from the date of Ex. C his position as a mere tenant was at an end. Ex. MM and the contention of defendants 1 and 2 in the suit, Ex. L, are a complete answer to this finding, and a further answer is to be found in the fact that in this very suit itself plaintiff, the assignee of defendants 1 and 2, sued defendant 3 in ejectment on the muchilika Ex. MM. He has not sought to recover possession of the land from the defendant as a usufructuary mortgagee, but alleged that he was entitled to possession on termination of the period of the lease in Ex. MM. It is not contended before us that defendant 3 was not cultivating the land. Under the pattas and muchilikas the land was expressly let to him for cultivation, and I do not think that is it now open to the plaintiff to resile from the position taken up by defendants 1 and 2 in Ex. L and in his plaint in this suit, and seek to treat defendant 3 as a usufructuary mortgagee, which in fact he never was simply because the legislature has intervened and given him rights which were not contemplated at the date of the patta and muchilika.

Mr. P. Narayanamurthi has urged that if he is not entitled to recover the land, the Courts will give him a decree for rent due. The appeal will be allowed with costs and a decree for rent to be ascertained by the Subordinate Court will be passed. The decree will be in the terms proposed by my learned brother.

S.N./R.K. *Case remanded.*

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OLDFIELD AND SADASIVA AIYAR, JJ.

Kodi Sankara Bhatta—Plaintiff—Appellant.

v.

Moidin and *others*—Defendants—Respondents.

Second Appeal No. 364 of 1917, Decided on 26th February 1918, against decree of Sub-Judge, South Canara, in Appeal Suit No. 73 of 1916.

(a) Transfer of Property Act (1882), S. 70—Usufructuary mortgage by plaintiff of warg land with adjoining kumki land—Mortgagee in possession over 12 years—Patta issued for warg land alone and kumki land assigned to plaintiff—Plaintiff's suit to eject mortgagee from kumki land—Mortgagee's possession of kumki land held did not create title by adverse possession—Mortgage did not operate on interest acquired by plaintiff in kumoki land—Kumki land held not accession—Mortgagee was not protected by Trusts Act (1882), S. 90.

Plaintiff's predecessor-in title mortgaged usufructuarily in 1890 certain warg land and kumki land adjoining it to defendants' predecessor-in-interest. The mortgagee and his heirs were in possession up to 1914. Meanwhile, in the settlement of 1902 patta was issued for the warg land alone and the kumki land, which was classed as waste poramboke, was assigned on darkhast to the plaintiff in 1911. On a suit by the plaintiff to eject the defendant from the kumki land in 1914:

Held: (1) that the paramount right of Government over the kumki land which was assigned to the plaintiff prevailed over the rights of the mortgagee whose enjoyment between 1890 and 1914 could not confer on him any adverse title as against the plaintiff: (2) that the mortgage of 1890 did not operate on the interest acquired by the plaintiff by the darkhast grant of 1911, as no proof had been let in of any erroneous representation by the mortgagor at the date of the mortgage or of the mortgagee having acted on any such representation to his detriment (3) that the suit land could not be treated as an accession to the mortgaged property under S. 70, T. P. Act, as it was at the absolute disposal of Government:

(4) that the defendants were not protected by S. 90, Trusts Act, as the plaintiff did not obtain the suit land on darkhast as representing all persons interested in the property. [P 123 C 2]

(b) Transfer of Property Act (1882), S. 43—S. 43 is branch of law of estoppel.

S. 43, should be treated as a branch of the law of estoppel. [P 123 C 1]

B. Sitarama Row—for Appellant.

H. Balakrishna Row—for Respondents.

Sadasiva Aiyar, J.—The plaintiff is the appellant. The plaintiff owns a warg land marked 17/27 in the plan Ex. C, as the reversionary heir of the husband of one Devamma. Devamma granted a usufructuary mortgage Ex. A in 1890, not only of the warg land 17/27, but also of plaint item (1) which was the slope of a hill adjoining the warg land. Item (1) is marked A, A-1 and B in the plaint. It is well known that in South Kanara, warg lands have what are called kumki rights over a certain extent of adjoining waste land. Hence Devamma usufructuarily mortgaged in 1890 both her warg land and the plaint item (1) in dispute and put her mortgagee in possession, and the said mortgagee and his successors-in-title including defendant 1 have been in possession of item (1) along with the warg lands all along from 1890. In the settlement of 1902, patta was issued for the warg land alone, item (1) being classed as waste poramboke.

The plaintiff, who owned the equity of redemption in the lands usufructuarily mortgaged, took advantage of the fact that item (1), a portion of the lands, belonged to the Government and was at its absolute disposal (though under the darkhast rules the revenue officers charged with the duty of granting lands on darkhast were directed to prefer the neighbouring wargdars), applied for the darkhast grant of item (2) in 1910 and obtained a grant of it to himself in March 1911: see Ex. B. The plaintiff thereupon brought this suit against the mortgagee, defendant 1 (who died after suit and whose legal representatives are defendants 2 to 5) for possession of the plaint item (1) on the strength of his title under the above darkhast grant. The plaintiff cleverly omitted in his plaint all mention of the fact that his predecessor-in-title (Devamma) had usufructuarily mortgaged the plaint item (1) also in 1890 to defendant 1's predecessor-in title and that defendant 1 and his predecessors-in-title had been in possession of plaint item (1) along with other lands as usufructuary mortgagees from 1890. On the other hand he told a falsehood in the plaint that the defendants trespassed upon the Government land item (1) only in December 1910, that he was in possession of it before and that he was granted the land by Government, while he was so in possession of it on behalf of a stanom.

The plaintiff also sued for recovery of plaint item (2) (ridge bunds on which trees stand and called kattupannis) alleging that the defendants unlawfully trespassed at the same time (in December 1910) on those kattupani lands also. The real truth was that these kattupannis were also included in the mortgage of 1890 (except the portion marked XY in the plan) and have all along been in the possession of the mortgagee and his successors-in-title. The District Munsif gave a decree to the plaintiff for the portion XY of the kattupannis (to which the defendats laid no claim) and dismissed the plaintiff's suit in other respects, on the ground that the plaintiff in order to evade his liability to give compensation for the house built on item (1) by defendant 1 (which plaintiff would have to do if the plaintiff sued to redeem item (1) and the warg land and the kattupannis except X Y on the mortgage of 1890) has brought this suit in ejectment as regards items (1) and (2) alone, excluding the warg land, making the false allegation of trespass in December 1890 as regards the items 1 and 2. The Subordinate Judge on appeal confirmed the lower Court's decree.

Nothing was alleged by Mr. B. Sitarama Row for the appellant (plaintiff) which could induce us to differ from the concurrent findings of fact by the lower Courts. He however strongly relied upon the question of law, namely, that item (1) being merely a kumki land attached to the warg land, the Government was entitled to ignore the mortgage made in 1890 by the wargdar so far as regards the kumki land, that it was entitled to grant the kumki land to whomsoever it pleased, that the plaintiff as such grantee acquired a title to it as owner against defendant 1 (the usufructuary mortgagee under the wargdar) and that defendant 1 was not entitled to rely upon the right of possession granted by the wargdar (under the mortgage) of the kumki land as against the right of possession granted by

the Government (under the darkhast proceedings) to the plaintiff. Having regard to the decision in *Hattikudur Narain Rao* v. *Andar Sayad Abbas Sahib* (1), approved in *Swaminatha Mudali* v. *Saravana Mudali* (2), and to the rights of the Government in waste land in South Kanara as settled by the Full Bench decision in *Secy. of State* v. *Manjeshwar Krishnayya* (3). I do not see my way to get round the above contention of Mr. Sitarama Row. The lower appellate Court relied on the fact that defendant and his predecessors had been enjoying the land item (1) as mortgages for more than 12 years, that is, between 1890 and 1914, when this suit was brought. But such enjoyment cannot confer any adverse title on the mortgagees as against the Government and when the Government exercised their paramount right in 1911, the plaintiff got a clean title. The District Munsif relied on S. 43, T. P. Act, but S. 43 has been treated as a branch of the law of estoppel: see *Pandiri Bangaram* v. *Karumoory Subbaraju* (4), *Jadu Bans Upadhiya* v. *Sheojit Singh* (5) and *Rashmoni Dasi* v. *Surja Kanta Roy Chowdhry* (6). No proof of any erroneous representation by the mortgagor at the time of Ex. A (the mortgage of 1890) or of the mortgagee's having acted on any such representation to his detriment has been proved and I cannot agree with the District Munsif that by reason of S. 43, T. P. Act, the mortgage of 1890 operated on the interest which the plaintiff acquired by his darkhast grant of 1911.

The respondents' learned vakil Mr. Balakrishna Row attempted to support the decision of the lower Courts on a ground not put forward in the judgments of the lower Courts, namely, that under S. 70, T. P. Act, any accession to the mortgaged property becomes part of the security and that the plaint item (1) should be treated as such an succession to the mortgaged warg land. Having regard to the illustrations to S. 70, T. P. Act, I am unable to hold that the kumki land at the absolute disposal of the Government and granted by them to the owner of the equity of redemption of the neighbouring warg land can be treated as an accession to the said warg land. Mr. Balakrishna Row relied also upon S. 90, Trusts Act, but the provisions of that section apply to tenants for life, co-owners, mortgagees and similar persons who avail themselves of their position to obtain benefits for themselves in "derogation of the rights of other persons interested" or "as representing all persons interested." Here it was the mortgagor who obtained the grant of the neighbouring waste land from the Government, and not the mortgagee, and there is nothing to show that he obtained it as representing all persons interested in the mortgaged property.

In the result, I have reluctantly come to the conclusion that the decisions of the lower Courts must be modified by giving judgment for the plaintiff for item (1) also, the defendants being allowed six month's time to remove the improvements made by them on that land. This is not a case for allowing any costs at all to the plaintiff, who made dishonest suppressions and false allegations in his plaint as regards both item (1) and item (2) and as he has failed in respect of the greater part of item (2) in all the Courts, I would direct the plaintiff to bear his own costs throughout and pay out half of defendants' costs throughout.

Oldfield, J.—I agree.

S.N./R.K. *Appeal allowed.*

(1) [1915] 27 I. C. 785.
(2) [1917] 40 I. C. 581.
(3) [1905] 28 Mad. 257 (F.B.).
(4) [1910] 34 Mad. 159 =8 I. C. 388.
(5) [1911] 10 I. C. 443.
(6) [1905] 32 Cal. 832.

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* A. I. R. 1919 Madras 123

SADASIVA AIYAR AND NAPIER, JJ.

Thimma Reddi — Appellant.

v.

Subba Reddiar and *others*—Respondents.

Appeal No. 38 of 1917, Decided on 3rd April 1918, against appellate order of Temporary Sub-Judge. Sivaganga, in O. S. No. 6 of 1916, D/- 16th August 1916.

(a) Decree—Execution—Absence of consideration does not deprive assignee of decree of right to execute.

The absence of consideration for an assignment of a decree will not, provided the assignment is not a sham transaction, deprive the assignee of his right to execute the decree.: 43 I. C. 801, *Foll.* [P 125 C 1]

(b) Civil P.C. (1908) O. 21, R. 2—Certificate of satisfaction need not be in any particular form—Even mention of payment in execution petition is sufficient—Absence of formal

record by Court of such payment does not nullify effect of certificate.

A certificate of satisfaction under O. 21, R. 2, Civil P. C., need not be in any particular form, provided that the satisfaction is in some manner notified to Court, and even the mention of payment to the Court at any time by the decree-holder, e. g. in his execution petition, is a sufficient certificate.

The record of such satisfaction by the Court is only a formal matter which may be made at any time or even be treated as having been made. The absence of such a formal record will not nullify the effect of the certificate, which alone is sufficient to enable the Court to recognize the payment. [P 125 C 2]

* (c) **Civil P. C. (1908), O. 21, R. 2—Joint decree-holders being partners— Certificate by some will not bind others—But if certificate is given for and on behalf of all, others cannot apply for execution.**

Certificates of satisfaction given by some of several joint decree-holders will not bind others even of all them are partners.

But where a certificate is given for and on behelf if all the decree-holders, and there is a de facto discharge of the decree, he other decree-holders cannot be allowed to apply for execution [P 128 C 2]

* (d) **Civil P. C. (1908), O. 21, R. 16—Release by some joint decree-holders in favour of others when there was already discharge of decree does not vest title.**

A release by some of several joint decree-holders of all their rights in favour of the others will not vest any title in the latter in the decree, if there was a discharge at the date of release and the releasors had themselves no interest in the decree to assign away. [P 128 C 2]

(e) Civil P. C. (1908), O. 21, R. 15—Assignment of decree by only some decree-holders —Assignee must apply for execution under R. 15 for benefit of himself and other joint decree-holders and not for his individual benefit alone.

Where all the decree-holders do not join in the assignment of a decree, but some only of them make an assignment, the assignee gets no interest even in a fraction of the decree amount; and even if he can be regarded as acquiring the status of a joint decree-holder with the others, he must apply for excution of the decree under O. 21, R. 15, for the benefit of himself and the other joint decree-holder with his assignors, and not for this individual benefit alone.

[P 126 C 2]

K. S. Ramabhadra Ayyar—for Appellant.

A. Krishnaswami Aiyar—for Respondents.

Sadasiva Aiyar, J.—The 3rd and 4th Plaintiffs' (decree holders') assignee is the appellant before us. The material facts may be shortly stated thus: Plaintiffs 2 and 3 were partners of the joint decree-holders with the appellant's assignors, namely, the plaintiffs 3 and 4. The decree was passed in favour of all the four plaintiffs in 1908 for a certain sum of money. There was an adjustment of the decree amount between the defendants and plaintiffs at Rs. 485 and that sum was paid up to all the four plaintiffs in 1909 by the defendants through one Muthia Thevan. The decree was thus really satisfied but a certificate of satisfaction was not filed by all or any of the four plaintiffs till December 1911 and hence the executing Court could not recognize the satisfaction till then.

In 1910 the four plaintiffs dissolved the partnership and plaintiffs 2 and 1 respectively executed release deeds in February 1910 and February 1911 in respect of the pertnership assets and liabilities. As all the four partners knew well that the decree debt due by the defendants had been really satisfied in 1909, plaintiffs 1 and 2 never could have thought when they executed their release deeds that the partnership owned any interest in the decree and could not have intended to transfer any rights under the decree to plaintiffs 3 and 4. (The release deeds A and B have not been translated and printed.) Plaintiffs 3 and 4 treating the decree however as still alive and treating themselves as the sole owners of the decree, fraudulently assigned the decree to the appellant (execution petitioner) for no consideration in May 1911. The appellant first applied for execution in July 1911 (just within three years of the decree). Plaintiffs 1 and 2 got notice and filed counter-petitions in December 1911, which contained certificates of satisfaction of the decree by payment of Rs. 485 in 1909. The appellant did not prosecute that petition and had it dismissed in 1912. Then he filed the present execution petition in November 1913 for a warrant of arrest against defendant 1 for recovery of the decree amount. The lower appellate Court (confirming the decision of the District Munsif) refused to recognize the appellant as transferee of decree and dismissed the execution application, on the above facts and on the view that the certificates of plaintiffs 1 and 2 were legally valid certificates of satisfaction which discharged the decree.

The appellant's learned vakil (Mr. K. S. Ramabhadra Aiyar) strenuously argued the fooling points (each of which I shall deal with below immediately after stating it). First contention: The lower appellate Court was wrong in going into the

question of consideration for the assignment of the decree to the appellant. This argument seems wellfounded: see *Chellam Chetti* v. *Seeni Chetti* (1), which decides that, provided the assignment is not a sham transaction, the absence of consideration will not deprive the assignee of his right to execute the decree. Second contention: The so called certificates of plaintiffs 1 and 2 are not in proper form and ought not to be treated as certificates of satisfaction under O. 21, R. 2.

There is no substance in this contention as a certificate under O. 21, R. 2, of the decree-holder need not be in any particular form and even the mention of the payment to the Court at any time by the decree-holder, say in his execution petition, is a sufficient certificate: see *Mohamed Silar Sahib & Co.* v. *Nabi Khan Sahib* (2) and *Mathar Dravia Sahaya Ela Nidhi Co., Ltd.*, In re (3). Third contention: As no record of satisfaction was made by the Court on those certificates, they are legally useless. Mr. Ramabhadra Aiyar relied on certain passages in the judgments in *Moti Ram* v. *Hannu Prasad* (4) and *Periasami* v. *Krishna Ayyan* (5) and other cases for his contention that it is the record of satisfaction made by the Court on the decree-holder's certificate that discharges the decree and not the certificate itself. In the old Civil Proceduro Code, S. 258, Para. 1, corresponding to O. 21, R. 2. sub-R. (1), there was no express provision for any record of the certificate of satisfaction when given by the decree-holder, though the mofussil Courts usually endorsed "recorded" on such certificates. Where the decree-holder did not certify but the judgment-debtor applied within 90 days to the Court to send notice to the decree-holder to show cause why payment or adjustment should not be recorded as certified, it was enacted that the Court, on his failure to show cause, "shall record the same" (that is as certified). Para. 3, S. 258, which was intended to provide for the executing Court not recognizing payment, out of Court except in the two cases referred to in the previous, two paragraphs, mentions expressly one of the cases, namely, the payment or adjustment being "certified as aforesaid," that is, by the decree-holder under para. 1, and does not expressly add "or recorded by the Court as certified" under para. 2.

Evidently the word "certified" in para. 3 was intended to mean "certified" or "recorded by Court as certified." The new Code supplies in sub-R. 3 the omitted words "or recorded." Mr. Ramabhadra Aiyar's argument that because the 1st sub-rule in O. 21, R. 2, has added the words "and the Court shall record the same", that is, the decree-holder's certificate of adjustment. the words "or recorded" in sub-R. 3 must be read as "and recorded" where there is a certificate by the decree-holder under sub-R. 1, is ingenious but wholly inadmissible. In the case of sub-R. 2, there is no certificate at all but only a record by the Court as certified, and the expression in sub-R. 3 "certified or recorded", if read "certified and recorded", will make sub-R. 2 wholly ineffectual to protect the judgment-debtor. The neglect by the Court of the duty expressly imposed on it (under sub-R. 1, O. 21, R. 2, of the new Code) of recording the decree-holder's certificate cannot prejudice the judgment-debtor and it cannot be argued successfully that the record also by the Court is required under sub-R. 3 before the payment or adjustment could be recognized. The record by the Court being a formal matter, of course, may be made at any time or even be treated as having been made. In the cases of *Mahomed Silar Sahib & Co.* v. *Nabi Khan Sahib* (2) and *Mathar Dravia Sahaya Ela Nidhi Co.*, In re (3), no such record by the Court of the certificate of payment could have been made (as the payment was mentioned for the first time in the execution petition itself) and yet it was not argued in those cases that, in the absence of such a formal record, the certificate alone would not enable the Court to recognize the payment. This contention of Mr. Ramabhadra Aiyar therefore also fails.

Fourth contention: The certificates of plaintiffs 2 and 1, after they had released all their rights in the decree in favour respectively of plaintiffs 3 and 4, are useless. The releases (as I said before) are not translated or printed. Admittedly, they do not refer expressly to the decree amount due to the four partners as joint

(1) [1918] 43 I. C. 801.
(2) [1916] 35 I. C. 157.
(3) [1917] 40 I. C. 889.
(4) [1904] 26 All. 334.
(5) [1902] 25 Mad. 431.

decree-holders. Oldfield, J., and myself held in *Mahomed Silar Sahib & Co.* v. *Nabi Khan Sahib*(2), following Bashyam Aiyangar J.'s statement of the law in *Periasami* v. *Krishna Ayyan* (5), that a payment out of Court to one only of several joint decree-holders cannot bind the others even if he and the others were partners. I think it follows on the same principle that certificates given by two joint decree-holders cannot also bind the other decree-holders even if all of them were partners. Hence I am inclined to hold that the certificates themselves given by plaintiffs 1 and 2 cannot be treated by the executing Court as having discharged the decree passed in favour of all the four plaintiffs, unless plaintiffs 3 and 4 had given authority (express or implied) to plaintiffs 1 and 2 to certify satisfaction. Turning to the releases given by plaintiffs 2 and 1, however I do not agree with the appellant's contention that those releases had the effect of vesting the entire rights in the decree in plaintiffs 3 and 4 alone. In the first place the decree had been discharged except in the eye of an executing Court. In the second place, plaintiffs 1 and 2 never intended to and never did transfer their interests in the decree (to the extent that they remained alive in the eye of the executing Court) in favour of plaintiffs 3 and 4 Hence, it must be taken that, notwithstanding the releases, the decree was alive in favour of all the four decree-holders so far as the executing Court was concerned.

The fifth and the last contention is that, in any event, plaintiffs 3 and 4 owned some fractional interest in the decree and that at least there was a transfer of that interest to the petitioner (appellant) and as the holder of such a fractional share in the decree, he could apply for execution of the whole decree on behalf of himself and of plaintiffs 1 and 2. I am inclined to hold in answer to this contention, that the transfer by plaintiffs 3 and 4 alone conveyed no title or interest in the decree debt in favour of the petitioner. In *Mahomed Silar Sahib & Co.* v. *Nabi Khan Sahib* (2) I observed as follows:

"I am very doubtful whether two out of three partners" (here it is two out of four partners) "can, in their individual capacities, legally claim definite shares in a particular decree debt belonging to themselves and the other partners jointly, such a decree debt being only an asset out of the numerous partnership assets. I think that they cannot make such a claim to own separate shares in a particular asset any more than a member of a joint Hindu family can claim to receive in his individual capacity (or give a valid discharge for) his share of a partner debt due by one of the debtors of the joint Hindu family which possesses numerous other assets. Neither a partner nor a member of a joint Hindu family can claim and receive a definite share in a particular partnership debt or family debt as the case may be."

It follows that as all the joint decree-holders did not join in the transfer, the petitioner got no interest even in a fraction of the decree amount. Further, under O. 21, R. 15, even if the petitioner by reason of the deed he obtained from plaintiffs 3 and 4 secured the status of a joint decree-holder with plaintiffs 1 and 2, he should have applied for the execution of the decree for the benefit of himself and plaintiffs 1 and 2 [see O. 21, R 15 (1)] whereas the application which he actually made was for his individual benefit alone. For the above reasons I hold that the dismissal of the petitioner's application for execution by the lower Courts ought to be upheld and this appeal shoul be dismissed with costs.

Napier, J.—The facts out of which this appeal arises are found by the lower appellate Court as follows: Plaintiffs 1 to 4 were partners and brought a suit against the defendants upon a promissory note. In the appellate Court the suit was settled by the payment of Rs. 485. This money was paid by one Muthia Thevan to the plaintiffs and credited in the partnership accounts. Subsequent to the payment, the plaintiffs dissolved the partnership defendants 3 and 4 taking over the assets and liabilities of the partnership and later on they assigned their interest to the petitioner without any consideration passing. The petitioner now seeks to execute the decree against the defendants who have discharged their liability. The Court having found that the amount was discharged and paid to all the plaintiffs, the claim has no merits, but it is argued that there has been no valid discharge within the meaning of O. 21, R. 2, Civil P. C., and that therefore the decree is still capable of execution. The proceedings taken under O. 21, R. 2, were as follows: The transferee decree-holder put in Execution Petition No. 407 of 1911 on 5th August 1911. Plaintiffs 1 and 2 put in separate

counter petitions on 19th December 1911 and 6th December 1911 respectively. stating that a sum of Rs. 500 or Rs. 485 had been settled in full discharge of the decree debt and credited in the plaintiff's partnership accounts.

The District Munsif took proceedings to ascertain the truth of this statement, and partnership books were produced, but before further proceedings could be taken, plaintiff 1, and, then shortly afterwards, plaintiff 2 died. Notice was ordered to their representatives, but batta was not paid and the petition was dismissed. A subsequent petition was filed on 2nd October 1912 and withdrawn. Another petition, Execution Petition No. 4 of 1913, was filed on 20th November 1913, which is the petition out of which this appeal arises. The defendants rely on the counterpetitions by the deceased plaintiffs 1 and 2 as a bar to execution, while the petitioner contends that it is not a valid discharge. It is argued that there has been no certificate and no record within the meaning of O. 21, R. 2. Reliance is placed on a passage in the judgment of Bashyam Aiyangar, J., in a decision of the Full Bench reported as *Periasami* v. *Krishna Ayyan* (5). The question for decision was one of limitation, but in expressing his opinion the learned Judge says that a discharge not so recorded cannot be recognized by the Court executing the decree, for such record is by statute made indispensable evidence for proving the alleged discharge. At p. 440 however the learned Judge uses this language:

"If payment be made out of Court . . . such payment will, of course, be a sufficient discharge of the decree debt, and it is not the act of the Court in recording such payment as certified that operates as a discharge."

I do not think that the learned Judge meant to lay down that there must be a formal order of record. I think the real question is whether there has in fact been a discharge, and whether the fact of the discharge has been brought to the notice of the Court for the express purpose of staying further proceedings. That was clearly done in this case, for the two counterpetitions were put in reply to an application for execution by the transferee decree-holder, and it seems to me immaterial that the Court did not pass any order on the counter-petitions. There can be no doubt that if the District Munsif had been able to proceed with the application, he would have found, on the evidence as has now been found in these proceedings, that the money had been paid to the partnership, and he would have dismissed the petition on its merits. I am therefore of opinion that the counter-petitions were good certificates in form. This view receives some support from the language used by the learned Judges in *Alathoor Badrudeen* v. *Gudam Mohideen* (6), where they say that they might have been inclined to treat the judgment-debtor's counter-petition to an execution petition as an application to compel the judgment creditors to certify the adjustment, if that counter-petition had not been put in far too late. A still stronger case is that in *Masilamani Mudaliar* v. *Sethuswami Aiyar* (7), where the Bench was considering an acknowledgment for the purpose of saving limitation. There the form of certificate was a payment set out in Col. 5 of the execution petition showing payment on account. Ayling, J., says with reference to this:

"I see no reason why this should not be accepted as a certificate of payment under Cl. (1) of the rule, for nothing is prescribed in the rule as to the time within which or the manner in which the decree-holder must certify payment."

Kumaraswami Sastri, J., says following the decision in *Rajam Aiyar* v. *Anantharatnam Aiyar* (8):

"I do not think that the payments can be ignored as not certified if they were as a matter of fact made,"

(meaning of course thereby made and brought to the notice of the Court). These decisions seem to me to lay down what I conceive to be the true principle, namely that the object of the rule is not to require any particular form of proceeding, but only to provide that the Court should be informed of the payment. The next objection taken to the counter-petitions is that they were put in by plaintiffs 1 and 2 only after they had ceased to have any interest in the debt. It is contended therefore that there has been no certificate by the decree-holders, the argument being that the word "decree-holder" must mean all the decree-holders where there are more than one, and that the rule cannot be read as if it said "the decree-holder or any one of the several decree-holders." There is a great deal of force in this contention. I have

(6) [1911] 36 Mad. 357=12 I. C. 562.
(7) [1917] 41 Mad. 251=41 I. C. 701.
(8) [1916] 31 I. C. 318.

however held that the object of the rule is to inform the Court, or putting it in the words of Bashyam Aiyangar, J.:

"It is not the act of the Court in recording such payment as certified that operates as a discharge."

The learned vakil for the appellant relies on the decision of a single Judge in *Moti Ram* v. *Hannu Prasad* (4). But in that case the joint decree-holder who had certified satisfaction did not certify it for the benefit of himself and the other decree-holders, and alleged only that he had received the amount of the decree. The decision of the learned Judge was based on the proposition that one of the two joint decree-holders cannot assume to himself power to give a discharge out of Court for the full amount of the decree. That is a proposition which cannot be disputed and is expressly laid down in *Periasami* v. *Krishna Ayyan* (5) and followed in a case reported as *Mahomed Silar Sahib & Co.* v. *Nabi Khan Sahib* (2). But here the amount has been paid to all the decree-holders though the certificate is only by two of them. The question is not one of substantive rights but of procedure. In a case reported as *Tarruck Chunder Bhuttacharjee* v. *Divendro Nath Sanyal* (9) one of the several joint decree-holders certified a payment to him of a 12-annas share in a decree and the other decree-holders applied for execution in full. The Court recognized the fact that in two earlier cases of *Ranee Nyna Kooer* v. *Doolee Chund* (10) and *Brojeswari Chowdhranee* v. *Tripoora Soonderee Debi* (11) the Court had held that where one of the decree-holders had certified payment of the whole decree, the remaining decree-holders ought not to be allowed to take out execution again until they had satisfied the Court that they knew nothing of the payment. The Court was however not prepared to go quite so far as that it decided that the Court ought not to recognize payment made out of Court if certified by only one decree-holder unless made and certified for the benefit of all. This view was based on the analogy of S. 231 of the old Code, which allowed one of several joint decree holders to apply for execution of the whole decree for the benefit of all. To my mind there is great force in this analogy and to allow one of several joint decree-holders who have already received payment to come in and apply for execution after the other decree-holders have certified discharge of the debt would, in my opinion, open the door to fraud and defeat the object of the section, which is not aimed at the prevention of payment out of Court but merely requires notice of it so as to prevent execution issuing. I can find no case in which such a certificate has been held to be bad where the amount has in fact been received by all the joint decree-holders. Therefore, in my opinion, this point also fails and the appeal must be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(9) [1883] 9 Cal. 831.
(10) [1874] 22 W. R. 77.
(11) [1879] 3 C. L. R. 513.

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SADASIVA AIYAR AND ODGERS, JJ.

Muthusawmi Asari In re—Prisoner—Appellant.

Criminal Appeal No. 115 of 1919, Decided on 28th July 1919, against order of Sess., Judge Ramnad, in Case No. 3 of 1919.

Penal Code (45 of 1860), Ss. 84 and 302—Evidence of insanity some time before occurrence but nothing to show that accused did not know consequence of his act—Conviction for murder is right—But reference is justified under Criminal P. C. (1908), S. 401.

The accused was charged with having stabbed his wife with a knife as a result of which she died. It was proved that sometime before the occurrence he was subject to insane fits, but there was no proof that when he committed the murder he did not know the nature or the consequences of his act. The accused was convicted and sentenced to transportation for life.

Held: that the conviction was right, but that the papers should be submitted to the Government under S. 401, Criminal P. C. for such action as it might think fit to take: 12 *Mad.* 459 and 23 *Cal.* 604, *Foll.* [P 129 C 1]

T. Rangaramanujachariar—for Appellant.

Public Prosecutor—for the Crown.

Sadasiva Aiyar, J.—The appellant has been convicted of murdering his wife by stabbing her in 2 or 3 places on her person. The two stabs given on the side of the abdomen brought on peritionitis and she died of the wounds 5 days after she was sent to the hospital. No motive for the offence has been established. The woman herself in her complaint, Ex. I, and in her statement (Ex. H to the Sub-Magistrate) stated that about 1½ years before the date of the occurrence, which was on 21st July 1918, her husband was

insane, threw the domestic pots here and there and had his hands and legs chained for some mouths. She also stated that for about 4 days before the occurrence her husband was out of his senses, speaking to himself, weeping and abusing his wife and children. But it is not proved that his mind was so affected as to prevent him from knowing the nature and consequences of his acts and though he seems to have stabbed his wife in a fit of homicidal mania, I am unable to say that he is free from criminal responsibility for his act, having regard to the law as laid down by this Court in *Queen Empress* v. *Venkatasami* (1) and by the Calcutta High Court in *Queen Empress* v. *Kader Nasyer Shah* (2). I shall however, while following these cases and confirming the conviction and the sentence of transportation for life, direct (as directed by the learned Judges who decided those cases) that the proceedings be forwarded to His Excellency the Governor in Council for any action which His Excellency may think fit to take under the powers given to the Local Government by S. 401, Criminal P. C.

Odgers, J.—I agree. It is impossible in face of the medical evidence to say that the accused falls within the purview of S. 84, I P. C. The evidence is that the doctor had the accused under his observation for about a week in August 1918 and was unable to say that the accused showed any signs of insanity whatever. He admitted however that he was also unable to say what the state of the accused's mind might have been in July 1918 when the crime was committed. It is also, in my opinion, a fact to be borne in mind that the accused was in hiding for 20 or 25 days after the commission of the offence.

I agree with my learned brother that the facts of this case are governed by the cases in *Queen Empress* v. *Venkatasami* (1) and *Queen Empress* v. *Kadar Naseer Shah* (2) which he has referred to, and I concur in the order proposed by him.

S.N./R.K. *Conviction confirmed.*

(1) [1889] 12 Mad. 459.
(2) [1896] 23 Cal. 604.

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SPENCER AND KRISHNAN, JJ.

Anikaden Manappatti Kanari and *others*—Defendants—Appellants.

v.

Thayyan Kalliani and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1567 of 1917, Decided on 9th January 1919, against the decree of Temporary Sub-Judge, Tellicherry, in Appeal Suit No. 621 of 1916.

Mortgage — Redemption — Time-barred mortgages need not be redeemed along with those not barred.

Where a person has executed several mortgages in favour of one party, some of which are barred, he can sue for redemption of such of the mortgage deeds only as are not barred, and is under no obligation to redeem those which are time barred. 43 *I. C.* 285 and (1918) *M. W. N.* 75, *Foll.* [P 130 C 2]

C. Madhavan Nair—for Appellants.

C. Kunhi Raman—for Respondents.

Order.—The appellants have no case against respondent 5 on the findings of fact. Defendants 1 and 2 contended that the plaintiffs must redeem the mortgages evidenced by Exs. 1 and 2 simultaneously with the mortgage under Ex. B. Before we decide this point of law, we think it desirable to call for a finding on the following issue:

"Whether the mortgages under Exs. 1 and 2 were real and valid, and if so, whether they were time barred or not on the date of plaintiffs' suit."

As this will depend on whether there is any evidence that these rights were really created and were kept alive by acknowledgment or otherwise, either party will be allowed to adduce fresh evidence on both points. The finding should be submitted within two months from the date of the receipt of this order and ten days will be allowed for filing objections after the notice of the receipt of the same has been posted up in this Court. In compliance with the above order the Temporary Subordinate Judge of Tellicherry submitted the following

Finding.—I have been ordered to submit a finding on the following issue, namely: Whether the mortgages under Exs. 1 and 2 were real and valid and if so, whether they were time-barred or not on the date of plaintiffs' suit? (2) In Original Suit No. 456 of 1889, these two debts were held to be not binding on the tarwad. It was so held, as the mortgaged property was found to be property belonging to the tarwad and Kanhoonham Amma, who held the property as a pro-

vision for her maintenance, had no right to create charges on the property (vide Ex. 3). But in that case Raman Nambiar, one of the executants of these two documents, when examined in that case, admitted receipt of consideration (vide Ex. 4.) So it should be held that the bonds are genuine and that they are supported by consideration. In 1900 this property was found to be the separate property of Kunhoonham Amma and the decree in Original Suit No. 456 of 1889 to be one obtained by collusion (vide Ex. D). In 1910 on a melcharth obtained from the tarwad a suit was instituted to recover this property. There also it was found that the property did not belong to the tarwad (vide Ex. E). The property should therefore be held to be property which belonged exclusively to Kunhconham Amma. Kunhoonham Amma is one of the executants of Exs. 1 and 2. Under the circumstances I should hold that the mortgages under Exs. 1 and 2 were real and valid.

The next question is whether these debts were time barred or not on the date of this suit. Kunhoonham Amma leased this property in 1052 (1877) to Raman on a rent of Rs. 6 a year (vide para. 6 of the plaint). In 1053 (1877) Raman was empowered to appropriate this rent of Rs. 6 towards the interest due to him for the sum of Rs. 50 lent by him under Ex. B. Ex. 1 is a mortgage deed for Rs. 70 executed on 22nd Kumbhom 1056 (22nd *sic* February 1881). The interest fixed in it is 18 per cent. per annum. The time fixed for payment is one year. Ex. 2 is for Rs. 35. It is a document executed on 17th Vrichigam 1063 (1st December 1887). The interest fixed in it is 18 per cent. per annum. The time fixed for payment in it expired on 15th August 1888. On default of payment on the due date there is provision in it, that the amount due then with further interest at 24 per cent. per annum should be a charge on the plaint property. There is Raman's admission of these debts on 3rd October 1890 vide Ex. 4. After the case was sent back for finding, parties have not produced any new document. The only witness examined is defendant 1. He states that the agreement was to return the sum due under Ex. 2 along with the sum due under Ex. B. This agreement does not find a place in Ex. 2. On the evidence on record I should find that the claims under Exs. 1 and 2 were time barred on the date of the institution of this suit. My finding therefore is that the mortgages under Exs. 1 and 2 were real and valid and that they were time-barred on the date of the plaintiffs' suit.

This second appeal coming on for final hearing, after the return of the finding of the lower appellate Court on the issue referred by this Court for trial, the Court delivered the following

Judgment.—We accept the findings. Following *Ramakrishna Kukkilaya* v. *Nekkar Kuppanna* (1), we consider that plaintiffs were under no obligation to redeem the time barred hypothecation deeds. The second appeal is dismissed with costs. Time for redemption is extended for three months.

S.N./R.K. *Appeal dismissed.*

(1) [1918] 43 I. C. 286.

A. I. R. 1919 Madras 130

SADASIVA AIYAR AND NAPIER, JJ.

Venkatappier—Defendant—Appellant.

v.

Ramaswami Aiyar and *another*—Plaintiffs—Respondents.

Second Appeal No. 1100 of 1918, Decided on 27th February 1919, from decree of Dist. Judge, Tanjore, in Appeal Suit No. 618 of 1917.

(a) Hindu Law — Religious endowment—Trustee — Powers — Trustees cannot grant perpetual lease.

The trustee of a religious trust cannot grant a permanent lease of the trust properties : *A. I. R.* 1917 *P. C.* 33, *Foll.* [P 131 C 1]

(b) Transfer of Property Act (4 of 1882), S. 51 — Lessee under invalid lease cannot claim compensation for improvements under S. 51 or under Mesne Profits and Improvements Act (11 of 1855), S. 2.

A lessee holding under an invalid lease cannot claim compensation for improvements before eviction under S. 51, T. P. Act, or under S. 2, Mesne Profits and Improvements Act. [P 131 C 1]

(c) Mesne Profits and Improvements Act (11 of 1855)—Act applies to cases tried on original side.

The Mesne Profits and Improvements Act applies only to cases tried on the original side of the High Court. [P 131 C 1]

(d) Mesne Profits and Improvements Act (11 of 1855), S. 2—Term "other absolute estate" in S. 2 does not include occupancy tenancy.

The expression "other absolute estate" in S. 2 does not include the estate of a lessee with occupancy rights. [P 131 C 1]

(e) Practice—New plea—New plea cannot be considered for first time in second appeal.

In an action in ejectment the High Court will not consider the plea of want of proper notice to

quit, if the same was not urged in the lower Courts and was not decided by them: 12 *Mad.* 353 and 2 *Mad.* 346, *Dist.* [P 131 C 2]

The High Court in second appeal is not bound to consider a ground of defence not taken in the lower Courts, unless perhaps, it is a question of limitation arising out of proved or admitted facts. [P 131 C 2]

(f) Civil P. C. (5 of 1908), S. 100 and O. 41 R. 2—Decision of point not raised in memorandum of appeal is not invalid on ground of defect of procedure within S. 100.

The fact that an appellate Court does not take notice of a question not raised in the memorandum of appeal, cannot be said to vitiate its decision by any error or defect in procedure within the meaning of S. 100. [P 132 C 1]

T. V. Venkatarama Aiyar and *C. R. Subramania Aiyar*—for Appellant.

S. T. Srinivasagopala Chariar—for Respondents.

Judgment.—The defendant is the appellant. He obtained a permanent lease of a house site from the trustee of a religious trust in 1911. The successor in the trusteeship brought this suit in 1915 to eject him. That the permanent lease is invalid against the trust cannot be denied and though the second ground in the appeal memorandum contends that it is valid against the trust, the point was not seriously argued: see *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (1). The next contention was that defendant who has built a house on the leased site, is entitled to compensation before his evictment and is not merely entitled to be allowed to remove the materials of the house (which he has been allowed to do by the decrees of the lower Courts). Mr. T. V. Venkatarama Aiyar conceded that he cannot rely on S. 51, Act 4 of 1882, (T. P. Act), in support of his claim to compensation: see on this point our judgment in *Perumal Gramani* v. *Mahamad Kasim Sahib* (2). He however relied on S. 2, Act 11 of 1855 (Mesne Profits and Improvements Act). That Act applies only to cases tried on the original side of the High Courts to which English law applies and, even in such cases, we are not, as at present advised, prepared to agree with certain obiter dicta quoted by Mr. T. V. Venkatarama Aiyar that the words "other absolute estate" in S. 2, Act 11 of 1855 include the estate of a lessee with permanent occupancy rights.

Lastly it was contended that the plaint does not allege that the tenancy from year to year created by payment of rent [see *Municipal Corporation of Bombay* v. *Secretary of State* (3)], had been put an end to by a proper notice to quit and that therefore the suit should be dismissed as not disclosing a complete cause of action in ejectment. It may be conceded that though this point was not taken in the lower Courts, this Court, even in second appeal, can allow the point to be taken and argued and can decide the case on that point: see *Subba* v. *Nagappa* (4) and *Abdulla Rawutan* v. *Subbarayyar* (5). But we do not think we are bound to consider it and to decide this second appeal on a point not taken in the lower Courts. In *Subba* v. *Nagappa* (4) the tenant had been in possession from 1869 and the case was finally decided against the tenant on the finding submitted after remand that reasonable notice had been given. In *Abdulla Rawutan* v. *Subbarayyar* (5) also the tenants had long been in possession, and though the suit was remanded for a finding the ultimate result of the cases is not known. We do not think that these cases decide that we are bound in second appeal to consider a ground of defence not taken in the lower Courts, unless perhaps it is a question of limitation arising out of proved or admitted facts. O. 41, R. 2, Civil P. C., says:

"The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal, but the appellate Court . . . shall not be confined to the grounds set forth, etc."

Now no ground of objection was set forth in the appeal memorandum presented to the lower appellate Court on the question of want of notice and it was not argued there. The lower appellate Court therefore was not bound to take the point itself and its decision on the grounds argued before it is correct. The defendant in this case obtained his lease only four or five years before this suit was brought and though we are entitled to consider the question of want of notice and to remand the suit for getting findings on the facts relating to that question after, if necessary, allowing plaintiff to amend his plaint, we do not think we are bound in second appeal to do more than

(1) A I. R. 1917 P. C. 33=39 I. C. 722=40 Mad. 709=44 I. A. 147 (P.C.).
(2) [1915] 28 I. C. 840.
(3) [1905] 29 Bom. 580.
(4) [1889] 12 Mad. 353.
(5) [1878-80] 2 Mad. 346.

decide whether the lower appellate Court's decision was wrong in having been contrary to law, etc., or failed to determine an issue of law, etc., or vitiated by substantial error or defect in procedure (S. 100, Civil P. C.). If the lower appellate Court was not bound to take notice of a question not raised in the appeal memorandum presented to it, it cannot be said that its decision was vitiated by any errors in procedure or defect in determination of points which it was bound to have considered.

We do not think that, on the facts found in this case, our discretion should be exercised in favour of the question of want of notice being allowed to be raised and argued before us. In the result the second appeal is dismissed with costs. Three months' time from this day is allowed to the appellant for the removal of the superstructure.

S N./R.K. *Appeal dismissed.*

A. I. R 1919 Madras 132

ABDUR RAHIM AND OLDFIELD, JJ.

M. S. Yesuvadiyan—Defendant—Appellant.

v.

P. S. A. Subba Naicker — Plaintiff—Respondent.

Civil Appeal No. 98 of 1917, Decided on 1st November 1918, against decree of Sub-Judge, Tuticorin, in Civil Suit No. 6 of 1916.

(a) Evidence Act (1872), S. 34—Account book entries must be shown to be real and honest transactions—They must be corroborated—No form of evidence can be prescribed.

Section 34, Evidence Act only lays dows that a plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account, even though those books are shown to be kept in the regular course of business. He will have to show further by some independent evidence that the entries represent real and honest transactions and that the moneys were paid in accordance with those entries. No particular form or kind of evidence in addition to the entries is required. Any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished in books of account if true. [P 136 C 1]

(b) Evidence Act (1872), S. 160—"Sure" explained—It must be shown that the witness is justified in being sure that the record relied on by him is correct.

The expression "sure" in S. 160 in the sentence "if he is sure that the facts were correctly recorded in the statement" does not mean that the degree of conviction postulated by it can be treated as equivalent to any on which the witness may choose to say that he is sure, whether or not it is too fantastic or illogical to commend itself to reasonable men. The meaning of the expression is that the witness must satisfy the Court, with reference to ordinary probabilities, of his right to be sure that the record relied on by him is correct. [P 138 C 2]

T. Rangacharair—for Appellant.

K. Srinivasa Aiyangar—for Respondent.

Abdur Rahim, J.—The appeal arises in a suit to recover sums of money amounting to Rs. 8,000 from the defendant on the basis of certain dealings. The plaintiff is a dealer in cotton and had been doing businesses with Messrs. Gaddam & Co. and afterwards with the New Berar Company, supplying them with cotton. The defendant was at first a writer employed in Gaddam & Co.'s office and afterwards did business as a broker Admittedly the defendant had dealings with the plaintiff ; he used to pay moneys to the plaintiff by way of deposit and drew moneys from time to time. The dealings out of which this suit has arisen covered a period of five or six years, and the claim of the plaintiff is that, on taking accounts, he was entitled to the sum which he has claimed. The defendant's case, on the other hand is that he was entitled to Rs. 7,000 odd and not that he owed anything to the plaintiff The mode of dealings between the parties was of an extremely lax character. The defendant paying in sums of money from time to time never asked for any reciept or voucher for them. According to the case of the plaintiff the defendant drew sums of money during the last five or six years on different dates ; on some occasions he sent round chits to the plaintiff on which payments were made, but on the majority of occasions, payments were made on the defendant's personal equest, there being no chits from the defendant authorising those payments. The learned Subordinate Judge has given a decree to the plaintiff as asked for in the plaint. The evidence in the case consists mainly of entries in the plaintiff's books of account. The defendant has not produced any accounts whatever, and the suggestion of the plaintiff is that he has accounts but has wilfully withheld them. The defendant denies that he has accounts but, he says, with reference to about 29 or 30 out of about 200 items, that he did draw those sums and that he recollected having done so, although he has no accounts or other

records with which he could refresh his memory. The accounts filed by the plaintiff have been impeached by the defendant as fabrications. The accounts consist of ledgers and day-books. They are properly bound books and from outward appearance the books seem to be regularly kept. The parties fell out sometime in December 1915. Before that, admittedly, they were good friends and there cannot be the slightest doubt that they trusted each other. The case of the defence, if true, would mean that these accounts-books, covering a period of six years and containing accounts of the dealings not only of the defendant but of various other persons, have all been fabricated.

It would also mean, on the admitted facts of the case, that if they were fabricated it was done after the parties fell out, that is, after December 1915. Without saying that it is impossible, I should regard it as extremely improbable, that books such as we have before us have been paged, especially, without any sort of internal evidence whatever in the books themselves to bear out the defendant's suggestion that they have been concocted for the purpose of this case. No attempt was, in fact, made in the Court of trial, nor was any serious attempt made before me by Mr. T. Rangachariar who opened the case of the defendant (appellant) to show, from the character of the books or the entries, that the entries were either interpolated or that pages had been removed and new pages containing fresh entries had been substituted. There are, on the other hand, circumstances which would show that there is no substantial reason for doubting the garnishees and the bona fides of these books of account. They had been filed previously in connexion with other suits in other Courts. And the nature of the entries relating to the dealings between the plaintiff and the defendant would in itself make it extremely difficult for the plaintiff to get up false entries to support his case. There are only two entries with respect to which any attempt has been made by the defendant to contradict the plaintiff's books. I shall deal with them later and point out that no good arguments can be based on these two items. It has to be pointed out that the case was not satisfactorily conducted for either party in the lower Court, and the procedure adopted for proving the entries was not strictly in accordance with what the law required. The plaintiff's evidence is that he made all these payments with which the defendant is charged ; whether he made payments with his own hand or through clerks or writers who made payments on his orders would not make any difference. He apparently attended to his business himself. He used to be present at the shop, except when he was away to some other place of business and plaintiff knew the way in which entries used to be made in the books of account by the different writers and accountants. In his examination-in-chief, in addition to general statement that all the payments were made as entered and that he made the payments himself, he speaks to a large number of specific items of which he has personal recollection independently of the entries in the books ; most of those items are of large amounts and he deals with them in detail in his examination-in-chief.

While he was cross-examined with reference to these specific items, it does not appear that any attempt was made by the pleader for the defendant to make out that as regards other items he could have had no personal knowledge or means of speaking to them in the way he did in his examination-in-chief. No doubt it would have been more in accordance with the proper practice for the pleader for the plaintiff having asked him specifically about the items of which he had independent recollection, to have questioned him about the other items, which he said were actually paid to the defendant, but with reference to which he had no independent recollection allowing him to refresh his memory with the entries in the books according to the provisions of Ss. 159 and 160, Evidence Act. But no objection was apparently taken to the form of the question or the answer with reference to these latter items. We may take it, therefore that the plaintiff purported to speak not only to the specific items mentioned by him, but also to the other payments entered in the book as having been made within his knowledge. We have also the evidence of two of the writers of the books and in their case we find that they were asked to speak to the way in which the books were kept and not to the items

specifically. I should have been disposed to take a more serious view of this mode of proving the entries, but for the fact that the defendant's pleader made no objection Further, the plaintiff has with the plaint filed a list of the items with respect to which the defendant is charged that list being simply a copy of the entries in the books of account, so that the defendant has ample notice of the items to which the plaintiff and his witnesses must have been referring as relating to the defendant's transactions in Exs. A and B series.

Then we have a number of items which has been clearly proved by evidence other than the entries by means of vouchers or chits, in addition to the oral testimony of the plaintiff. On the other hand, it is difficult to accept the defendant's statement that he kept no accounts whatever. He is a broker and had dealings not only with the plaintiff but with other persons, and it is unlikely that he did not keep any accounts or any records of the transactions into which he entered as broker or of his other dealings His case strikes me as somewhat extraordinary. He professes to remember 29 or 30 items extending over a number of years and ignores all the other transactions alleged by the plaintiff. All that he appears to have done was to pick out certain items which he felt could not possibly be resisted and about which no decent show of objection could be advanced by him and admitted them, not because he had any recollection whatever of these items. His case is that he never drew money, except on chits. On this point the evidence is absolutely clear to my mind that he used to ask the plaintiff to make payments on his account or get money from him himself without any sort of voucher whatever. There are several instances of that sort proved by evidence independently of the entries. The nature of his drawings would also suggest that he could not have been sending chits for every payment. We find for instance, entries relating to small amounts like Rs. 2, Rs. 3 and Rs. 5, and there are entries to show that payments were made through himself or through other persons some of whom were apparently peons employed in the office of Gaddam & Co. If there were chits in connexion with those payments then the entries relating to them would not have appeared in the form in which they are made. The entries mention the names of persons through whom payments were made at the instance of and on behalf of the defendant.

If the defence of the defendant was true he could easily have called those persons and shown that the entries were false. He has made no such attempt except in the two cases above mentioned but which I shall show do not bear out the suggestion of the defendant. It was strongly pressed upon us by Mt. T. Rangachariar that the plaintiff ought to have asked for some voucher whenever he made payments, or that he ought to have taken the signature of the defendant whenever payments were made to him. And it was pointed out to us that the plaintiff did keep books for taking signatures of persons. As regards these books the evidence is not at all clear as to the nature of the transactions with respect to which the signature of parties used to be taken. That the plaintiff and the defendant, until they fell out, reposed confidence in each other is abundantly clear. As already mentioned, the defendant does not declare that he obtained any receipts or vouchers for the amounts paid in by him from time to time. He must have trusted not only the plaintiff but must have relied upon the mode in which the plaintiff kept his books of account and did business. And if the defendant trusted the plaintiff in that way, it does not surprise me in the least that the plaintiff should have made payments without insisting on vouchers on each occasion. I may here mention some of the larger items which must be taken to be proved by evidence independently of the entries, for instance the item of Rs. 1,391-8-2. The case of the plaintiffs is that he borrowed from the office of Messrs. Gaddam & Co. Rs. 1,500, and out of that amount gave this sum to the defendant. It was suggested by Mr. T. Rangachariar that it is a false story that he borrowed any money from Messrs. Gaddam & Co. If there was any foundation for this suggestion nothing was easier for the defendant than to produce the books of his employees and to prove the falsity of the plaintiff's case.

As regards the transaction relating to mortgage Ex. E with respect to which a sum of Rs. 496 was paid by the plaintiff, the case of the defendant is that it was paid not to him but to his brother. This

payment is supported by the receipt Ex. D-1, the payments being made at the shop of one Ambalavana Pillai, and P. W. 5 proves the handwriting of this man in Ex. D. If the payment was not made at the instance of the defendant, and it was a dealing directly between the plaintiff and the plaintiff's brother, one would have expected the defendant to examine his brother and prove the falsity of the plaintiff's case. No such attempt has however been made. I might refer to the transaction evidenced by Ex. A as showing that it is unlikely that the plaintiff owed large sums of money to the defendant in 1915 or thereabouts as related by him. The defendant obtained from the plaintiff assignment of an othi for Rs. 4,000 and he paid down Rs. 1,000 and agreed to pay the balance of Rs 3,000 before the Sub-Registrar. As he failed to pay the balance, the transaction fell through and the plaintiff had to refund Rs. 1,000 to the defendant. If the defendant's case were true it was not likely that he would pay Rs. 1,000 if as a matter of fact Rs. 6,000 or Rs. 7,000, were owing to the plaintiff. I shall deal now with some of the criticisms made on behalf of the defendant as to the corrections of certain entries. Under the transaction which is represented by Ex. C 5 that is a chit on which, according to the case of the plaintiff, certain payments were made, Rs. 100 was to be paid to some person not mentioned therein.

The suggestion' on behalf of the defendant that Ex. C-5, which he alleges has been wrongly translated, means that the payment was to be made on behalf of the defendant to the plaintiff himself, is not borne out. If that were the correct interpretation, then one would have expected that the man who was to pay the money to the plaintiff would be mentioned. Taking the document as it stands, the criticism on behalf of the defendant is that the entry on 10th June 1913 is not of Rs. 100 but of Rs. 80. There is also a further entry of Rs. 25; that would make up Rs. 105 and not Rs 100. There is to that extent discrepancy between Ex. C-5 and the entry in plaintiff's book. But I am not satisfied that the discrepancy could not have been explained if the plaintiff or any of the accountants who had knowledge of the matter was asked about it. But the defendant's strongest criticism is with reference to the entries dated 3rd April and 17th April 1914. The first one reads: "Debit. taken and paid by S. A. for P K. S. Rs. 25," and the latter is to the effect: "Debit for P. R. M. S. Rs. 373-12 4."

The defendant has examined D. Ws 3 and 4 who are employed in the P. K. S. A. A. firm and P. R. M. S. firm respectively, who prove that on the dates mentioned there are no entries in the plaintiff's book. But these two witnesses were examined after the plaintiff had closed the case, and neither the plaintiff's nor any of his witnesses' attention had been specifically drawn to nor were they asked any questions as to the nature of these transactions that might not in itself be a sufficient answer, if the entries themselves were quite clear and unambiguous which we do not think they are. Both these entries are worded differently from other entries in cases where payments were made to a particular person or firm at the instance of the defendant. This entry of the 3rd April is that Rs. 25 was paid by the plaintiff "for" P. K. S. and similarly the entry of the 17th is that Rs. 373-12-4 was debited "for" P. R. M. S. As Mr. K. Srinivasa Aiyangar, the learned vakil for the respondent, suggested it might be that money was taken for payment to the said two firms by the defendant himself or some one on his behalf and not actually paid on those dates or not paid at all. In the absence of any question put to the plaintiff or the witnesses asking them to explain these transactions, I do not think it would be fair to accept the evidence of D. Ws. 3 and 4 showing that the entries in question in the plaintiff's books are false. I am satisfied on considering the evidence as a whole, in spite of the irregular way in which the case of the parties was conducted in the lower Court and the unsatisfactory manner of proving the entries in the books of account which were not specifically put to the plaintiff or his witnesses, that the accounts were duly kept in the regular course of business and that the entries represent true and honest transactions. Further as regards certain items, there is corroborative evidence in the shape of vouchers; and the circumstances of the case to which I have alluded also show that the items mentioned in the entries in question are true and genuine and represent a real transaction.

But it is argued on behalf of the appellant, that the evidence as it stands is not sufficient in law to found a decree on against the defendant. S. 34, Evidence Act, lays down that the entries in books of account, regularly kept in the course of business are relevant, but such a statement will not alone be sufficient to charge any person with liability. That merely means that the plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account even though those books are shown to be kept in the regular course of business. He will have to show further by some independent evidence that the entries represent real and honest transactions and that the moneys were paid in accordance with those entries. The legislature however does not require any particular form or kind of evidence in addition to entries in books of account, and I take it that any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished by entries in books of account if true. I have already pointed out that with reference to certain specific items, there is ample corroborative evidence, and I have also mentioned the circumstances which would go to show that the transactions represented by these entries are true and honest. I am inclined to think that, apart from the oral statement there is sufficient corroboration of the entries in this case. Then I do not find that sufficient reason has been shown for not accepting the statement of the plaintiff in his examination-in-chief, that all the items in the accounts were really given to the defendant meaning that all the payments as entered were actually made to the defendant. This is not a mere isolated statement. In the very beginning of the examination-in-chief he says:

"The defendant used to take money without giving chits. If the defendant had personally asked me to pay the money to anybody, I used to pay without taking the signature of the person who takes the money. When I paid money to defendant directly, I never took his signature or got any voucher. The defendant has not made any payment over and above what I have entered in the accounts."

His case was according to his evidence that it was he who used to make the payments. This does not necessarily mean that he used with his own hands always to hand over money to the defendant or his messenger, but only that the payments were made under his personal supervision or direction. That is the case he sought to make out. It might be that if the defendant had made an attempt he might have been able to show by cross-examination that this was an improbable statement and should not be accepted, but I do not find that he really made any such attempt. It is possible that the plaintiff did not have any direct recollection of all the items. He had independent recollection of some items, and as regards others he might have remembered them on looking into the accounts. This is suggested by a statement made by the plaintiff in his cross-examination. He says with reference to certain entries: "These I remember independently even without looking into accounts." As regards the items which he did not remember in that way I do not find that the cross-examination was directed to show that it was improbable or unlikely, having regard to the lapse of time, or the course of business adopted by the plaintiff, or that he could not be relied upon to remember those items even on reference to the entries.

It is quite true as pointed out by the learned pleader for the respondent, that so far as it appears on the record, the plaintiff did not in so many words say that, as regards the items of which he had no independent recollection, he was sure that they were true items on examining the entries which were made and of which he had knowledge at the time or soon afterwards. That would have been the correct way of examining the plaintiff on this point, but the pleader who conducted the case for the defence neither raised any objection to his making a general categorical statement that all the items in the accounts were really given to the defendant as entered in the accounts, nor did he attempt by cross-examination to show that these general statements could not be accepted. Having regard to the way in which the plaintiff was cross-examined, I am unable to say that the statement as regards the entries in the books of account generally should be rejected on grounds of improbability, especially as I have not the slightest hesitation in holding that the accounts of

the plaintiff are genuine and bona fide and that the admitted facts and circumstances point to the truth of the plaintiff's case and the falsity of the defendant's case.

I do not propose to go into all the cases cited at the Bar with reference to S. 34, Evidence Act. There is no difficulty in ascertaining what the enactment means, but the difficulty lies in applying it to the facts of a particular case. Much reliance was placed on behalf of the appellant on the ruling of the Privy Council reported as *Baboo Gunga Persad* v. *Baboo Inderjit Singh* (1). But, apart from the facts of that case, all that their Lordships laid down was that an entry in the books of account regularly kept in the course of business is merely corroborative evidence. To the same effect is the ruling reported as *Queen* v. *Hurdeep Sahoy* (2). I might here point out that the present Evidence Act does not say that an entry is merely corroborative evidence, it is substantive evidence, though by itself not sufficient to charge a person with liability. I do not find that the cases reported as *Sorab Jee Vacha Ganda* v. *Koonwur Jee Manik-Jee* (3) and *Hingu Miya* v. *Heramba Chandra Chakravarti* (4) help the appellant any further. With reference to the latter, emphasis is laid on the fact that the learned Judges then say that each particular entry must be proved. No doubt that is the correct proceeding. But as I have already pointed out, it is merely a matter of mode of proof and, as the defendant raised no objection to the way in which the entries were proved in the lower Court, I do not think anything turns upon this point. We hope however that in future when entries in books of account are sought to be proved, strict attention should be paid to the method of proving them as pointed out in *Hingu Miya* v. *Heramba Chandra Chakravarti* (4), and further that the entries themselves ought to be marked as exhibits and not the books.

In *Jaswant Singh* v. *Sheo Narain Lal* (5) we find that their Lordships discuss at length not only the genuineness of the entries in the books of account, but also the character of the entries themselves as to whether they represented a real transaction with reference to certain items which were proved by evidence independently of the entries, and rely upon the general circumstances of the case showing that the accounts were bona fide and true. They observe:

"There Lordships need not go through other items in the books nor deal with the evidence showing that the defendant had bill transactions with other people The cases they have examined are sufficient, in the entire absence of countervailing evidence, to establish three propositions. They prove that the defendant's sweeping denials of his connexion with bill transactions are not true, and thereby they materially shake his credit. They prove that he drew hundis on Gobind Dass and sold them to the plaintiff, thereby displacing the defendant's flat denials of dealings with the plaintiff, and meeting the improbability that he should have drawn upon a house unknown to him, by proof of the fact that he did so. They lead to the belief that the plaintiff's books are authentic and honest, and his gumasta's evidence true, so that the course of the dealing alleged by the plaintiff terminating in the six hundis now sued on is supported."

Here also enough has been proved to show that the defendant's denial that he ever drew money except on chits is untrue and the course of dealings between the plaintiff and the defendant showed that the transactions took place as evidenced by the entries. I may also here refer to the decision in *Dwarka Das* v. *Sant Bakhsh* (6). With reference to the value to be attached to the plaintiff's general statement that the items mentioned in the entries were paid to the defendant, the learned Judges point out that it was the duty of the defendant to challenge the statement, to cross-examine with reference to it and show that it could not be believed. I am therefore satisfied that the judgment of the Subordinate Judge is right and must be upheld. I would dismiss the appeal with costs.

Oldfield, J.—I concur generally with my learned brother and I therefore do not think it necessary to follow him in his detailed statement of the evidence. But I desire to say a few words regarding the cases in which it was alleged that there was no corroboration for the various items of the plaintiff's claim except the accounts and regarding which the question arose whether other evidence was in fact given. If no other evidence besides the accounts were given, however

(1) [1875] 23 W. R. 390.
(2) [1875] 23 W. R. 27 Cr.
(3) [1836] 1 M. I. A. 47=1 Suth. 50=1 Sar. 93 (P.C.).
(4) [1910] 8 I. C. 81.
(5) [1894] 16 All. 157=21 I. A. 6=6 Sar. 404 (P.C.).
(6) [1895] 18 All. 92.

strongly those accounts may be supported by the probabilities, and however strong may be the evidence as to the honesty of those who kept them, such consideration could not alone with reference to S. 34, Evidence Act, be the basis of a decree. In *Jaswat Singh* v. *Sheo Narayan Lal* (5) the Judicial Committee no doubt gave a decree after testing the entries in the accounts before it with reference to the correspondence regarding certain entries in those accounts and other independent evidence regarding them. But I do not think that that decision is in any way inconsistent with the general pro position enunciated regarding S. 34.

In that case there was in fact some direct evidence as to the making of the hundis which were in question and their Lordships, no doubt, said that the direct evidence was quite untrustworthy. They must presumably have meant that notwithstanding its intrinsically untrustworthy character they were prepared to act on it in view of the other circumstances of the case and the direct evidence as to particular items. The question is whether the evidence of the plaintiff can be accepted and taken as a basis for the decree supplemented as it is by the evidence of the accounts. The defendant contends that the plaintiff's evidence, if rightly construed, was not direct evidence at all and what he said really amounted only to inference from the account entries, and that he should not be understood as saying that he himself had any knowledge of the payments whatever independently of the presumptions which he was drawing from the entries in the accounts regarding them. The plaintiff's evidence in chief consisted first in a statement "when I paid money to defendant directly, I never took his signature or got any voucher." There were then various particular references to particular payments, which he prefaced with the words "I paid." Lastly there was the statement: "All the itmes in the account were really given to defendant and entered in the accounts." Those are his statements in chief. If the defendant's were the proper interpretation of plaintiff's evidence, I should certainly hold that it did not afford the corroboration which the law requires. No doubt, S. 160, Evidence Act, says:

> "The witness may also testify to facts in any such document as is mentioned in S. 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document,"

and it was suggested that in any case the plaintiff, on the one hand, must be presumed to have correctly recorded the facts in his accounts, although on the other he did not say so explicitly. As regards the section, I may observe first that the use of the word "sure" is, I believe, unique in the Evidence Act. It does not seem to me that the degree of conviction postulated by the use of that word can be treated as equivalent to any, on which the witness may choose to say that he is sure, whether or not it is too fantastic or illogical to commend itself to reasonable men. The meaning must be, I think, that the witness satisfies the Court with reference to ordinary probabilities of his right to be sure that the record relied on by him is correct. Then again there is the reference to S. 159, which provides that the witness may refer to "any such writing made by any other person and read by the witness within the time aforesaid", if, when he read it, he knew it to be correct, the time aforesaid being the time within which the Court would consider it likely that the transaction was fresh in his memory. Now if the case were only that the plaintiff must be supposed to have been speaking with reference to the accounts, it would be material that he said nothing definite as to his having looked into the accounts within the time above referred to or as to his reasons for being sure that they were a correct record. But that is not what the plaintiff said, and it is a very material point that there was no suggestion resembling that now made by the defendant in cross-examination. The defendant in fact made no objection to the plaintiff making the statements he did both generally and in detail. There were no doubt some questions put to the plaintiff with reference to his residence as to which he admitted that he stayed in Tuticorin and also in other villages 16 miles distant and that the suit transactions took place in Tuticorin. He said also that his agents transacted business in his absence. But he said nothing at that point regarding the particular payments which are in dispute. He said only: "I was present when I made those payments to the defendant." We have been referred to a number of payments

which are the subject-matter of the appeal and there is no reason for adopting any such unnatural interpretation of the evidence. There was nothing further in the plaintiff's cross-examination or in the cross examination of one of his accountants, P. W. 2. P. W. 3, another accountant, was no doubt asked a question, in reply to which he said:

"I must refer to the account to say whether all payments were made by me or by plaintiff. I cannot say anything from memory."

But there was no suggesting as regards the payments, if any, which were not made by him, the plaintiff having been present. In these circumstances it does not seem to me that there is any question of reliance by the plaintiff on S. 160. The plaintiff's evidence, as I understand it, was simply that he made the payments himself. There is nothing in the case regarding the plaintiff's course of business which enables me to form any opinion as to the probability of all his statements. It is not for us to speculate as to what stringent cross examination might have disclosed. The circumstances of the case in fact resemble those reported as *Dwarka Das* v. *Sant Bakhsh* (6). To adopt the language used there, the plaintiff's evidence should receive the favourable construction which would entitle us to treat it as substantive evidence in this case and not to conclude it as evidence which was inadmissible.

So treating it, we have a foundation, on which the decree in favour of the plaintiff can be passed, supplemented by the entries in the accounts. I agree that he is entitled to a decree as regards the items in connexion with which it was contended that no direct evidence was available. I agree with the decree proposed by my learned brother.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 139

PHILLIPS, J.

Sankunni—Defendant—Petitioner.

v.

Ikkora Kutti — Plaintiff — Opposite Party.

Civil Revn. Petn. No. 377 of 1918, Decided on 7th March 1919, to revise decree of Dist. Munsif, Chowghat, in Sm. C. S. No. 607 of 1917.

Contract Act (9 of 1872), S. 30—Wagering contract—"Kuri"—Suit to recover money paid towards "kuri" is not enforceable.

Though a "kuri", as ordinarily conducted in Malabar is not a lottery, yet if some subscribers obtain as prizes amounts which are in excess of the amounts subscribed by them, it comes within the definition of lottery and a suit to recover money paid for such lottery is not enforceable.

[P 139 C 2]

C. Madhavan Nair—for Petitioner.

Judgment. — It has been held in *Kamakshi Achari* v. *Appavu Pillai* (1) that a "kuri" as ordinarily conducted is not lottery, inasmuch as each subscriber merely gets back his subscriptions in the form of a loan, and the only thing which is dependent on chance is the order in which the loans are received. In the present case however one subscriber at each of the first 99 drawings received something more than what he subscribed the amounts varying from four annas to Rs. 24-12-0. No doubt all the other subscribers eventually got back their money without interest but that does not affect the case of those subscribers who got prizes in excess of their subscriptions.

The fact that the promoter of the kuri was liable to the remaining subscribers for the future subscriptions of the prize winners does not alter the nature of the business, for the prize-winners themselves were under no such liability. Although therefore it has been consistently held in this Court that a kuri as ordinarily conducted does not amount to a lottery, the present form of kuri appears to me to come within the definition of lottery (i. e.,) a distribution of prizes by lot, or chances, and I may refer to the English cases on the point [*Taylor* v. *Smetten* (2), *Reg* v. *Harris* (3) and *Willis* v. *Young* (4)]. The prizes may by actuarial calculation be found to be approximately equivalent to the interest that might have been earned by the prize-winner in the ordinary form of kuri, but in the present case he is absolved from all risks attendant on earning such interest but gets his prize in ready cash. I therefore hold that the plaint kuri is a lottery in which some subscribers obtain prizes by lot and consequently plaintiff's suit to recover money paid for such lottery is not maintainable. The petition is allowed and plaintiff's suit dismissed with costs throughout.

S.N./R.K. *Petition allowed.*

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(1) [1862-63] 1 M. H. C. R. 448.
(2) [1883] 11 Q. B. D. 207.
(3) 10 Cox. C. C. 352.
(4) [1907] 1 K. B. 448.

A. I. R. 1919 Madras 140

WALLIS, C. J. AND SPENCER, J.

M. & S. M. Ry. Co. Ltd.—Appellants.

v.

Haridoss Banmali Doss—Respondent.

Original Side Appeal No 63 of 1916, Decided on 22nd February 1918, from judgment of Kumaraswami Sastri, J. D/. 8th September 1916.

(a) Contract Act (1872), Ss. 151 and 152—Railway company's responsibility for misdelivery of goods and animals is similar to that of bailee—Railways Act, S 72.

The measure of responsibility of a railway company as a carrier of animals or goods is that of a bailee under the Contract Act. The chapter relating to bailments in the Contract Act covers the whole liability of the railway company including, among other things, their responsibility for misdelivery by whatever reason caused. [P 141 C 2]

(b) Railways Act (1890), S. 77--Railway causing wilful misdelivery—Suit without prior notice is not maintainable — In requiring notice no distinction is to be made between cases in which goods are inadvertently delivered to wrong person and cases in which they are delivered to person other than consignee who did not produce receipt.

A suit for damages against a railway company caused by wilful misdelivery of the goods is not maintainable without a prior notice of the claim under S. 77.

In the matter of requiring notice no distinction should be drawn between cases in which goods have been delivered inadvertently to the wrong person and cases in which they were delivered to a person other than the consignee who claimed to be entitled to them but did not not produce the railway receipt as he should have done, in support of his claim. [P 142 C 1]

*** (c) Railways Act (1890), S. 72—Company is under no duty to get back railway receipts on delivery of goods—Goods delivered to person entitled to them without production of receipt—Subsequent endorsement will not give endorsee of receipt cause of action against company even though person taking delivery becomes entitled to them only after delivery but before endorsement.**

A railway company is under no obligation to deliver goods consigned to the consignee or any person entitled to it only on production of the railway receipt. Whatever may be the value of railway receipts as documents of title according to mercantile usage, a railway company is under no duty to the public to get back the railway receipts on delivery of the goods. It only reserves liberty to refuse, in its discretion, to deliver the goods, unless the railway receipt is produced, or unless, if the receipt is not produced, an indemnity is not given.

Therefore if goods are delivered to a person who is legally entitled to them without production of the railway receipt, any subsequent pledge or endorsement of the railway receipt will not give the pledgee or endorsee a cause of action against the railway company even though the person taking delivery became entitled to them only after delivery but before the pledge or indorsement: *Nash* v. *De Freville*, (1900) 2 *Q. B.* 72 and *Brooks* v. *Mitchell*, (1841) 9 *M. & W.* 15, *Dist.* [P 142 C 2]

(d) Rights of Common Carrier's Act (1865)—Scope.

Per *Wallis, C. J.*—The Rights of Common Carriers Act (3 of 1865) and the Indian Railways Act are not in pari materia with the English Carriers Act of 1830. [P 141 C 2]

(e) Railways Act (1890), S. 77—"Loss" covers cases where goods are not forthcoming either from deliberate acts or from acts of negligence.

Per *Spencer, J.*—The word "loss" in S. 77 is sufficiently wide to cover cases where the goods are not forthcoming either from deliberate acts or from acts of negligence. [P 145 C 1]

*** (f) Contract Act (1872), S. 108, Excep. 1—Railway receipts cease to be instruments of title after delivery to person having right to take—Railway receipts left with consignee after delivery is not proximate cause of loss occasioned to subsequent endorsee.**

Railway receipts are only symbols of property and they cease to be living instruments of title from the moment they are delivered to a person having a right to take them.

The fact that the railway receipts are left with the consignee after delivery is not the proximate cause of the loss occasioned to a subsequent endorsee. [P 145 C 2]

D. Chamier, R. N. Ayyangar, Grant and *Greatorex*—for Appellants.

V. V. Srinivasa Ayyangar—for Respondents.

Wallis, C. J.—This is an appeal from the judgment of Kumaraswami Sastri, J., in a suit brought by the plaintiff, who was the endorsee for value of two railway receipts, to make the railway company liable for misdelivery. The facts were that the goods in question were consigned by one Gurunatham to his own order to the Madras Harbour Station of the defendant railway. Gurunatham had pledged the railway receipts to the Bank of Madras, and the Bank of Madras were the persons entitled to delivery of the goods. It was intended that one Swaminatha Reddi should pay the bank and get the railway receipts assigned to him and then take delivery of the goods. He managed however to get possession of the goods from the railway company, without production of the railway receipts and before he had paid the bank. This was apparently because, for many years, large consignments of cotton had been consigned by Gurunatham in this way and had been duly taken delivery of by Swaminatha Reddi. Two or three days afterwards, Swaminatha Reddi paid the Bank of Madras and obtained the railway receipts. When that happened, in our opinion, the contract of carriage by the railway company was entirely com-

pleted. Swaminatha Reddi, however did not return the railway receipts to the railway company, but committed a fraud on the plaintiff by obtaining an advance against the railway receipts, which were taken, as is usual, to represent that the goods specified in the receipts were still in course of transit, which was not the case, as they had already been delivered to him and had come into his possession as the rightful owner.

In these circumstances, two interesting questions have been raised and very elaborately argued before us. The first question is one of limitation, whether the suit is barred under S. 77, Railways Act, because notice of the claim for compensation for the loss of the goods was not given in writing by the plaintiff, or on his behalf, to the railway within six months from the date of the delivery of the goods for carriage by the railway. The learned Judge held that this section was inapplicable to the present case, because the servants of the railway delivered the goods to Swaminatha Reddi, without the production of the railway receipts and with full knowledge that they were consigned, not to Swaminatha Reddi, but to Gurunatham. Mr. V. V. Srinivasa Ayyangar, who argued this part of the case for the respondent, relied on certain English decisions on the Carriers Act, 1830, which is practically re-enacted in India by Act 3 of 1865. That Act exempted carriers from liability in respect of loss or injury to certain valuable articles, if they were consigned without being declared and the extra charges paid. That Act was construed by the Court of Exchequer in *Hearn* v. *London and South Western Railway Co.* (1), where Parke, B., held that the exemption only applied to what I may describe as accidental loss; and similarly in the subsequent case of *Morritt* v. *North-Eastern Railway Co.* (2), Blackburn, J., as he then was, also observed that a misdelivery, such as that with which we are dealing, would not be a loss covered by that Act. The Act was also construed in *Millen* v. *Brasch and Co* (3), in which it was held, among other things, that delay would be covered by the word "loss" as there used.

These decisions undoubtedly would support Mr. Srinivasa Ayyangar, if the Indian Act was in pari materia with the Carriers Act of 1830, but it is not. That was an Act relieving carriers to a certain extent from their common law liability as insurers; and I may point out that in arriving at that construction Baron Parke, took into account the preamble of the Act and the object with which it was passed. We must do the same with regard to this Act. Ch. 7, Railways Act, 1890, is headed; "Responsibility of Railway Administrations as Carriers," and prima facie is intended to deal with the whole subject. The marginal note, which is not part of the Act but represents, what I gather upon an independent perusal of the section to be, its meaning, describes S. 72 as: "Measure of the general responsibility of a railway administration as a carrier of animals and goods." That measure of general responsibility is said, subject to the other provisions of the Act, to be that of a bailee under Ss. 152 and 161, Contract Act. Now S. 151, Contract Act, deals with the duty of a bailee to take as much care of the goods bailed to him as he would take of his own goods while they are in his custody, and S. 152 says that, in the absence of a special contract, he is not responsible for the loss, destruction or deterioration of the thing bailed, if he takes this amount of care. Then S. 160 provides:

"It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed without demand as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished."

Therefore it deals with the duty of the bailee to duly deliver the goods bailed at the proper time; and the marginal note to the section is:

"Return of goods bailed, on expiration of time or accomplishment of purpose."

S 161 provides for the consequence of the bailee's failure to discharge the duty prescribed in that section including the duty of making the delivery. It says:

"If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time"

The marginal note is: "Bailee's responsibility when goods are not duly returned." So that these sections of the Contract, Act which are applied by the Indian Railways Act, purport to deal, not merely

(1) [1885] 10 Ex. 793.
(2) [1876] 1 Q. B. D. 302.
(3) [1883] 10 Q. B. D. 142.

with the bailee's duty of safe custody, but also with the performance of the bailee's duty to deliver at the proper time. Therefore it seems to me that this Chapter must be taken, and was intended, to cover the whole liability of the railway company, including among other things the responsibility of the railway company for misdelivery, by whatever reason caused. That being so, when we come to S. 77 and find that notice is required in any claim for compensation "for the loss, destruction or deterioration of animals or goods," it seems to me that notice is required in all claims which arise with reference to the liability defined in the earlier sections and in the specified sections of the Contract Act, Ss. 152 and 161, the latter of which covers all cases of nondelivery or misdelivery. In S. 9, Act 3 of 1865, which is reproduced in S.76, Indian Railways Act, it is provided:

"In any suit brought against a common carrier for the loss, damage or nondelivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or nondelivery was owing to the negligence or criminal act of the carrier, his servants or agents."

In S. 76, Railways Act, it was not thought necessary to reproduce the word "nondelivery," the reason being, in my opinion, that cases of nondelivery are already sufficiently provided by the reference to Ss. 152 and 161, Contract Act in the earlier section. In this matter of requiring notice to the railway company within a reasonable time in order to enable them to make inquiries and if possible to recover the goods, there is really no reason for making a distinction between cases in which goods have been delivered inadvertently to the wrong person and cases, such as the present, in which they were delivered to a person other than the consignee who claimed to be entitled to them but did not produce the railway receipt, as he should have done. in support of his claim. We ought not to import distinctions of this sort into the Railways Act, unless they rest upon some basis of sound reason which would be likely to have commended itself to the legislature. I see none such in this case. For these reasons, I think that the cases decided under the Carriers Act, on which the learned Judge relied, are inapplicable, and that the claim is barred because notice was not given as required by S. 77, Railways Act. That would be sufficient to dispose of the present case, but as another interesting question was raised, and it was decided by the learned Judge, I propose to deal with it. It is said that the fact that the railway did not get back the railway receipts when it delivered the goods, ought to make them responsible to the plaintiff for the value of the goods, the plaintiff having on the strength of the production of the railway receipts by Swaminatha Reddi advanced money to him, considering the railway receipts as representing that goods to that value were in transit and in possession of the railway company. Much reliance has been placed on the arguments before us, and some reliance was also placed apparently by the learned Judge, on the fact that the delivery to Swaminatha Reddi when it was made was a wrongful delivery, because at that time he had no right to the goods. But long before Swaminatha Reddi indorsed over the railway receipts to the plaintiff, he had paid the Bank of Madras and obtained the railway receipts, and was therefore the only person entitled to the goods, and also the contract of carriage was at an end. The goods had found their way into the hands of the lawful owner, and therefore no one was prejudiced by the misdelivery, and no injurious consequences followed. There may have been damnum so far as the Bank of Madras was concerned but it was damnum sine injuria.

I think that in the event which happened, the case must be decided as if the railway had made delivery of these goods to Swaminatha Reddi without the production of the railway receipts at a time when he was entitled to them, although he had not brought the railway receipts with him. But even so, it has been contended before us that the action of the Railway, in not getting back the Railway receipts, was such negligence or breach of duty as to make them liable to subsequent transferees for value of the railway receipts. This proposition has been supported mainly on the authority of the case of *Nash* v. *De Freville* (4). That was a case of the execution and delivery by the defendant of promissory notes payable on demand. Such an "on demand" note is intended to be a continuing security and cannot be treated as overdue

(4) [1900] 2 Q. B. 72.

merely because it was indorsed over some years after the date of execution: *Brooks* v. *Mitchell* (5). Consequently it remains current in the hands of the payee or indorsee until the maker gets it back; and if, as in the case cited, he omits to get it back, when he pays it, he cannot set up that payment against a subsequent transferee.

Now, it by no means follows that a decision as to a promissory note payable on demand is necessarily applicable to a spent bill of lading or a railway receipt. Indeed the analogy is rather with an overdue note. A bill of lading in origin, as it still is in form, is nothing but a receipt for the goods from the master of the ship to the shipper. But for mercantile convenience and by mercantile usage, it has become a symbol of the goods as explained by Baron Martin in *Barber* v. *Meyerstein* (6). As possession could not be given of goods at sea, the bill of lading came to be treated as a symbol of the goods and a transfer of the bill of lading as equivalent to a transfer of the goods themselves. The question of the period during which bill of lading can pass title to the goods, was considered in the leading case of *Barber* v. *Meyerstein* (6), to which I have just referred, and the general effect of that decision is, that the property in the goods passes by indorsement of the bill of lading so long as the contract of carriage has not been completed by delivery to the proper consignee. This limitation follows from the very origin of this mercantile custom which, as already stated, depends on the fact that goods in transit are incapable of delivery. But once transit is over and they have come to the possession of the consignee, there is no reason for the goods any longer being held to pass by indorsement of the bill of lading, and no authority has been cited before us for the proposition that they would so pass. The contrary is, in my opinion, clearly assumed in *Barber* v. *Meyerstein* (6). At the very beginning of his judgment, Lord Hatherley says:

"The question has really turned upon one point, and I may almost say upon one point alone, namely, whether or not the bills of lading had fully performed their office, and were discharged and spent at the time that the plaintiff took his security. Whether, in other words, the landing of those goods .... was or was not a delivery which had exhausted the whole effect of the bill of lading."

And the case proceeded on the footing that if that was so, any subsequent transfer of the bill of lading would be entirely ineffective. It was held in that case that the stage had not yet been reached. Similarly later on Lord Hatherley says:

"The shipowner contracts that he will deliver the goods on the payment of freight. He discharges his contract when he delivers the goods."

Then Lord Westbury says:

"Unquestionably the bill of lading, as long as the engagement to the shipowner has not been fulfilled, is a living current instrument, and no doubt the transfer of it for value passes the absolute property in the goods."

There is no authority whatever for the proposition that after the bill of lading has ceased to be a living instrument by the delivery of the goods, any dealing with it can affect the property in those goods. Similarly in *Sanders* v. *Maclean* (7) Bowen, L. J., observed in a much quoted passage:

"And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one lightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."

Now, if that be so with regard to a bill of lading, it is equally so with regard to a railway receipt. The contract of the railway is to carry goods and to deliver them to the consignee. Ordinarily, it would be bound to deliver at its peril to the person entitled at the end of the transit. But S. 57, Railways Act protects the railway, and empowers it to refuse delivery except upon the production of the railway receipt. The terms of the railway receipt show that the railway does not hold itself out as delivering goods only on production of the railway receipt. It only reserves liberty to refuse, in its discretion, to deliver the goods, unless the railway receipt is produced, or unless, if the receipt is not produced, an indemnity is given. There is no reason for saying that the railway holds itself out to the mercantile community as never parting with goods except upon the production of the railway

(5) [1841] 9 M. & W. 15.
(6) [1870] 4 H. L. 317.
(7) [1883] 11 Q. B. D. 327.

receipt. The railway is not, in my opinion, under any duty to the public or to any body else to insist upon the return of the railway receipt. It is said that mercantile men in India treat railway receipts as documents of title and that the usage has now, at any rate, since the decision of the Privy Council in *Ramdas Vithaldas Durbar* v. *Amerchand & Co.* (8) received legal recognition. But that cannot alter the position of the railway company in this respect. It seems to me that the first step in the respondent's position is not established namely, that there was some duty on the part of the railway not to part with the goods except against the railway receipt.

Apart from that, there is the serious question as to whether what happened could be held to follow from their failure to do so. What happened was, that a fraud and a crime were committed by Swaminatha Reddi in obtaining money from the plaintiff, on a railway receipt for goods that had already been delivered to him at the end of the transit. Reliance has been placed on the maxim laid down in *Licbarrow* v. *Masan* (9) that

"wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."

In that case, it was held that, by parting with the bill of lading to the consignee, the consignor had estopped himself from asserting his right to stop in transit against a transferee of the bill of lading from the consignee. It is however well established that there are serious limitations to the general application of this doctrine. In *Bank of Ireland* v. *Trustees of Evans' Charities* (10) it was held that the carelessness of the Company in leaving its seal in the hands of its secretary, even if it amounted to negligence, did not estop it from disputing forged transfers of its securities made by the secretary under its seal. In the similar decision in *Merchants of the Staple* v. *Bank of England* (11) Bowen, L. J., pointed out that there was a distinction between doing that which enabled a fraud to be effected, and being the cause of that fraud, and held that the fraudulent transfer in that case was not the natural consequence of the alleged negligence of the defendant Company, so as to give rise to an estoppel against them. The limitations on this doctrine were further considered in *Tarquharson Brothers & Co.* v. *King & Co.* (12) and in the very recent case of *Macmillan* v. *London Joint-Stock Bank* (13), where Swinfen Eady, L. J, referred to the judgment of Blackburn, J., in *Swan* v. *North British Australasian Co.* (14) that negligence, in order to estop, must be in the transaction itself and must also be the proximate cause of the loss, and Scrutton, L. J., observed at p. 459 (of 1917 2 *K.B.*)

"I think the effect of the authorities is that if *A* owing a duty to B, by the neglect of that duty induces *B* to believe that a certain state of facts, exists, he is estopped as against *B* from denying that such a state of facts exists. But the neglect must be in the transaction itself, not in previous history.....And the neglect must be the proximate cause of leading *B* to his belief. Neglect of precautions by *A* which enable *C* to commit a crime causing loss to *B* can never in my view give rise to a claim by *B* against *A*, for the loss is not the proximate or even natural consequence of the neglect."

As regards the present case, I think it has not been shown that the railway was under any duty to the public to get back the railway receipts on delivery of the goods and even if there was such a duty, I think on the authorities cited, that would not render the railway liable for the fraud subsequently perpetrated by the holder of the receipts. In the judgment under appeal, the learned Judge observed:

"Had Swaminathan Reddi and Co. on the dates when they obtained delivery of the goods, been the persons who were really entitled to delivery it follows from the authorities above cited that the railway receipts would have exhausted their force and any negotiation subsequent to it by Swaminathan Reddi and Co. would not be operative or pass any title."

That, if I may say so, appears to me to accurately state the effect of the authorities. But the learned Judge went on to make a distinction which I am unable to follow and held the railway liable because at the time of delivery to Swaminatha Reddi, he was not the person entitled to the goods. I have already given my reasons for holding that this circumstance makes no difference, having regard to the fact that Swaminatha Reddi had become entitled to the goods before the date of

(8) A. I. R. 1916 P. C. 7=40 Bom. 630=35 I. C. 954=43 I A. 164 (P. C.).
(9) [1787] 1 Smith's L C. (Edn. 12) 726=2 T. R. 63.
(10) [1855] 5 H. L. C. 389.
(11) [1888] 21 Q. B. D. 160.
(12) [1902] A. C. 325.
(13) [1917] 2 K. B. 439.
(14) [1863] 2 H & C. 175.

his transfer of the spent railway receipts to the plaintiff. For these reasons on both grounds, I think the appeal must be allowed and the suit dismissed with costs throughout. I certify for two counsel.

Spencer, J.—I entirely agree. I do not think I can usefully add much to what has fallen from my Lord Chief Justice on the second point which he has discussed in the judgment just delivered. On the question of limitation I cannot follow the learned Judge who tried this case in the opinion that he expressed, that S. 77, Railways Act does not include cases where the railway company have with their eyes open delivered the goods to the wrong person. In Ss. 72 and 77 of the Act, "loss" is coupled with "destruction" or "deterioration" of goods. Now it could not be asserted for a moment that in cases where a railway company found it necessary to destroy goods, say for some necessary purpose, such as to clear their line to avoid danger of life to a passenger train, such destruction would not come within the meaning of destruction of goods in these sections. If destruction is to include deliberate acts of the company or its servants, I cannot see why the word "loss" should only apply to cases where the goods have been mislaid. If the company is liable for negligence, it must a fortiori be liable for wilful acts. I think the intention of the legislature in inserting S. 77 into the Act must have been that by requiring notice to be given before claims are put in, the company might have time to investigate such cases and meet the claims of persons who have suffered loss, if possible, out of Court. The word "loss" in English language is in my opinion sufficiently wide to cover cases where the goods are not forthcoming either from deliberate acts or from acts of negligence, and I see no reason to confine it only to cases of the latter kind.

I therefore agree in thinking that notice not having been given within six months of the consignment of these goods the present suit cannot be maintained. I also agree in thinking that there is no cause of action against the railway company. The plaintiff presents his claim in two ways. Either he says to the railway company:

"Property has passed to me by the pledge of the railway receipts which by mercantile usege represent goods. As I paid money in good faith on the belief that the goods were with you, you must give me the goods, or their value if they have been converted."

Or he says:

"By the negligence of your booking clerk in making over the goods without taking the railway receipts, I was led to believe that I had good security for the loan which I made to Swaminatha Reddi. You are responsible for the misrepresentation made to me and you must compensate me for the loss"

The railway company can in my opinion meet each of these demands in a legal way. Its answer to the first will be this:

"The railway receipts are only symbols of property and they ceased to be living instruments of title from the moment the goods were delivered to a person having a right to take them Swaminathan Reddi had a right to receive the goods and he actually took them before you acquired any interest under the pledge to you. You have been the victim of a fraud, but the transaction, so far as we are concerned, had come to an end before you acquired an interest in the goods: see *Barber* v. *Meyerstein* (6)."

To the second, its defence is this:

"It may be that our clerk was negligent but he only risked our responsibility till the receipts were forthcoming. We know nothing of Swaminatha Reddi's subsequent transactions with you and we did not conspire with him to cheat you. We acknowledge no liability to the public to see that our receipts are all collected, and the fact that this receipt happened to be left in the consignee's hands was not a proximate or effective cause of your being cheated nor did it directly lead to that result: see *Merchants of the Staple* v. *Bank of England* (11) and *Macmillan* v. *London Joint Stock Bank* (13)."

S.N./R.K. *Appeal allowed.*

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BAKEWELL AND PHILLIPS, JJ.

Venkata Lakshmi Narasayya and *another*—Plaintiffs—Appellants.

v.

Meenakshi Ammal and *others*—Defendants—Respondents.

Second Appeal No. 2025 of 1917 Decided on 17th February 1919 against decree of Temporary Sub. Judge, Chingleput, in Appeal Suit No. 106 of 1916.

(a) Transfer of Property Act (4 of 1882), S. 43—Purchaser knowing that sale did not convey interest it purported to convey—S. 43 does not apply.

S. 43 does not apply to the case of a purchaser who knew, at the date of the sale, that the sale did not convey to him the whole interest which it purported to convey. [P 146 C 1]

(b) Transfer of Property Act (4 of 1882), S. 43—Sale by widow of her own and co-widow's interest has no effect on subsequent acquired interest—Hind Law, Widow, Alienation.

Where a Hindu widow sold properties belonging to her and her co-widow and the pur-

chaser knew of the co-widow's interest in the property :

Held, that the purchase would not operate on the interest which the vendor subsequently acquired in her co-widow's share. [P 146 C 1]

C. V. Ananthakrishna Aiyar — for Appellants.

A. Krishnaswami Aiyar and *B. Somayya* — for Respondents.

Judgment.—It is found by the lower appellate Court that the purchaser was fully aware of the interest of the co-widow of his vendor at the time of the purchase and that, accordingly, there was no erroneous representation to the purchaser that his vendor was authorized to transfer the interest of her co-widow.

The purchaser therefore accepted a sale deed which he was aware did not transfer the interest which it purported to deal with. He was therefore not misled in any way and S. 43, T. P. Act, which is founded on the principles of estoppel, does not apply. *Pandiri Bangaram* v. *Karumoory Subbaraju* (1). The decision in *Adikesavan Naidu* v. *Gurunatha Chetti* (2) does not in any way affect *Pandiri Bangaram* v. *Karumoory Subbaraju* (1). The second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1910] 34 Mad. 159=8 I. C. 388.
(2) [1917] 40 Mad. 338=39 I. C. 358.

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ABDUR RAHIM AND SPENCER, JJ.

Annamalai Chetti and *another*—Defendants—Appellants.

v.

Annamalai Chetti—Plaintiff—Respondent.

Civil Appeal No. 54 of 1918, Decided on 29th January 1919, from the decree of Temporary Sub. Judge, Sivaganga, in Original Suit No. 105 of 1915.

(a) Contract Act (9 of 1872), Ss. 253, 254 and 256—Exclusive right cannot be asserted by partner with respect to any partnership property—Share can be assertained only after taking accounts.

No partner has a right, at least in the absence of a special agreement, to take any portion of the partnership property and to say that it is his exclusively either during the existence of the partnership or after it has become dissolved. The share of a partner to which he is entitled is his proportion of the partnership assets that have been realized and converted into money after all the partnership debts and liabilities have been paid and discharged. [P 148 C 1]

(b) Contract Act (9 of 1872), Ss. 253, 254 and 256—Partner cannot claim his share and ask to be given his share item of firm's account before all liabilities and assets are realized.

A partner cannot be allowed to take one item of the firm's accounts, divide it into equal shares according to the number of partnership shares, and ask to be given one share, without first having an account taken of the partnership liabilities and deducting the some total of them from the aggregate assets of the firm. 45 *I. C.* 86, *Foll.* [P 148 C 1]

(c) Limitation Act (9 of 1908), Art 60, 57 and 115—Nattukottai Chetties—Deposit on thavanai are payable on demand—Art 60, applies—Deposit proved as payable without demand—Art. 57 or Art 115 apply

In the absence of evidence to the contrary deposits made with Nattukottai Chetties on thavanai are deposits payable on demand and come within the definition of deposits under Art. 60, Sch. 1, Lim. Act. If there is evidence however that the money is payable without demand, Art. 57 or Art. 115 would be applicable, according as it is payable at any time after it was lent or after a fixed period. [P 149 C 2; P 150 C 1]

(d) Contract Act (9 of 1872) Ss. 253, 254 and 256—Partner even after dissolution can give valid discharge of debt.

A partner is competent to give a valid discharge of a debt due to the partnership even after its dissolution: 19 *I. C.* 12; 36 *Mad.* 544; 13 *M. L. T.* 268; (1913) *M. W. N.* 328; 24 *M. L. J.* 333; 44 *I. C.* 466 and 41 *Mad.* 446; 34 *M. L. J.* 41 *Foll.* [P 149 C 1]

(e) Evidence Act (10 of 1872), S. 32, (5)—Child's father's statement about date of birth can be proved by person who prepared horoscope.

The evidence of a person who prepared a child's horoscope, as to the statement made to him by the child's father about the date of the child's birth, is admissible in evidence under S. 32 (5) as it is the date of the commencement of a relationship. [P 149 C 1]

K. Srinivasa Aiyangar, *K. Rajah Aiyar* and *T. R. Srinivasarajagopala Aiyangar*—for Appellants.

A. Krishnaswami Aiyar—for Respondents.

Spencer, J.—The plaintiff and defendants 1 to 10 represent a firm which was started in Mandalay under the style of A. L. A. M. for doing money lending business, which for brevity, may be referred to as the Mandalay firm. In 1908, defendant 8 in this suit brought a suit in the District Court of Mandalay for dissolution of the partnership of this firm and obtained a decree in which the proportionate shares of the partners were defined, seven in number, and the plaintiff in the present suit was declared to be the owner of one share. While the suit was pending and before the partnership was dissolved, a sum of Rs. 35,239 odd was collected by one Arunachalla Chetty, who was the agent of the Mandalay firm, and

this sum was deposited at interest with a firm consisting of defendants 1 to 7 and a stranger who is defendant 11 in this suit, which may be briefly referred to as the Rangoon firm. It may be seen that defendants 1 to 7 are common partners in both the Mandalay and Rangoon firms. The present suit was brought to recover 1/5th share of the money deposited with the Rangoon firm and the temporary Subordinate Judge of Sivaganga has given the plaintiff a decree accordingly. Defendants 3 and 4 appeal and they attack the correctness of the Subordinate Judge's judgment upon two points: (a) that the suit as framed is not maintainable, and (b) that it is time barred

The grounds for saying that the suit is not maintainable are stated in full in grounds 27 to 29 of the appeal memorandum. Although in the written statement of defendant 1 the objection was simply raised that the suit could not be maintained without giving reasons, it appears from the appeal memorandum that the reasons are that the plaintiff's only remedy was to work out the claim as an item of asset in the winding up proceedings of the Mandalay firm under the decree of the District Court, which is Ex. 4 (a), and was confirmed on appeal to the Judicial Commissioner by his judgment Ex. 4 (c). Ground 28 is that

"the money having been advanced as a whole and there having been admittedly no division or apportionment among the several partners, it was not competent for the plaintiff to maintain a suit for the recovery of his share alone;" and ground 29 is that "the plaintiff cannot evade the equities arising out of the state of the account between himself and his partners of the Mandalay firm as a whole."

It goes on to state that either a suit should have been brought on behalf of all the partners of the Mandalay firm for recovery of the entire loan or the plaintiff should have taken proper proceedings in execution of the decree of the Mandalay Court. Now on this point, there is no doubt that in England an action may, in the present state of the law, be brought in some cases by one firm against another, although they may have a common partner or partners, or on behalf of a firm to recover a debt due by one of the partners of that firm: see Lindley on Partnership (8th Edn.), p.323. In India, O. 30 R. 9, Civil P. C., recognizes the maintainability of suits between firms and one or more partners of such firms and also suits between firms having one or more partners in common. But a suit does not ordinarily lie if brought by one partner to recover money lent by him to a firm of which he is a member: see *Rustomji* v. *Purshotamdas*(1) the reason being that the advance made by one partner would be only one item in the partnership account; nor can one firm sue another when the sole partners of the first firm are partners along with others in the second firm and the claim is to recover as plaintiff's share certain advances made to the second firm before it ceased to do business, see *Kashinath Kedari* v. *Ganesh Hari Narkar* (2), the reason being that, without taking a general account it would be impossible to do justice between the parties. It was held in *Karri Venkatareddi* v. *Kollu Narasayya* (3) that in certain circumstances one partner can sue another for a partial account. Those circumstances are that the granting of the relief asked for by the plaintiff would not involve the taking of general accounts and would not work injustice to the other partners.

In the same volume of *I. L. R. Madras* series at p. 203, another case, *Sadhu Narayana Aiyangar* v. *Ramaswami Aiyangar* (4), is reported in which it was held that a partner, who has been compelled after dissolution of the partnership to pay a debt due by the partnership, may bring a suit for contribution; but in such a suit it was laid down that the defendant must be given an opportunity of showing, if he can, that on a settlement of accounts the amount payable by him as contribution has been wiped out or reduced. In *Gottipatichina Kandiah* v. *Gottipatinarasappa Naidu* (5), to which decision I was a party, a partner was allowed to sue for his share of the collections made by another partner after dissolution of the partnership, on the condition that the defendants were given an opportunity of showing that, if a general account of the partnership transactions were taken, the plaintiff would not be entitled to the share which he claimed. But in another case decided by a different Bench to which my learned brother was a party, *Lakshmanan*

(1) [1901] 25 Bom 606.
(2) [1902] 26 Bom. 739.
(3) [1909] 32 Mad. 76=1 I. C. 384.
(4) [1909] 32 Mad 203=3 I. C. 486.
(5) A. I. R. 1914 Mad. 295=22 I. C. 947.

Chetty v. *Nagappa Chetty* (6), where the plaintiff sued to establish a certain liability against the defendants on the basis of accounts, and he did not ask for accounts to be taken, it was held that the suit was not maintainable. What are the rights of persons in a firm inter se has been clearly set out in Lindley on Partnership at p. 689, 8th Edn. One of these is to have the partnership assets applied in liquidation of the partnership debts and to have the surplus assets divided. This result is usually obtained by the process referred to at p. 614 of having a receiver appointed. The share of a partner to which he is entitled is his proportion of the partnership assets that have been realized and converted into money after all the partnership debts and liabilities have been paid and discharged: see p. 402.

No partner has a right, at least in the absence of a special agreement, to take any portion of the partnership property and to say that it is his exclusively either during the existence of the partnership or after it has been dissolved. The decision in *Lakshmanan Chetty* v. *Nagappa Chetty* (6) proceeds upon this principle: see p. 410 of 34 *M. L. J.* The plaintiff in this suit cannot legally assert any right to a specific portion of the deposit made by his partners with the Rangoon firm. His only right is to take steps for an account being taken of the liabilities and assets of the Mandalay firm and to claim his proportionate share of the balance so arrived at. A partner cannot be allowed to take one item of the firm's assets, divide it into equal shares according to the number of partnership shares, and ask to be given one share without first having an account taken of the partnership liabilities and deducting the sum total of them from the aggregate assets of the firm. This is what the plaintiff has done here. In the plaint there is no prayer for accounts nor has he since applied to amend his plaint. In paras. 1 and 8 of defendant 1's written statement an objection was taken to the maintainability of the suit in its present form without specifying that the suit would have been maintainable if it had been framed differently so as to include a prayer for taking accounts and ascertaining the nett assets of the firm. Under O. 8, R. 2, Civil P. C., it was the duty of defendants to state how the plaintiff's suit was not maintainable, but under O. 7, R. 7, a duty is cast upon the plaintiff in the first instance to state specifically what relief he claims, and he must bear the consequences of his failure to ask for the only thing that he is entitled to get when that thing is not of the nature of general relief. It was for want of a prayer for accounts that the suit concerned in *Lakshmanan Chetty* v. *Nagappa Chetty* (6) was held to be not maintainable, and as that appears to be sound law, I think we should follow the decision.

It makes no difference whether the plaintiff is, as he was in that case, a member of the defendant's firm or whether, as here, the defendants or some of them are members of the plaintiff's firm, when in either case the obvious remedy open to the plaintiff is to get the business (in this case the affairs of the Mandalay firm) would up by getting a receiver appointed to collect the partnership assets, to adjust the liabilities of the partners inter se and to distribute the net proceeds after paying the partnership debts. In *Sokkanadha Vannimundar* v. *Sokkanada Vannimundhar* (7) and *Thiruvengada Mudaliar* v. *Sadagopa Mudaliar* (8), plaintiffs were allowed to sue for their share of assets received by a co-partner after the dissolution of a partnership, but this was not without the defendants being at liberty to reopen the whole accounts of the business. *Sadhu Narayana Aiyangar* v. *Ramaswami Aiyangar* (4) dealt with a suit by one partner, who had been compelled to pay the whole of a partnership debt, for contribution against his co-partners. It was not, like this, a suit to recover a share in a partnership debt from the debtors including members of the plaintiff's firm, but it partook of the nature of a suit for contribution, pure and simple. The circumstances of those cases were thus different from those of the present suit. Issues 3 and 4 must now be decided against the plaintiffs. The question of limitation is more difficult. It stands in this way: The sum of Rupees 35,289 odd were placed with the Rangoon firm on 20th August 1908. This suit was instituted on 5th October 1915.

(6) [1918] 45 I. C. 86=34 M. L. J. 408.

(7) [1905] 28 Mad. 344.

(8) [1910] 34 Mad. 112=7 I. C. 811.

The Subordinate Judge has found that plaintiff attained majority on 6th October 1912. If the date 20th October 1908, when repayment of the money became due according to the Thavanai, be taken as the starting point for limitation and if the plaintiff's minority is not treated as entitling him to exception, the suit is time barred. It would equally be barred if three years were to be calculated as running from 15th March 1909, the date of the Mandalay District Court's decree defining the plaintiff's share in the assets of the firm. The Subordinate Judge held that the suit was in time as it was brought within three years of the plaintiff attaining majority. It is now argued by Mr. K. Srinivasa Ayyangar that the plaintiff cannot claim under S. 6, Lim. Act, that time does not begin to run against him till he attained majority as any one of the adult members of the Mandalay firm was competent to give a discharge of the debt without his concurrence and thus the first part of S. 7 of the Act is applicable. He also attacks the Subordinate Judge's finding on the question of fact. The plaintiff in his plaint gives the date of his birth as 8th October 1891. This would make him 21 on 8th October 1912, as a guardian of his property was appointed by the District Court of Madura in Civil Miscellaneous Petition No. 411 of 1900, which had the effect under the Indian Majority Act of extending the attainment of his majority till he completed his 21st year,

The Subordinate Judge has accepted 6th October 1891, which was also the date given by the plaintiff as the date of his birth in another suit, Original Suit No. 257 of 1912 (compare the plaint Ex. E-1), as correct. I see no sufficient reason to differ from this finding. The evidence of P. W. 1 who prepared the plaintiff's horoscope, as to the statement made by plaintiff's father about the date of his son's birth, is admissible under S. 32 (5), Evidence Act, as it was the date of the commencement of a relationship; vide *Oriental Government Security Life Assurance Co. Limited* v. *Narasimha Chari* (9) and Amir Ali's Evidence Act, p. 359. No doubt Exs. 2 and 5 throw some doubt on the correctness of the age given in the later proceedings to which the plaintiff was a party, but there is no reason for supposing, in the absence of evidence to that effect, that Ex. D related to another person of the same name as plaintiff. His statement as D. W. 2 that he was not aware, at the time when Exs. 2 and 5 were drawn up, that a guardian had been appointed by Court during his minority, has not been contradicted or shown to be false. If it is taken to be true, it sufficiently explains the circumstances under which he was treated on those occasions as having attained majority earlier than in 1912. The Subordinate Judge's finding on the point must therefore be confirmed. On the question of law we must allow the Full Bench ruling in *Mannava Annapurnamma* v. *Uppala Akkayya* (10) and the decision in *Palaniappa Chettiar* v. *Veerappa Chettiar* (11) and pronounce in favour of the competence of one of several joint promisees or of one member of a partnership to give a valid discharge of debt due to the joint tenancy or to the firm even after it has been dissolved.

Mr. A. Krishnaswami Ayyar, for the respondent, has endeavoured to support the lower Court's finding on issue 2 which relates to limitation, by arguing that the money in the defendants' hands was a fixed deposit in a bank and that Art. 60, under which time begins to run from the date when a demand is made for payment, is the article of limitation applicable to the case. In the plaint it is asserted that demands were made in December 1914 and at the beginning of September 1915, and this assertion is not denied in the defendants' written statements. In *Balakrishnuda* v. *Narayanasawmy Chetty* (12) the learned Chief Justice of this Court, when sitting on the original side, traced the history of Art. 60 Lim. Act, and showed its application to so-called fixed deposits and other deposits with bankers and other bodies doing similar business, if they are repayable on demand and whether they carry interest or not, even if they are of the nature of loans. In a series of subsequent decisions, this Court has repeatedly presumed, in the absence of evidence as to the terms on which the money was handed over, that deposits made with Nattukkottai Chetties, who are the Indian bankers of this part of the coun-

(9) [1902] 25 Mad. 183.

(10) [1913] 36 Mad. 544=19 I. C. 12.
(11) [1918] 41 Mad. 446=44 I. C. 466.
(12) A. I. R. 1914 Mad. 51=24 I. C. 852=37 Mad. 175.

try, are payable on demand and come within the definition of deposits under Art. 60: see *Ramanathan Chetty* v. *Subramaniyam Chetty* (13), *Narayanan Chettyar* v. *Vellayappa Chettyar* (14), *Vellayappa Chettiyar* v. *Unnamalai Achi* (15), *Muthiah Chettiar* v. *Ramanatham Chettiar* (16) and *Chellappa Chetty* v. *Subramania Chetty* (17).

If there is evidence that the money was payable without demand, Art. 57 or Art. 115 would be applicable, according as it was payable at any time after it was lent or after a fixed period. If either of these articles governs this case, the suit is out of time. In this case there is such evidence. Although the terms on which the money was deposited with the Rangoon firm were not embodied in a bond or promissory note, we have the oral evidence of D. W. 1 that in this Thavanai arrangement the investor was not entitled to demand the money till the Thavanai date, but when that date arrived, the person with whom it was invested was bound to repay it immediately and that it was the custom to pay it without any demand being made. There is no other evidence as to the nature of the transaction. The Subordinate Judge has accepted the evidence of this witness on this point and has found that the money was payable without demand. This issue must therefore be decided against the plaintiff. The appeal is allowed and this suit is dismissed with costs in both Courts. Appellants (defendants 3 and 4) are entitled to recover their costs in both Courts from the plaintiff. The defendants who have not appealed will bear their own costs in the lower Court.

Abdur Rahim, J.—I agree in the conclusions which my learned brother has arrived at in the judgment prepared by him.

S.N./R.K. *Appeal allowed.*

(13) [1915] 28 I. C. 688.
(14) [1916] 34 I. C. 347.
(15) [1917] 42 I. C. 573.
(16) [1918] 43 I. C. 972.
(17) [1918] 47 I. C. 948.

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SADASIVA AIYAR AND SPENCER, JJ.

Chengalraya Chetty and *others*—Defendants—Appellants.

v.

Raghava Ramanuja Doss and *others*—Plaintiff and Defendants—Respondents.

Appeal No. 325 of 1917, Decided on 27th November 1918, against the order of Tempy. Sub-Judge, Vellore, D/- 26th March 1917, in Appeal Suit No. 34 of 1917.

(a) Civil P. C. (5 of 1908), Sch. 2, Para. 16 —Consent to abide by decision of Court is not reference to arbitration.

A consent given by the parties to a suit to abide by the decision of a Court is not such a reference to arbitration as is contemplated by the provisions of Sch. 2 [P 151 C 2]

(b) Civil P. C. (5 of 1908), Sch. 2, Para. 16 —Court acting as arbitrator—Award given—No appeal lies.

Where a Court itself acts as arbitrator on a question of fact and gives an award, there is no appeal against its decision, not because the provisions of Sch. 2 apply to the award made by the Court but because a party cannot go back on his consent to abide by the decision of an arbitrator after the award is given. [P. 152 C 1]

(c) Civil P. C. (5 of 1908), Sch. 2, Para. 16 —Judgment on award contravening provisions of para. 16 is appealable.

A judgment on an award, if it is pronounced in contravention of the provisions of Sch. 2, para. 16, Cl. (1), does not fall under para. 16 (2) and, consequently, there is no prohibition of an appeal from such a judgment. [P 152 C 2]

(d) Civil P. C. (5 of 1908), Sch. 2, Para. 16 —Award passed on local inspection without allowing time for objections is illegal—High Court has power of interference.

Where, a Court, which is asked to arbitrate, pronounces an award on a mere local inspection and on no legal evidence and without pronouncing on the evidence already adduced and without giving time to the parties to prefer their objections to it, the award is illegal and an appeal lies against it. Even if no appeal were competent in such a case, the High Court would have power to interfere in revision on the ground of material irregularity. [P 153 C 1, 2; P 154 C 1]

(e) Civil P. C. (5 of 1908), Sch. 2, Para. 16 —Court as arbitrator — Reference by some only of parties—Award does not bind all but only those making reference—Legality.

An award by a Court, which is appointed as arbitrator by some only of the parties, will bind those who join in the reference, but in respect of those who do not, the Court should give its decision on the materials placed before it as a Court. It is illegal for a Court to accept the position of arbitrator when all the parties interested do not join in consenting to such appointment. [P 153 C 1]

(f) Civil P. C. (5 of 1908), Sch. 2, Para. 16 —Court as arbitrator on reference by some parties only—Award against all parties is not valid—Remand on appeal by those not

joining in reference — Whole case is re-opened.

Where an appellate Court remands a case for retrial on the appeal of those defendants who did not join in a reference to arbitration on the ground that the award was not binding on them, the whole case is reopened even in respect of those parties who did not appeal. [P 153 C 1]

M. Patanjali Sastri—for Appellants.

A. Viswanatha Aiyar—for Respondents.

Sadasiva Aiyar, J.—The defendants 1 to 3 and 5 to 8 are the appellants. Defendants 1 to 3 alone and the plaintiff agreed to abide by the decision of the District Munsif passed as an arbitrator. Defendants 4 and 5, who are majors and who are interested in the litigation remained ex parte as also the guardian of the minor defendants 9 and 10. Defendants 6 to 8 are minors represented by their guardians, defendants 1 and 2. So far as defendants 6 to 8 are concerned, it might be taken (though defendants 1 to 3 do not expressly say so in the statement given to the District Munsif) that their guardians, defendants 1 and 2, agreed to abide by the District Munsif's decision on behalf of these minors also. The District Munsif, as such arbitrator, dismissed the plaintiff's suit on a mere inspection of the disputed house sites without referring to the evidence of the plaintiff's witness already examined and apparently without allowing an opportunity to the plaintiff to prove his case further against the ex parte defendants 4, 5, 9 and 10.

On appeal by the plaintiff, the Subordinate Judge set aside the District Munsif's decision on the following grounds: (1) There was no valid reference to arbitration under Sch. 2. para 1, Civil P, C., as defendants 4 to 10 did not join in the reference. (2) The judgment of the Dictrict Munsif (which was also the award) was passed on the date of the award itself, without giving to the plaintiff 10 days' time to apply to set aside the award under Sch. 2, para 16 (1). (3) The reference to arbitration on behalf of the minors (defendants 6 to 8) not having been made with sanction of the Court, the reference was invalid under O. 32, R. 7. The Subordinate Judge accordingly remanded the suit to the District Munsif for fresh disposal according to law. In this appeal against the Subordinate Judge's order of remand it was contended as follows.

Ground 3.—The decision of the District Munsif was in the nature of an award and no appeal lay.

Ground 5.—The lower Court erred in assuming that the provision in para. 1, Sch. 2, Civil P. C. would in terms apply to this case.

Ground 7—No appeal would lie from the decree passed on an award even if it is illegal (evidently Sch. 2, para. 16, Cl. (2) is relied on in this ground).

Two other points not clearly raised in the grounds of appeal were also argued, namely, (1) that defendants 6 to 8 (though their guardians did not expressly state that they give their consent on the minors' behalf) were bound by the consent given by their guardians, (2) that in any event, the decision was voidable by the minors under O. 32, R. 7 (2), and not at the instance of the plaintiff (who appealed to the sub-Court). I think that a consent given by the parties to abide by the decision of a Court is not such a reference to arbitration as is contemplated by the provisions of Sch. 2, Civil P. C. In *Nimmagadda Peda Naganna*, In re (1) I made the following observations:

"An agreement not to appeal is binding on the parties the consideration being their mutual consent to refer the matter in dispute to the Court as an arbitrator. The application to the Court itself to act as arbitrator is not an application coming under the Civil Procedure Code, Sch. 2, paras. 1 and 2, which paragraphs clearly contemplate the passing of an order of reference under Sch. 2, para. 3, the fixing of a time by the Court in that order for the making of the award by the arbitrator (other than the Court) and the Court's not acting further in the matter till the time expires. They all clearly contemplate a reference to a third person (or third persons other than the Court) as arbitrator or arbitrators. When an award is made by the Court itself acting as arbitrator, there is no separate judgment to be passed as distinguished from the award itself. As said in *Nidamarthi Mukkanti* v. *Thammana Ramayya* (2), the decision of the Court 'must be looked on as award.' The Code nowhere contemplates that when the Court itself is the arbitrator, it must first give a separate award, then wait for objections to the award made by itself, hear such objections as a Court to its own award as arbitrator and lastly pronounce judgment on the award if it does not set it-aside. The provisions of the Civil Procedure Code, which are naturally applicable and were clearly intended by the Legislature to apply only to awards made by an arbitrator other than the Court and which are clearly inapplicable and would be almost grotesque when applied to an award made by the Court itself acting as an arbi-

(1) [1915] 26 I. C. 355.
(2) [1903] 26 Mad. 76.

rator, cannot be invoked in the latter class of awards."

I adhere to my above view and hold that where the Court itself acts as an arbitrator on a question of fact, the reason why an appeal does not lie is not because the provisions of Sch 2, Civil P. C, (including the provision in para. 16, Cl. 2, which forbids an appeal in certain cases) apply to the award made by the Court, but because on general principles of jurisprudence a party cannot go back on his consent to abide by the decision of an arbitrator after the award is given just as he cannot resile from the obligations arising from an executed contract. I am aware that in *Nidamarthi Mukkanti* v. *Thammana Ramayya* (2) (Bhashyam Aiyangar and Moore, JJ.) the award by the Court is treated on the footing of an award under Ch. 37, old Civil P. C, corresponding to the present Sch. 2, and that Ss. 521 and 522 corresponding to para. 15 and 16, of the new Code, are referred to in the short judgment delivered by the learned Judges. While the decision itself is if I may say so with respect, correct I venture to doubt if the reason based on the assumed applicability of Ss. 521 and 522 can be supported. In *Sayad Zain* v. *Kalabhai Lallubhai* (3) the learned Judges say at p. 755,

"here the parties agreed that they would abide by the decision of the Subordinate Judge. The fact that the express provisions of Ch. 38, Civil P. C. were knowingly disregarded, shows that the proceedings were extra cursum curia and thus the judgment of the Subordinate Judge was in the nature of an arbitrator's award against which an appeal cannot be entertained, if the competency of the Appellate Court is objected to by the party holding the judgment See *Burgess* v. *Morton* (4).

The learned Judges in this case clearly held that it is not by reason of the provisions of Ch. 38 that the appeal does not lie, but on general principles of jurisprudence. Turning to *Burgess* v. *Morton* (4), Lord Halsbury says at p. 138:

"My Lords it has been held in this House that where with the acquiescence of both parties, a Judge departs from the ordinary course of procedure and as in this case decides upon a question of fact, it is incompetent for the parties afterwards to assume that they have then an alternative mode of proceeding and to treat the matter as if it had been heard in due course. * * * *

They are precluded from treating the matter as subject to appeal. The Court of appeal had no jurisdiction to entertain the question."

As Lord Westbury put it in *Bickett* v. *Morris* (5), the decisions in these cases proceeded upon the personal incompetency of the parties to raise an objection to the correctness of the Court's award as arbitrator by way of an appeal, and not on any statutory or other provisions. The reasons, therefore given by the learned Subordinate Judge and the contentions of the appellant's vakil based on the provisions of Sch. 2, cannot in my opinion, be supported. I might however state that assuming that the provisions of Sch. 2, do apply to a submission to the Court, the decision in *Najm-ud-din Ahmad* v. *Albert Puech* (6), lays down that the judgment on an award, if the judgment is prouounced in contravention of the provisions of Sch. 2, para. 16 (1), does not fall under para. 16 (2) and hence there is no prohibition of an appeal from such a judgment.

The Privy Counsel decision in *Ghulam khan* v. *Muhammad Hussan* (7) does not affect thts particular question. There the provisions of the first three paragraphs of S. 522, corresponding to Sch. 2, para. 16, Cl. 1, had been complied with and so the judgment given was a judgment according to those provisions and hence para. 4, S. 522, corresponding to Sch. 2, para. 16, Cl. 2, did apply and their Lordships of the Privy Council, therefore held that no appeal lay. In the present case, the judgment on the award was pronounced without allowing any opportunity for an application to be made to set it aside and hence without hearing and deciding any objection. The decision in *Najm-ud-din Ahmad* v. *Albert Puech* (6) directly applies, assuming for argument's sake (as I said before) that Sch. 2 applies to the award made by a Court acting out of its ordinary procedure.

So far as the defendants 6 to 8 are concerned, I am inclined to agree with the appellants' learned vakil that their guardians (defendants 1 and 2) did evidently intend to refer a question of fact to the arbitration of the District Munsif on behalf of the said minors also and the Subordinate Judge's opinion that the award is invalid owing to the minor defendants 6 to 8 not having joined cannot therefore be supported. But he rightly relied on the fact that defendants 4, 5, 9 and 10 did not join in the

(3) [1899] 23 Bom. 752.
(4) [1896] A. C. 136.
(5) [1866] 1 H. L. Sc. 47.
(6) [1907] 29 All. 584.
(7) [1902] 29 Cal. 167=8 Sar. 154 (P. C.).

reference. A perusal of the plaint clearly indicates that defendants 4, 5, 9 and 10 were as much interested in the suit as the other defendants and hence the decision in *Vythinatha Aiyar* v. *Vaithilinga Mudaliar* (8) (assuming it to have been rightly decided) has no application, as it was assumed in that case that the ex parte defendants were not interested in the suit. In the result I am inclined to hold that if the District Munsif acted properly in accepting the position of an arbitrator under the circumstances of this case, his judgment, which is in the nature of an award as between the plaintiff and defendants 1 to 3 and 6 to 8, is binding on these parties as between themselves just as a lawful contract is binding on the parties thereto. But the suit as between the plaintiff and defendants 4, 5, 9 and 10 could not be decided by the District Munsif as an arbitrator, and he ought to have given a decision in the suit, so far as they were concerned, on the materials placed before him as a Court. He however dismissed the plaintiff's suit against defendants 4, 5, 9 and 10 also, merely on the impression he formed at his local inspection and on no legal evidence and without pronouncing on the evidence already adduced before him as a Court and without giving an opportunity to the plaintiff to proceed with the trial against those defendants.

It is true that those defendants have not been prejudiced and did not appeal to the Subordinate Judge, the plaintiff who consented to abide by the Court's decision as an arbitrator having been the appellant. But the Subordinate Judge was entitled to consider on appeal the illegality of the District Munsif's judgment passed against the plaintiff in favour of defendants 4, 5, 9 and 10 and to set it aside. It might be said that he should then have set the Munsif's decree aside only so far as it dismissed the plaintiff's suit against those defendants, and not so far as it dismissed the suit against defendants 1 to 3 and 6 to 8. But it would be a wholly inconvenient and anomalous thing that where several defendants have got the same interest, the plaintiff's suit should be dismissed in respect of some defendants and decreed against others. The two decrees would be inconsistent and unworkable. It is, on this ground, that Sch. 2, para. 1, rightly insists that a reference to arbitration, even when made to an arbitrator who is not a Court, should be by "all the parties interested." (The former Code, S. 506, was even more stringent and in its literal sense insisted on all parties, whether interested or not joining in the reference). Though as I said already, para. 1, Sch. 2, does not apply to a case where a Court departing from its function of deciding in the ordinary way is asked to decide a question of fact extra cursum curiae at the request of parties, the Court should follow the rule laid down in Sch. 2, para. 1 (1), and refuse to act as an arbitrator unless all the parties interested agree. In this particular case, the District Munsif acted with material irregularity and illegally in consenting to decide the suit as arbitrator even as between defendants 1 to 3 and 6 to 8 on the one hand and the plaintiff on the other, as defendants 4, 5, 9 and 10, who were interested in the dispute in the same way as the other defendants, did not join and as his decision as an arbitrator would not bind the plaintiff so far as his claim was made against defendants 4, 5, 9 and 10 and the futility of his decision as an arbitrator, when some of the parties did not join, was apparent.

Though the Subordinate Judge did not base his order setting aside the dismissal of the suit against defendants 1 to 3 and 6 to 8 also on the above ground, I think that we might support it on that ground, namely that the District Munsif acted illegally in accepting the position of an arbitrator when all the parties interested did not join in consenting to his acting as such. I might add that the District Munsif seems to have when writing his judgment, forgotten altogether that there were other parties in the suit besides those who consented to abide by his decision on inspection (see para. 4 of his judgment). Finally, even if no appeal lay against the District Munsif's judgment (in the nature of an award) because Sch. 2, Civil P. C., applies to such an award, because it had not been set aside by an application under Sch. 2, para. 15, and because para. 16 (2) also applied, I should be prepared in revision to set aside the District Munsif's decision [see *Velu Pillay* v. *Appasawmi Pandaram* (9) and *Sita Nath Goswami* v. *Baikuntha Nath*

(8) [1915] 31 I. C. 206.

(9) [1911] 9 I. C. 197.

Goswami (10)] as affected with illegalities and irregularities and I would pass a decision in the same terms as those of the Subordinate Judge. In the result the appeal is dismissed; but as the plaintiff's own conduct led to the illegal decision of the District Munsif, I would make no order as to costs.

Spencer, J.—I agree. In *Nidhamarthi Mukkanti* v. *Thammana Ramayya* (2), *Sayad Zain* v. *Kalabhai Lallubhai* (3) and *Sita Nath Goswami* v. *Baikunta Nath Goswami* (10), which are all cases of Munsifs or Judges arbitrating between the parties in suits over which they had jurisdiction, it is stated that their decision in each case "must be looked on as an award" or "was in the nature of an arbitrator's award." In the lastnamed case Chitty, J., goes so far as to say it was an award, and in this and the Madras case allusions are made to the sections of the old Code which provide for references to arbitration. But I agree with my learned brother that parties who give their consent to the Court itself acting as an arbitrator are debarred from afterwards questioning the Court's decision, not by reason of the procedure prescribed in the Code, but because they are bound by their agreement. In this case, even if the District Munsif's decision is treated as falling under the rules laid down in Sch. 2, Civil P. C., an appeal lies on the authority of *Najm-ud-din Ahmad* v. *Albert Puech* (6) on account of that Court's failure to allow time for objections before passing its decree. I feel some hesitation in assuming, as was done in *Ishar Das* v. *Keshab Deo* (11) and *Vythinatha Aiyar* v. *Vaithilinga Mudaliar* (8), that all parties, who remain ex parte at the trial of a suit, even if they are minors or persons whose presence is necessary to enable the Court to adjudicate effectually and completely on the issues, are not "parties interested" within the meaning of para. 1, Sch. 2, Civil P. C. I think that the plaintiff was entitled and bound to prove his claim against those parties who did not join in the agreement to have the suit decided in a particular manner, and I hold that even if no appeal lay to the Sub-Court against the District Munsif's decision, we should not interfere with an order which we should ourselves have passed if the matter had come up to this Court on revision, especially when it is one that, as it stands, does substantial justice between the parties. The civil miscellaneous appeal should therefore be dismissed on the terms proposed.

S.N./R.K. *Appeal dismissed.*

(10) [1911] 38 Cal. 421=9 I. C. 296.
(11) [1910] 32 All. 657=7 I. C. 68.

** A. I. R. 1919 Madras 154
Full Bench

OLDFIELD, SESHAGIRI AIYAR AND BAKEWELL, JJ.

Rajagopala Aiyangar—Appellant.

v.

Singaravelu Thevan and *others*—Respondents.

Letters Patent Appeal No. 49 of 1918, Decided on 7th March 1919, from judgment of Spencer, J., in Appeal Suit No. 223 of 1917.

**** Hindu Law — Partition—Father taking his share — Grandfather and grandson can continue joint.**

There is no rule of Hindu Law that a father cannot separate himself without disrupting the joint family. He can leave the family after taking his own share, just as any other coparcener who is not a father can do. When, therefore, a man becomes divided from his father, his sons retain a joint status with the latter. [P 157 C 1, 2]

By a deed of partition one *S*, his son and grandson as representing one branch and his brother Sevu and his sons and grandsons as representing the other branch effected a division of their family properties, the reason being that *U*., the son of *S*., was leading an extravagant life. The properties were divided into two shares; one share was allotted to Sevu's branch and one-twelfth out of the other share was given to *U*. and the rest to *S* and the son of *U*. The share of U. alone was specified:

Held, that both by law and by the construction of the document *S*. and his grandson, i. e, the son of *U*. did not become separated inter se. [P 157 C 1]

K. Bhasyam Aiyangar—for Appellant.

S. Vardachariar—for Respondents.

Oldfield, J. The suit, out of which this letters patent appeal arises, was brought on a mortgage executed by defendants 1 and 3, and the only question is whether the minor defendant 2, respondent 2, grandson of defendant 1 and nephew of defendant 3, is liable as a member of joint family composed of them and the sons of defendant 3, defendants 4 and 5. The appeal is against the decision of Spencer, J., that he is not liable, having ceased to be a member of the joint family in 1905, when a partition evidenced by Ex. 1 took place.

In 1905 the family was composed of those already referred to, Uthrapathi, the

father of defendant 2, and Sevu, the brother of defendant 1, with his two sons. Under Ex. 1, the family property was divided into four portions, one being allotted to defendants, 1, 2 and 3, one to Uthrapathi, one to Sevu and his sons and one being retained as the common property of defendants 1, 2 and 3, and Sevu's branches, each to enjoy half the produce. Spencer, J., held and respondents contend that defendant 2, did not become a member of a co-parcenary with defendants 1 and 3. The question is whether this conclusion is right. Here, Mr. Varadachari for respondents has, as I understood him argued that, when a father has become divided from the grandfather or from collaterals, his son either cannot or at least must be presumed not to retain a joint status with the latter.

This contention, whatever its exact scope, is, in my opinion, without substance. The right of a co-parcener to claim partition against his grandfather and against his father's collaterals was recognized in *Nagalinga Mudali* v. *Subbiramaniya Mudali* (1) and *Subba Ayyar* v. *Ganasa Ayyar* (2), as co extensive with his right to claim it against any other member of the family, and the same is implied in the judgments in *Manjanath* v. *Narayana* (3). For respondents reliance has been placed on the dicta of Muthuswami Ayyar, J., in the latter case, tha

> "as between different branches division should be by the stock and that when a joint family is broken up by division, regard should be had to the successive vested interests of each branch,"

the argument being that, where and so far as a joint family originally consists in branches, division in which each is regarded as a unit, is all that is contemplated by the learned Judge; and reference has also been made to the description of Bhashyam Ayyangar, J., in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (4), of the joint family as forming corporate bodies within a larger corporate body, each capable of owning or acquiring property. But in the first of these cases, apart from the general tendency of the decision, the learned Judge was not concerned with the effect of division on status but only with the method by which shares should be calculated; and I would respectfully adopt the opinion expressed in the present case by the learned Chief Justice that the indication of that method in a particular deed for the purpose of the severance of particular members entails nothing as to the intention of others or of these members inter se to remain joint. In the second case the question was of a partition, but it was not of ordinarily divisible property but of the rights of the co-parceners or a group of them to property separately acquired by such group. There is, so far as has been shown, no special restriction on a partition, to which a grandson or nephew is a party, and no special presumption arises in respect of it, the ruling being only that stated in *Balabux* v. *Rukhmabai* (5), that it must be proved like any other fact.

In this case the principal evidence as to the intention of those concerned consists in the terms of the partition deed Ex. 1, and as they are clear, it is unnecessary and it would not be admissible to consider the other evidence on the record relating to subsequent conduct. Ex. 1 is headed "partition deed"; its last clause refers to the parties to it as henceforth bound by no pecuniary relations but only those of friendship; another clause refers to division of moveables as having already taken place; and these are the only portions of the document relied on as directly supporting a complete division.

But the two first are common features of partition transactions, which might easily be included, whatever the particular intention, and the last is inconclusive in the absence of details as to the shares of those who received them. On the other hand the stated motive for the partition, Uthrapathi's extravagance, afford strong reason for holding that, although there is nothing definite on the point, the remaining members of his branch intended to make no further change than his exclusion involved and to hold the property assigned to them as joint tenants; and this is particularly clear as regards the share of the property to be held by them in common with Sevu's branch, of which division was deferred. For the view for which respondents contend, Uthrapathi, as the natural guardian of defendant 2, would have been able at

(1) [1862-63] 1 M. H. C.R. 77.
(2) [1895] 18 Mad. 179.
(3) [1892] 5 Mad. 362.
(4) [1902] 25 Mad. 149.
(5) [1903] 30 Cal. 725=30 I. A. 130. (P.C.)

any time to nullify the arrangement and by compelling a division to obtain control of his son's share. Spencer, J., in fact drew an inference from the reference in Ex. 1 to defendant 1 as defendant 2's guardian and the absence of similar refeence in the case of defendant 3's minor sons in favour of the divided status of each of them. But, with all due deference, the inference is the other way. For whilst no special reference to the guardian of the latter would be necessary when their father, defendant 3, was executing the document, and there was no conflict of interests between them and him, the case was different between defendant 2 and Uthrapathi, who was to be excluded; and the mention of defendant 1 as the former's guardian in the first clause is intelligible only on the assumption that he was the managing member of a joint family, to which both belonged. The allegation that all the members of the family became divided in status, but that some of them were to hold portions of the property as tenants-in-common is improbable in the extreme and, in the absence of anything in Ex. 1 to support it, cannot be accepted. Construing Ex. 1 in what appears to me the manner naturally consistent with its terms, I would allow the appeal and modify the decree of the Subordinate Judge by making defendant 2's share liable under the suit mortgage, as found by the lower Court's judgment. The time allowed to defendant 2 for payment is 3 months from this date. Defendant 2 will pay plaintiff's costs throughout.

Seshagiri Aiyar, J.—By Ex. 1 one Singaravelu, his sons and grandsons, as representing one branch, and his brother Sevu and his sons, as representing the other branch, effected a division of their family properties. The occasion for this arrangement, as recited in the deed, was because Uthrapathi, the son of Singaravelu, was leading an immoral life and wasting the family property. The properties were divided into two shares and after allotting one share to Sevu and his sons, in the other share one-twelfth of the whole property was given to Uthrapathi. There was a question whether one-twelfth was the proper share which was due to Uthrapathi. There was also another question as to whether he got any share in certain properties which were left undivided. In this Letters Patent appeal we are not concerned with these minor questions. The point in dispute is whether by this partition there was a severance of interest among the members of Singaravelu's branch inter se, or whether it was an arrangement by which Uthrapathi alone was sent out of the family, the other members remaining undivided. Spencer, J., has discussed some questions relating to presumptions as to partition in a Hindu family being partial or complete. With all deference, I am unable to see any necessity for discussing such a question, where the construction of a document is what we are concerned with. The presumptions the learned Judge referred to may probably help if there is any difficulty in construing the deed of partition. In the opinion I have formed of its contents I find no ambiguity in the document which would enable me to seek the aid of extraneous evidence to construe it.

Mr. Varadachariar relied upon some recitals in the deed as indicating that the partition was intended to sever the interests per se of the members of Singaravelu's family. He alluded to the fact that the minor was represented by a guardian. I do not consider that that circumstance has any bearing upon the question. His interests had to be safeguarded anyhow, and the very fact that the father who was the legal guardian was discarded in favour of the grandfather, indicates that the father was to be sent out of the family. The next circumstance which the learned vakil relied on was the fact that the two main branches entered into the partition. The point he raised was if the object was to send away Uthrapathi alone, why should there be a division between the two main branches. The answer is plain. Sevu apparently did not want to have anything to do with his spendthrift nephew, and he naturally asked his brother to separate his share. The next circumstances relied on was the clause at the end of the partition deed that the members mentioned in the deed should have no more connexion with each other. Persons acquainted with this part of India would not attach any special significance to such a clause. It is a formula adopted invariably in every deed of partition; and it would not have entered into the head of the draftsman to think that he was by

this clause providing for the separation of the son from the father.

These are all the facts relied on by the learned vakil. On the other hand, there is an omission in Ex. 1 which is almost conclusive against an intention to effect a severance inter se. Whereas the share of Uthrapathi is set apart and a special schedule is annexed to represent his share, no such schedule of special shares of the grandfather and of the grandsons separately was annexed. This shows that it was the intention of the parties that the son should go out of the family leaving the father and the grandsons undivided. I feel very little doubt in arriving at the conclusion that the document did not affect a partition inter se among the members of the branch of Singaravelu. Notwithstanding this conclusion on the facts Mr. Varadachariar's question of law has to be decided. He said that on the language of the instrument the legal consequence necessarily follows that the father Uthrapathi and his son Manikam were divided. If I understood the learned vakil aright his contention was that, as the principle of division in Hindu families is per stirpes and not per capita, the allotment of a share to the father carried with it the separation of his son from the main branch; he further argued that the fact that the son's share was not specifically set apart cannot weigh against this principle of Hindu law. I do not agree with this contention.

There is no rule, as I understand it, in Hindu law that a father cannot separate himself without disrupting the joint family. He can leave the family after taking his own share just as any other co-parcener, who is not a father, can do. The Hindu law clothes him with a further right of effecting a partition among his sons, whether they like it or not. The reference of the learned vakil to the theory which for a long time gained currency in Bombay, that a minor son cannot sue for partition against the wish of his father, does not lend any support to this contention. Moreover, as against the view in *Apaji Narhar Kulkarni* v. *Ramchandra Ravji Kulkarni* (6) it may be mentioned that for a long time beginning with *Nagalinga Mudali* v. *Subbramania Mudali* (1) the view in Madras had been consistent that a minor son can compel the father to give him his share. The decision in *Manjanatha* v. *Narayana* (3) strongly supports the view taken by the learned Chief Justice. That was a case of the sons bringing suits against their father, and uncles and cousins. There was a decree in the suit. After the share of these sons had been separated, the question arose whether the other members of the family remained undivided. Muthuswami Ayyar, J. in a very elaborate judgment held that the suit of the sons did not effect a severance of the family in its entirety. This is what he said:

> "It seems to me anomalous to hold that in a case where two brothers, each of whom may have several sons and grandsons, desire to separate, all the members should be forced to separate the sons and grandsons from their father and grandfather.....Again, it appears to me that each co-parcener is at liberty to elect to separate from the joint family, but I am aware of no text which recognizes his power to force a separation among others against their will."

I think that the principle above enunciated applies with equal force to the present case. In a later case, *Sudarsanam Maistri* v. *Narasimhulu Maistri* (4), Bhashyam Ayyangar, J., said this:

> "According to usage and custom, the remaining members of an undivided family, from which one or more alone has become divided, continue as an undivided family in its normal state and not as members who after partition have become reunited."

If I may say so, this exactly represents the practice which prevails throughout the whole of Southern India. For these reasons I am of opinion that by allotting a share to Uthrapathi neither by law nor by the construction of the document Singaravelu, the father, and Manickam the grandson, became separated inter se. The effect of the deed was to leave these two members undivided, while the son alone ceased to belong to the joint family. I therefore agree with the conclusion at which the learned Chief Justice has arrived and would allow this appeal with costs.

Bakewell, J.—I agree.

S.N./R.K. *Appeal allowed.*

(6) [1892] 16 Bom. 29 (F. B.).

A. I. R. 1919 Madras 157

ODGERS, J.

Guruswami Pandiyan—Petitionor.

v.

Sendathi Kalai Pandia Chinna Thambirar and *others*—Opposite Parties.

Civil Misc. Petn. No. 1801 of 1917, Decided on 10th September 1919.

(a) Civil P. C. (5 of 1908), O. 40, R. 1—**Waste is ground for appointing receiver.**

Proof of waste is a ground for the appointment of Receiver [P 158 C 2]

(b) Civil P. C. (5 of 1908), O. 39, R. 1 and O. 40, R. 1—**When injunction can be issued and when receiver appointed stated—Difference between these pointed out.**

In order to obtain an injunction or the appointment of a Receiver the applicant has to show that the property is in danger of being wasted or alienated and should be preserved from waste or alienation; but while in order to secure an injunction it is enough to show that the applicant has a fair question to raise as to the existence of the right alleged, the Court will not ordinarily appoint a Receiver while one party is actually in possession and an irreparable wrong may be done to him by the Court taking interim possession of the property. [P 158 C 2]

K. Rajah Aiyyar and *T. M. Ramasami Ayyar*—for Petitioner.

A. Krishnaswami Aiyar, *C. A. Seshagiri Sastriar* for *A. S. Visvanatha Ayyar* and *K. C. Gopala Desikan*—for Opposite Parties.

Order—In this petition the appellant in Appeal No. 324 of 1918 on the file of this Court moves for the appointment of a receiver for the properties of the Sivagiri Zamin, which are in the hands of respondent 1 to the appeal as he has succeeded in the suit to establish his right to the zamindary properties. The motion is based on three allegations of waste: (i) alienation of 114 kotahs of land at a gross undervalue, about 1/9th if their real worth, (ii) indiscriminate cutting of timber trees and (iii) removal of melvaram paddy by the raiyats. The matter was before their Lordships the Chief Justice and Napier, J., in March of this year and they then decided that the appointment of a receiver was as things then stood, unnecessary and directed that respondent 1 should have possession of the plaint properties on furnishing security in 1½ (one and a half) lakhs of rupees, representing two years' income of the properties the subject of the appeal. It was brought to the notice of their Lordships that respondent 1 had entered into an agreement (Ex. 45 in the case) to alienate 100 kotahs of land to various persons who were financing him in his litigation. The learned Chief Justice, however remarked that the conveyance of the property had not then been carried out and might never take place. It is undisputed before me that not only has the conveyance of the 100 kotahs taken place but an additional 14 kotahs have also since been transferred. Respondent 1 only entered into possession of the property in March last in execution of the decree passed in his favour. Mr. A. Krishnaswami Aiyar for respondent 1, offers to submit to a temporary injunction restraining the respondent from further alienating the corpus of the property pending the appeal, and the question is whether this is sufficient in the circumstances of this case.

As to the cutting and selling of timber it is objected by respondent 1 that the evidence of this is furnished largely by the very raiyats who are responsible for the removal of the melvaram crops. I am satisfied, however on the affidavits that there is some ground for thinking that timber may have been improperly cut and sold and the ordinary cutting of leased crops has been exceeded. As to the crops, any damage is amply covered by the security already furnished by respondent 1, and this point need not be considered. Assuming that acts of waste have been proved by the alienations referred to and by the cutting and selling of timber trees the question arises whether I ought in these circumstances to appoint a receiver. Proof of waste is certainly a ground for such appointment. Compare *Sivagnanathammal* v. *Arunachalam Pillai* (1). On the other hand, the distinction laid down in *Chandidat Jha* v. *Padmanand Singh Bahadur* (2) between the cases in which an injunction will issue and a receiver be appointed is as follows:

"The distinction seems to be that while in either case it must be shown that the property should be preserved from waste or alienation, in the former case, it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged; while in the latter case a good prima facie title has to be made out."

Here of course the respondent is in possession and his title has been established. In the leading case of *Owen* v. *Homan* (3) it is said

"that where the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The Court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant, in some cases an irreparable wrong If the plaintiff should eventually fail in establishing his right against the defendant, the Court may by its interim interference have caused mischief to the defendant

(1) [1911] 11 I. C. 870.
(2) [1895] 22 Cal. 459.
(3) [1853] 4 H. L. C. 997.

for which the subsequent restoration of the property may afford no adequate compensation."

In this case it is of course impossible to say that the petitioner (appellant) has a better prima facie title than respondent 1: see *Sivaji Raja Sahib* v. *Aiswariyanandaji Sahib* (4). I have therefore come to the conclusion that a receiver should be refused, but a temporary injunction will be granted restraining respondent 1 from making any further permanent alienation of the immovable property belonging to the zamin during the pendency of the appeal or until further orders. In my opinion the injunction should be extended to prevent him also from cutting or selling any trees except in the ordinary way by leasing crops or in the usual course of husbandry, for which of course, respondent 1 will continue to maintain accounts. The petition is dismissed without costs.

S.N./R.K. *Petition dismissed..*

(4) [1916] 29 I. C. 485.

A. I. R. 1919 Madras 159

ABDUR RAHIM AND SPENCER, JJ.

Subramania Pillai and *another*—Plaintiffs—Appellants.

v

Krishnaswami Somayajiar and *others*—Defendants—Respondents.

First Appeal No. 159 of 1918, Decided on 4th February 1919, from decree of Sub.-Judge, Tinnevelly, in Original Suit No. 1 of 1917.

(a) Civil P C. (1908), S. 92—Suit for declaration of invalidity of appointment of a trustee by temple committee and for injunction for restraining him from acting is one under S. 92—Sanction is essential—It is one for direction for administration of public trust and falls under Cl. (1) (h)—It does not fall under Religious Endowment Act (20 of 1863), S. 14.

A suit for a declaration that the appointment of a trustee by a temple committee is invalid and for an injunction restraining him from entering on his duties or interfering with the affairs of the temple and its properties is a suit virtually for the removal of a trustee and is not maintainable without the requisite sanction under S. 92. The suit may also be treated as one in which direction of the Court is necessary for the administration of a public trust and falls under the section, at least under Cl. (*h*), sub-S. (1): 4 *M. H. C. R.* 2; 7 *M. H. C. R.* 117 and 4 *I. C.* 874, *Dist.*

Such a suit does not come within the scope of S. 14, Religious Endowments Act. [P160 C 1]

(b) Civil P. C. (1908), S. 92—Appointment of trustee by temple committee if not in good faith can be questioned in suit.

A Civil Court can question the appointment of a trustee by a Devasthanam Committee, if the appointment is not made reasonably and in good faith. [P 159 C 2]

T. Rangachariar—for Appellants.

T. R. Ramachandra Iyer—for Defendants.

Abdur Rahim, J.—I am not disposed to agree with the learned Subordinate Judge that he had no jurisdiction to entertain the suit. The suit is instituted by two out of three trustees of a temple for a declaration that the appointment of defendant 8 which is practically in the vacancy created by the death of the third trustee, by the Devasthanam Committee is invalid and for an injunction restraining him from interfering with the affairs and the property of the temple. It is alleged in the plaint that this is not a proper appointment inasmuch as there was improper understanding between some of the members of the Committee and defendant 8 as regards the former obtaining lease of certain buildings belonging to the temple at less than the proper rent. It is further alleged that defendant 8 had agreed in consideration of his appointment to grant certain sites to some of the members of the Committee in the names of third persons. If those allegations are well founded in fact—and that is a matter which could only be investigated at the trial—the appointment of defendant 8 could not be said to be either reasonable or made in good faith. There are a number of rulings of this Court which lay down the principle that a civil Court can question an appointment of a trustee by a Devasthanam Committeee, if it is not made resonably or in good faith [vide *Thiruvengadatha Aiyangar* v. *Ponnappa Aiyangar* (1), *Tirumalaiyappa Pillai* v. *Vengu Aiyar* (2), *Ganapathi Ayyar* v. *Vedavyasa Alasinga Bhattar* (3), *Seshadri Ayyangar* v. *Nataraja Ayyar* (4), and also the general observations of the learned Chief Justice and Seshagiri Aiyar, J., in *Sitharama Chetty* v. *Subramania Aiyar* (5). In *Thiruvengatha Aiyangar* v. *Ponnappa Aiyangar* (1) the appointment under consideration was that of additional trustees: in *Ganapathi Ayyar* v. *Vedavyasa Alasinga Bhattar* (3) the question

(1) A. I. R. 1915 Mad. 38=38 Mad.=1176 25 I C. 965.
(2) [1915] 28 I. C. 556.
(3) [1906] 29 Mad. 534.
(4) [1898] 21 Mad. 179.
(5) [1916] 39 Mad. 700=32 I. C. 211.

was as regards the power of the Board of Revenue altering the scheme of management, and in *Seshadri Ayyangar* v. *Nataraja Ayyar* (4) the question which the civil Court was asked to decide was the propriety of the suspension of a trustee by the Committee. But the principle applied in those cases would apply equally to the case of an improper appointment of a trustee in a vacancy caused by the death of a trustee.

But then the learned pleaders for the respondents have argued that the suit would not lie because no sanction was obtained under S. 14, Act 20 of 1863 or under S. 92, Civil P. C. As regards the first, I do not think the present suit comes within the scope of that Act. It is not a case of misfeasance, breach of trust or neglect of duty committed by a trustee. But I am of opinion that S. 92, Civil P. C., does apply. This is a case which may properly be described as one in which direction of the Court is necessary for the administration of the public trust within the meaning of that section, as held in *Neti Rama Jogiah* v. *Venkatacharlu* (6) and in *Kalisawar Gurukkal* v. *Nataraja Tambiram* (7). The mere fact that defendant 8 had not yet taken charge of his office or taken possession of the properties as a co-trustee with the plaintiffs cannot make any difference, because the object of the suit is to obtain the direction of the Court as to whether the plaintffs alone are to act in the matter of the trust or they must so act in conjunction with defendant 8. That view is supported by an observation of the Privy Council in *Bishen Chand Basawat* v. *Nadir Hossein* (8), as pointed out in *Kaliswara Gurukkal* v. *Nataraja Tambiran* (7).

Mr. T. Rangachariar, the learned vakil for the appellants, however, argued that this is not a case for the removal of any trustee or for any other relief enumerated under S. 92, Civil P. C. Ordinarily, the removal of a trustee would mean the removal of a trustee from office by reason of some act or omission in connexion with his office of trustee, and here defendant 8 has not, as already stated, entered upon the duties of trustee at all. But he has been undoubtedly appointed by the Devasthanam Committee by proceedings held according to the rules. Therefore, the Devasthanam Committee, so far as they are concerned, having the power to appoint a trustee, have done what they could in order to clothe defendant 8 with the status and power of a trustee.

At the same time I am rather doubtful whether the prayer in the plaint comes within the words "removing any trustee." Even if they do not I have no doubt that the relief is one which is contemplated by the residuary relief No. (h) under S. 92, sub S. (1), Civil P. C. Clause (h) says :

"Granting such further or other relief as the nature of the case may require."

The object of this suit is to have it declared that defendant 8 is not a trustee properly appointed and also to prevent him from acting in the capacity of a trustee. I should say that that is a relief cognate to removing a trustee. It was also argued by Mr. Rangachariar that suits by trustees do not come within S. 92, Civil P. C. But I do not think that that contention is at all sound, snd no authority has been cited in support of that proposition. If the terms of S. 92, Civil P. C., apply to a suit by trustees, there is no apparent reason why such a suit should be held to be exempted from its restrictive provisions. The plaintiffs not having obtained any sanction under S. 92 of the Code the suit is not maintainable. In the result the appeal must be dismissed with costs.

Spencer, J.—I am of opinion that S. 92, Civil P. C., is a bar to the maintenance of the present suit. The decisions in *Jeyangarulavaru* v. *Durma Doosji* (9), *Ponnambala Mudaliyar* v. *Varaguna Rama Pandia Chinnatambiar* (10), and *Samaram Singaracharlar* v. *Krishhaswami Iyengar* (11), which were cited in the arguments, being all prior to the enactment of the Civil Procedure Code of 1908, in which Cl. (a), sub-S. (1), S. 92, and sub-S. (2), appeared for the first time, must be read in the light of the law as it then was. In effect this is a suit for the removal of a trustee from his office. No doubt the relief asked for

(6) [1903] 26 Mad. 450.
(7) [1909] 3 I. C. 255.
(8) [1888] 15 Cal. 329=15 I. A. 1=15 Sar. 113 (P. C.).
(9) [1868] 4 M. H. C. R. 2.
(10) [1871-74] 7 M. H. C. R. 117.
(11) [1919] 4 I. C. 874.

in the plaint is for a declaration that the appointment of defendant 8 is invalid and for a permanent injunction restraining him from interfering with the affairs of the temple. But it cannot be denied that defendant 8 has been appointed as a trustee by a statutary body competent to make the appointment and therefore he is a trustee until he is removed from his office by a competent authority. There was at the time of appointment an existing vacancy, and under Act 20 of 1863 the Devasthanam Committee have an inherent right to make appointments of trustees whenever vacancies occur. It is immaterial for the purposes of this suit what motives the members of the Committee had for making this particular appointment. They have as much power to appoint a bad man as trustee as to appoint a good man, in the exercise of their discretion. This is in fact an appointment of a man who, the plaintiffs say, ought not to be appointed, and the only means of getting rid of him is to bring a suit for his removal from office. The language of S. 92, sub-S. (2), Civil P. C., is very clear. It declares that no suit claiming any of the reliefs specified in sub-S (1) shall be instituted in respect of any such trust as is referred to in section, except in conformity with the provisions of sub-S. (1). One of the reliefs is that of removing a trustee. The only exception to this is the case where a trustee is sought to be removed under S. 14, Act 20 of 1863 for misfeasance or neglect of duly. In either case sanction is required, either the sanction of the Advocate-General or the sanction of the District Court, and as the present suit has been instituted without sanction, it is not sustainable. I therefore agree with my learned brother that the appeal must be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 161

SADASIVA AIYAR AND SPENCER, JJ.

Mariappa Pillai—Defendant—Appellant.

v.

Raman Chettiar and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1941 of 1917, Decided on 6th November 1918, against decree of Dist. Judge, Tinnevelly, in Appeal Suit No. 514 of 1916.

1919 M / 21 & 22

(a) Provincial Insolvency Act (3 of 1907), S. 37—"Court" means Court exercising insolvency jurisdiction.

The expression "the Court" in S. 37 signifies the Court exercising jurisdiction under that Act. [P 161 C 1]

(b) Provincial Insolvency Act (3 of 1907), S. 36—"Void" means voidable.

The word "void" in S. 36 means 'voidable.' [P 162 C 2]

(c) Provincial Insolvency Act (3 of 1907), S. 3(1)—Powers of invalidating certain defined transactions of insolvents should not be extended to all Courts of original jurisdiction.

A special statutory provision whereby District, Courts and other Courts are invested by notification of the Local Government under S. 3 (1), with the power, among other powers, of invalidating certain defined transactions of insolvents should not be extended to all Courts of original jurisdiction, whether notified under the Act or not. [P 162 C 2]

(d) Provincial Insolvency Act (3 of 1907), Ss. 36 and 37—Transfer by fraudulent preference or voluntary transfer—Annulment of transfer—Insolvency Court have exclusive jurisdiction.

No Court has the jurisdiction to annul, as such, a transfer amounting to a fraudulent preference or a voluntary transfer made within two years of an adjudication, except a Court excercising insolvency jurisdiction in proceedings which have been instituted to declare the debtor, who made the transfer, insolvent by a petition duly presented under the Act. [P 162 C 1,2]

(e) Provincial Insolvency Act (3 of 1907), Ss. 36 and 37—Annulment of transfer—Only Official Reciver can set Court in motion.

It is only the Official Reciver who can set the Court in motion to annul a transfer under S. 36 or S. 37 .38 *I. C.* 369: *Foll.* [P 163 C 1]

(f) Provincial Insolvency Act (3 of 1907), S. 36—Suit by alienee of insolvent impugning sale—Validity of transaction is not open as defence — Insolvency Court has exclusive jurisdiction.

Per *Sadasiva Aiyar, J.*—The Full Bench decision in 30 *Mad.* 169 (*F.B.*) should not be extended so as to enable a defendant to raise an equitable defence, if the Court before which it is raised would not have jurisdiction to entertain a suit if brought by the defendant to obtain the relief of cancellation based on the right put forward as the basis of the equitable defence. Where the right to grant such a relief is, by Statute law, vested in a special tribunal the defence cannot be pleaded before another tribunal not vested with such powers. A transfer therefore falling under S. 36 remain. valid till set aside by the insolvency Court at the instance of the receiver and the voidability of the transfer cannot be pleaded as a defence in any Court till it is set aside. [P 163 C 2]

T. M. Krishnaswami Ayyar and *E. Vinayaga Row*—for Appellant.

T. R. Venkatarama Sastri and *G. R. Sivaramakrishna Ayyar*—for Respondents.

Spencer, J.—The plaintiff is the wife of defendant 2. She purchased the suit peoperty from him on 5th August 1912, the consideration for the sale being

the debt to her which he had incurred for meeting the expenses of a certain litigation between himself and his father, for which he had pledged his wife's jewels. Defendant 1 was a creditor of defendant 2 and brought Original Suit No. 324 of 1913 in the Court of the District Munsif of Tinnevelly against him and got the suit property attached before judgment. The plaintiff put in a claim petition but it was dismissed on 2nd December 1913. On a debtor's petition presented in the District Court on 15th September 1913 defendant 2 was on 12th December 1913 declared insolvent. The Official Receiver sold the suit property by auction on 31st July 1914 and defendant 3 purchased it.

The plaintiff brought this suit to establish her title and has been successful in the lower Courts in obtaining a declaration of her title, both the Additional District Munsif and the District Judge finding that the sale by plaintiff's husband in her favour was a genuine one for good consideration. They also held that the sale by the Official Receiver was a nullity for want of a vesting order, citing the opinion of Moore, J., in *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (1). The proceedings in which defendant 2 was adjudicated insolvent are not in the records of this second appeal. Assuming that those proceedings were regular and that under Ss. 16 (2) (a) Provincial Insolvency Act, the insolvent's property by the order of adjudication ipso facto became vested in the Official Receiver, there are other obstacles in the way of defendant 3 who purchased the property from the Official Receiver and is the appellant in this second appeal. The defect in his title consists in the admitted fact that the transfer of the suit property by the insolvent to the plaintiff has not been annulled by the Court of insolvency either under S. 36 or S. 37, Provincial Insolvency Act. "The Court" in Ss. 36 and 37 signifies the Court excercising jurisdiction under that Act: see the definition in S. 2 (g), Provincial Inselvency Act), which in the present case was the District Court. I am of opinion that no Court has the jurisdiction to annul, as such, a transfer amounting to a fraudulent preference or a voluntary transfer made within two years of the adjudication, except a Court exercising insolvency jurisdiction in proceedings which have been instituted to declare the debtor, who made the transfer, insolvent by a petition duly presented under the Act. In *Gandla Veerama* v. *Ramaswamiah Garu* (2) it was held by Phillips and Krishnan, JJ., that a receiver appointed by a Court of insolvency could bring a regular suit in another Court to set aside a transaction under S. 36, Provincial Insolvency Act, but, with due respect, I feel doubt whether that decision was right. I do not think that a special statutory provision whereby District Courts and certain other Courts are invested by notification of the Local Government under S. 3 (1) with the power among other powers of invalidating certain defined transactions of insolvents should be extended to all Courts of original jurisdiction whether notified under this Act or not. Otherwise conflicts might arise between the decision of a Court sitting in insolvency and the judgment of another Court exercising ordinary original jurisdiction. Transfers of this kind, if they do not fall under S. 53, T.P. Act, would, in the absence of any provision to the contrary, be valid transfers.

I further agree with the view taken in *Hemraj Champa Lall* v. *Ramkishen Ram* (3) and in *Kauleshar Ram* v. *Bhawan Prasad* (4) that it is the Official Receiver who must set the Court in motion to annul a transfer under S. 36 or S. 37. These sections speak of such transfers as being "void against the receiver", not void against all the world.

On the analogy of the English Bankruptcy Act it has been laid down in three decisions of this Court that "void" in S. 36, Provincial Insolvency Act, and in the corresponding S. 55, Presidency Towns Insolvency Act, means "voidable" see *Abdul Kadhar* v. *Official Assignee of Madras* (5), *Sankaranarayana Aiyar* v. *Alagiri Aiyar* (6) and *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (1).

An additional reason was given by my learned brother in the latter case, viz. that the Act makes the intervention of the Court necessary, which would not be

(1) [1916] 34 I. C, 602.

(2) Second Appeal No 3.0 of 1916.
(3) [1917] 2 P. L. J 101=38 I. C. 369.
(4) [1917] 42 I. C. 845.
(5) A I. R. 1915 Mad. 107=20 I. C. 485
(6) [1919] 49 I. C. 283.

so if such a transfer was void ab initio. It has been held by another Bench of this Court in *Ussam Kassim Sait* v. *Palat Mammad Koya* (7) that even the word "void" in S. 37, Provincial Insolvency Act, only means "voidable", although that section leaves the Court no discretion in the matter, by declaring that every transfer of property which amounts to a fraudulent preference "shall be annulled by the Court," the words in S. 36, being "may be annulled." It is enough for this appeal that "void" in S. 36, means "voidable."

The appellant's pleader, citing the Full Bench case of *Lakshmi Doss* v. *Roop Laul* (8), argues that he should be allowed to raise the voidability of the transaction in plaintiff's favour as an equitable defence in this suit, and further contends that the Official Receiver, when he sold the insolvent's property by auction, sufficiently indicated his intention of exercising his discretion towards the avoidance of the sale to the plaintiff.

But that is not enough. The transfer has not been annulled by the insolvency Court. The appellant cannot be allowed, for the purposes of this suit, to stand in the shoes of the Official Receiver, an officer of Court, who has not been made a party, and to raise a defence involving the decision of a point which it is only within the jurisdiction of a Court dealing with the estate in insolvency to decide.

Moreover, the transfer to the plaintiff, looked at from the point of view of S. 36, is not a voluntary transfer, as both Courts have found that there was consideration for it. For the application of S. 37, it was not made within three months of the presentation of the petition on which the adjudication was made. Even regarded as a transfer in fraud of creditors it could, under the authority of *Palaniandi Chetty* v. *Appavu Chettyar* (9) and *Subramania Ayyar* v. *Muttia Chettiar* (10), only be avoided by a suit instituted for the purpose of having it set aside.

The appeal therefore fails from every point of view and is dismissed with costs.

(7) [1917] 38 I. C. 281.
(8) [1907] 30 Mad. 169 (F. B.).
(9) [1916] 34 I. C. 778.
(10) [1918] 41 Mad. 612=43 I. C. 651 (F. B.).

Sadasiva Aiyar, J.—The Full Bench decision in *Lakshmi Dass* v. *Roop Laul* (8) (which is binding on me sitting in a Division Bench) should not, in my opinion, be extended so as to enable a defendant to raise an equitable defence, if the Court before which it is raised would not have jurisdiction to entertain a suit if brought by the defendant to obtain the relief of cancellation based on the right put forward as the basis of the equitable defence. Such an equitable defence may be successfully pleaded in some cases, even though a suit to obtain the relief based on the facts on which the defence is based may be barred by limitation, but I do not think that where the right to grant such a relief is, by statute law, vested in a special tribunal, the defence could be pleaded before another tribunal not vested with such power. I therefore agree with my learned brother that a transfer falling under S. 36, Provincial Insolvency Act, remains valid till set aside by the insolvent Court at the instance of the receiver and that the voidability of the transfer could not be pleaded as a defence in any Court till it is so set aside. I might further add that in this case there is nothing to show that the receiver Gopala Ayyar knew of the transfer and elected to avoid it. It is the Receiver alone that could so elect and not a purchaser from him. Hence, assuming that an order of annulment by the Court at the receiver's instance is unnecessary and that the receiver's unilateral declaration of intention to avoid will suffice, there is nothing to indicate that even such a declaration of intention existed in this case. The receiver's act of selling the property to defendant 3 is no proof of such intention in the absence of evidence that the receiver had even knowledge of the alienation to the plaintiff. A man cannot intend to destroy a thing of whose existence he is unaware.

I do not wish to enter upon a consideration of the difficult question whether the Full Bench decision in *Lakshmi Doss* v. *Roop Laul* (8) can be reconciled with the principle of the recent Full Bench decision in *Subramani Ayyar* v. *Muthia Chettiar* (10), in which it was held that a defendant cannot set up the voidability under S. 53, T. P. Act, of an alienation made in the plaintiff's favour in fraud of creditors till such alienation is set aside actually by a decree passed

in a regular suit, especially in view of even more recent decisions which held that even a single creditor could maintain such a suit brought in his own individual interest and not necessarily on behalf of all the creditors.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 164

AYLING AND SESHAGIRI AIYAR, JJ.

(*P. S. K. Haji*) *Sena Muhammad Abdul Gaffur Rowthar* and *another*—Defendants—Appellants.

v.

Hamida Beevi Ammal and *others*—Plaintiff and Defendants—Respondents.

Civil Appeal No. 390 of 1917, Decided on 16th January 1919, from decree of Sub-Judge, Tuticorin, in O. S. 70 of 1916.

(a) Interest Act (32 of 1898)—Act is not exhaustive—Interest can be awarded in cases not coming under Act.

The Interest Act is not exhaustive of all claims as to interest and it is open to the Courts in India to award interest in cases not coming within the purview of the Act, on principles of equity, justice and good conscience. [P 164 C 2]

(b) Interest Act (32 of 1898)—Act does not apply to unascertained sums of profits of trade.

To attract the provisions of the Interest Act the amount in dispute must be a debt or a certain sum payable at a certain time or otherwise. It has no application to an unascertained sum claimed as the profits of a trade. [P 165 C 1]

(c) Interest—Minor Mahomedan suing for her father's share in family trade against her coheirs, who used assets in another trade, is entitled to 6 p. c. interest on her share from father's death.

Where a Mahomedan minor sued for the recovery of her deceased father's share in a family trade, which was utilized by her coheirs in a separate business from which they derived a profit:

Held: that the plaintiff was entitled to interest on her share at the ordinary current rate of 6 per cent. per annum from the date of her father's death: 29 *I. C.* 275, *Dist.*; *London, Chatham and Dover Railway Company* v. *South Eastern Railway Company* (1893) *A. C.* 429, *Expl.* [P 166 C 1]

T. Rangachariar and *C. R. Subramanya Aiyar*—for Appellants.

S. Srinivasa Ayyangar—for Respondents.

Judgment.—This is a suit by a Mahommedan cosharer for recovery of her share of her father's property from her brothers and sisters. The right of the plaintiff, who was a minor, to sue was denied in the Court below but has not been pressed before us. The only two points which Mr. T. Rangachariar argued were: (1) whether the plaintiff is entitled to mesne profits of the immovable property, and (2) whether she is entitled to interest upon her share of the assets of the partnership carried on by her father. On the first question it was pointed out to us that in the Court below there was no allegation that mesne profits were not payable. There is no issue upon the point, and there is no discussion in the judgment of the Court below about it. Issue 6 assumes that the plaintiff was entitled to mesne profits and only raises the question of the deductions claimed by the defendants in their written statement. Under these circumstances we refused to allow the learned vakil to argue that point before us.

The second question has been argued elaborately by Mr. T. Rangachariar for the appellants and by the learned Advocate-General for the respondents. We have come to the conclusion that the decree of the Court below is right, though not for the reasons given by it. It is clear from the admissions in the written statement and from the evidence in the evidence in the case that the share of the plaintiff in the firm's assets was utilized by defendants 1 and 2 in the trade carried on by them and that profits were derived from that trade; the amount of profits alone had not been ascertained. The learned vakil for the appellant relied upon *Kamalammal* v. *Peeru Meera* (1), *Subramania Aiyar* v. *Subramania Aiyar* (2) and *Lala Kalyan Das* v. *Sheikh Maqbul Ahmad* (3) and the earlier Madras cases and contended that, as no notice of demand was made, no interest was allowable under Act 32 of 1839. All of them were cases under the Act. In the first place it must be pointed out that the Interest Act is not comprehensive of all claims to interest. Without going into details, it may be mentioned that the object of 3 and 4 William 4, Ch. 42, S. 28, which was extended to India by Act 32 of 1839, was to repeal the usury laws relating to interest. Prior to the enactment of 3 and 4 William IV, there was a law in the reign of Edward the Confessor which absolutely prohibited Courts from awarding interest in suits upon moneys lent. Attempts were made in the reign of Henry VII to mitigate the

(1) [1897] 20 Mad. 481.
(2) [1908] 31 Mad. 250.
(3) A. I. R. 1918 P. C. 53=40 All. 497=46 I.C. 548 (P. C.).

rigour of this prohibition, 3 and 4 William 4, Ch. 42, was enacted with a view to meet such a demand. It is clear from the language of the Act that the provisions dealt with only a particular class of cases, and enabled the Courts to give interest at the current rate under certain conditions. The framers were anxious that the right to interest, if any, otherwise possessed should not be interfered with by this enactment, and inserted the proviso to the effect that interest shall be payable "in all cases in which it is now payable by law." In India also ancient texts can be quoted to show that there was a prohibition against the taking of interest on moneys lent. One text of Manu exemplifies the abhorrence felt by the ancient sages on this question. Manu stated:

"Neither a Brahmin nor a Kshatria, though distressed, must receive interest on loans, but each of them, if he please, may pay a small interest permitted by law, on borrowing for some pious use, to the sinful man who demands it. See Colebrooke's Digest, p. 28.

It looks as if when 3 and 4 William 4 was extended to India, these provisions contained in the Hindu law were kept in mind. It is therefore clear that the Interest Act is not exhaustive of the subject.

There is another difficulty in the way of applying the Interest Act to the present case. To attract its provisions the amount in dispute must be a debt or a certain sum payable at a certain time or otherwise. What is claimed now is a sum of money which, on taking accounts, would be payable to the plaintiff as her share. It was held in *Omrita Nath Mitter* v. *Admintstrator-General of Bengal* (4) that unless the amount is settled the Act is not applicable. In *London, Chatham and Dover Ry. Co.* v. *South-Eastern Railway Company* (5) a claim to payment under a building contract to be paid monthly on the certificate of the engineer was held not to be a debt or a sum certain if the amount was disputed. see also *Hill* v. *South Staffordshire Ry.* (6). In *Ward* v. *Eyre* (7) it was held that a balance of account is not a sum certain within 3 and 4 William 4, Ch. 42. The Calcutta High Court in *Rutnessur Biswas* v. *Hurish Chunder Bose* (8) acted on the same principle. Therefore the Interest Act has no application to the case before us, and consequently the decisions relied on by the learned vakil for the appellant have no bearing on the matter we have to decide. On the other hand, the cases to which the learned Advocate-General drew our attention establish that the Act was not intended to affect payments of interest or compensation in matters not coming strictly within the letter of the law.

In *Miller* v. *Barlow* (9) the Judicial Committee point out that Indian Courts are Courts both of law and of equity and that they can award as damages interest not covered by the Act. In *Hurropersaud Roy* v. *Shamapersaud Roy* (10) a similar principle was enunciated by the Judcial Committee. In *Hamira Bibi* v. *Zubaida Bibi* (11), which was a case of dower, the Judicial Committee, after saying that the Interest Act was not applicable, allowed interest as damages. see also *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji* (12) another decision of the Judicial Committee. There are decisions of the High Courts in which interest was allowed apart from the Act: *Alagappa Chettiar* v. *Muthukumara Chettiar* (13), *Abdul Rahiman* v. *Rangiah Gounden* (14), *Khetra Mohan Poddar* v. *Aswini Kumar Saha* (15), *Mohamaya Prosad Singh* v. *Ram Khelawan Singh* (16), *Chajmal Das* v. *Brij Bhukan Lal* (17) and *Collector of Ahmedabad* v. *Lavji Mulji* (18). Mr. Rangachariar contended that the above cases proceeded upon the principle that there was an established practice as to interest regarding the matter dealt with in them, and that the principle should not be extended to the case of a Mahomedan lady claiming interest on an unascertained sum of money due to her as her share of the trade. We fail to see any difference in principle between the cases to which we have referred and to the case now before us. The only decision which supports

(4) [1898] 25 Cal. 54.
(5) [1892] 1 Ch. 120.
(6) [1874] 18 Eq. 154=43 L. J. Ch. 556.
(7) [1880] 15 Ch. D. 130=49 L. J. Ch. 657.
(8) [1885] 11 Cal. 221.
(9) [1872] 3 P. C. 733.
(10) [1877-78] 3 Cal. 654=5 I. A. 31 (P. C.).
(11) A I. R. 1916 P. C. 46=38 All. 581=36 I. C. 87=43 I. A. 294 (P. C.).
(12) A. I. R. 1915 P. C. 116=42 Cal. 914=28 I. C. 710=42 I. A. 91 (P. C.).
(13) [1917] 41 Mad. 316=42 I. C. 836.
(14) A. I. R. 1914 Mad. 145=22 I. C. 597.
(15) [1918] 45 I. C. 667.
(16) [1912] 15 I. C. 911.
(17) [1895] 17 All. 511=22 I. A. 199 (P. C.).
(18) [1911] 35 Bom. 255=10 I. C. 818.

Mr. Rangachariar is *Marian Beeviammal* v. *Madir Keera Sahib Taragan* (6).

In that case there has been no discussion on the question and the reference to the earning of interest shows that the decision should be confined to the facts of the case. The learned vakil for the appellant relied very strongly upon the observations of the noble and learned Lords in *London, Chatham and Dover Railway Company* v. *South-Eastern Railway Company* (7) for the proposition that in matters outside the Interest Act no interest is payable. The noble Lords who took part in the discussion, especially Lord Herschell, point out that there has been a course of decisions in England which tried the hands of Courts from awarding interest on equitable grounds; and they regretted that they were obliged on the principle of stare decisis to decline to reopen the question. There is no such course of decisions in this country. On the other hand the Privy Council held very early that on principles of equity, justice and good conscience, which are specially referred to in the Civil Courts Act, the Courts in India are at liberty to award interest in cases not coming within the purview of the Interest Act. The Indian Courts have followed this rule for a long time. The Courts in this country therefore are not hampered in the exercise of their equity jurisdiction in the same way that English Courts have been.

It is not necessary therefore to refer to another argument of the learned Advocate-General which rested the claim to interest upon the existence of a quasi-fiduciary relationship between the plaintiff and her brothers. We think the Subordinate Judge is right in allowing interest. But, in our opinion, he ought not to have allowed more than 6 per cent. The current rate of interest in this country is ordinarily that, and no special reason has been shown why it should be raised to 9 per cent. The analogy of the Trusts Act, S. 23, to which the learned Advocate-General referred us, has no bearing on the present question and we are not prepared to allow compound interest at 6 per cent. The interest allowed will be reduced to 6 per cent throughout. Subject to this modification we dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 166

AYLING, J.

(*M. R. Ry. Vellankisrinivasa*) *Jagannadha Rao Bahadur*—Petitioner.

v.

(*M. R. Ry. Gadicherla Venkata*) *Gopalakrishna Rao Bahadur Zamindar of Rajupeta*—Accused—Opposite Party.

Criminal Revn. Case No. 714 of 1918, and Criminal Revn. Petn. No. 577 of 1918, D/- 10th April 1919, to revise order of Subdivisional Magistrate, Bezwada, in Misc. Case No. 14 of 1918.

(a) Criminal P. C. (5 of 1898), Ss. 145, 148 and 439—Final order based on evidence partly recorded by 1st Class Magistrate and partly by subordinate Magistrate under his directions is not bad and cannot be interfered in revision.

Where a 1st Class Magistrate passes a final order under S. 148, on evidence partly recorded by a Subordinate Magistrate under his directions and partly recorded by himself, he cannot be deemed to have acted without jurisdiction so as to call for interference by the High Court in revision. [P 167 C 1]

(b) Criminal P. C. (5 of 1898), S. 145—Likelihood of breach of peace is sufficient to vest jurisdiction.

The essential requisite to give a Magistrate jurisdiction under S. 145, is that he must be satisfied that a dispute exists likely to cause a breach of the peace concerning land or water or the boundaries thereof. Once he is so satisfied, his jurisdiction is complete and his subsequent action must be considered in relation to procedure, not jurisdiction. [P 167 C 2]

(c) Criminal P. C. (5 of 1898), S. 145—Enquiry by subordinate Magistrate is not limited to inspection and report.

An inquiry by a Subordinate Magistrate to whom a matter is referred under the provisions of S. 145, is not confined to a mere inspection of the locality and a report thereon: 17 *I. C.* 65, *Foll.* [P 167 C 2]

P. Somasundram—for Petitioner

V. Ramesam and *Osborne* and—for the Crown.

Order. — In this case the Subdivisional Magistrate passed a preliminary order under S. 145 (1), Criminal P. C. He then passed proceedings directing the Sub-Magistrate of Tiruvur to hold a local inquiry, record evidence on both sides as to possession and submit his report with the records. The Sub-Magistrate examined 24 witnesses, exhibited a number of documents and submitted his report with the records. The Subdivisional Magistrate examined 8 more witnesses himself and then passed orders on all the evidence thus recorded by himself and the Sub-Magistrate, declaring one party to be in possession. It is argued (1) that the Subdivisonal Magistrate's

action in directing the Sub-Magistrate to take evidence was not authorised by S. 148, and that he was not entitled to consider the evidence so recorded, (?) that this action rendered the final order passed by him void, as being without jurisdiction. For both propositions reliance is placed on the judgement of Wallis, J., in *Arumuga Gounden* v. *Venkata Subbier* (1), which certainly seems to support them. The true scope of S. 148, Criminal P. C., seems to me to be a very doubtful matter, and if it were necessary for this case to determine it, I should feel constrained to refer the case for the decision of a Division Bench. The question does not appear to have been seriously argued before the learned Judge in *Arumaga Gounden* v. *Venkata Subbier* (1) and he contents himself with quoting three earlier rulings [*Baikunt Kuar, In re* (2), *Hanumanthappa* v. *Hussain Saib* (3) and *High Court Proceedings*, 13*th November* 1868 No. 1492 (4).] In the former case Prinsep, J., certainly says that the local enquiry "should be restricted solely to some question relating to the feature of property about which the dispute has arisen, and that it should not be directed to any matter which can be proved before the Magistrate by oral evidence such as the question of actual possession."

This dictum seems to intirely ignore the very wide definition of "inquiry" in S. 4 (k), Criminal P. C.; and I may add that if it were the intention of the legislature to make the inquiry a mere "inspection" as the learned Judge seems to think, it would have been quite easy to say so. The two Madras cases merely lay down that it is not open to the Subdivisional Magistrate to depute the whole investigation to the Sub-Magistrate and to decline to receive any evidence himself, as he is bound to do under S. 145 (4). But assuming that the Subdivisional Magistrate's action in proceeding partially on evidence recorded under his order by a Subordinate Magistrate and not by himself is irregular, I am clearly of opinion that this does not effect his jurisdiction, or warrant the interference of this Court in revision. The whole question of the circumstances in which this Court would interfere with orders under S. 145, Criminal P. C., has been considered in *Kamal Kutty* v. *Udayavarma Raja* (5.) The judgment in that case (to which I was party) says p. 286 (*of* 36 *Mad.*):

"The essential requisite to give a Magistrate jurisdiction under S. 145, Criminal P. C., is that he must be satisfied from information of some sort that a dispute exists likely to cause a breach of the peace concerning land or water or the boundaries thereof in his jurisdiction. Once he is so satisfied, his jurisdiction is complete and his subsequent action must be considered in relation to procedure, not jurisdiction".

This ruling, so far as I am aware, has not been subsequently questioned and with all respect to the view expressed in *Arumuga Gounden* v. *Venkata Subbier* (1), I must follow it, especially as I see no reason to alter my opinion. I must therefore dismiss the present revision petition.

S N./R.K. *Petition dismissed.*

(1) [1908] 31 Mad. 82
(2) [1906] 3 C. L. R 134.
(3) [1868] 2 Weir 118.
(4) [1868] 2 Weir 97.
(5) [1912] 36 Mad. 275=17 I. C. 65

A. I. R. 1919 Madras 167

WALLIS, C. J. AND AYLING, J.

T. K. Vasudeva Kamath and *others*—Plaintiffs—Appellants.

v.

Nattoji Lakshminarayana Rao and *others*—Defendants—Respondents.

Appeal Suit No. 82 of 1918, Decided on 12th February 1919, from decree of Dist. Judge, South Kanara, in Original Suit No. 4 of 1917.

Provincial Insolvency Act (3 of 1907), S. 16—After adjudication creditor cannot sue under S. 53, T. P. Act, to set aside transfer without sanction—Transfer of Property Act (4 of 1882), S. 53.

After an order of adjudication has been passed under S. 16 a creditor of the insolvent is debarred by sub-S. (2) (b) of that section from suing under S. 53, T. P. Act, to set aside a transfer by the insolvent without first obtaining the leave of the insolvency Court. [P 168 C 1]

K. P. Lakshmana Row—for Appellants.

K Sundara Row—for Respondents.

Judgment.—The question in this appeal is whether, after the making of an order of adjudication under S. 16, Provincial Insolvency Act, 1907, a creditor of the insolvent is prevented by the provisions of sub S. (2) (b) of that section from suing under S. 53, T. P. Act, to set aside a transfer made by the insolvent without first obtaining the leave of the Court. There appears to be a curious absence of authority as to the effect of the corresponding provision in the English Bankruptcy Acts with respect to actions by creditors under the Statute of Elizabeth, which corresponds with

S. 53, T. P. Act. The nature of the suit under the English and Indian Acts has recently been discussed in this Court in *Palaniandi Chetti* v. *Appavu Chettiar* (1), *Subramania Ayyar* v. *Muthia Chettiar* (2) and *Kottarathil Puthiyapurayil Pokker* v. *Balathil Parkum Chandrankandi Kunhamad* (3). It appears that in England, while such a suit should ordinarily be on behalf of all the creditors and the decree should declare the transfer void against all of them, a judgment-creditor may sue in respect of his own debt alone and obtain satisfaction for it. The subsection of this Act provides that

"except as provided by the Act no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall, during the pendency of the insolvency proceedings, have any remedy against the property or person of the insolvent in respect of the debt or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose."

A suit by a judgment creditor, such as I have mentioned, without the leave of the Court would, I think be in contravention of this section, and would enable the judgment-creditor to obtain satisfaction of his decree out of the property declared in the suit to be the property of the insolvent. Even as regards a suit by a creditor who was not a judgment-creditor to declare a transfer void against creditors generally, I think the words of the subsection "or commence any suit or other legal proceeding" are sufficiently wide to cover a suit to make property available as the property of the judgment-debtor and to forbid the institution of such a suit as this without the leave of the Court. The policy of the law as disclosed in the section is to place the administration of the estate including the realization of assets under the control of the Court, and it would be opposed to this policy to allow a creditor to proceed with a suit of this kind except with the leave of the Court and on such terms as it might impose. We agree with the Subordinate Judge and dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1916] 34 I. C. 778.
(2) [1918] 41 Mad. 612=43 I. C. 651.
(3) [1919] 42 Mad. 143=51 I. C. 714.

A. I. R. 1919 Madras 168
Special Bench

ABDUR RAHIM, OLDFIELD AND COUTTS-TROTTER, JJ.

Kandasami Pillai and *others*— Plaintiffs—Appellants.

v.

Ramasomi Mannadi and *others*—Defendants—Respondents.

Letters Patent Appeal No. 186 of 1917, Decided on 30th September 1918, against judgment of Kumaraswami Sastri, J. in Appeal Suit No. 64 of 1916.

(a) Transfer of Property Act (1882), S. 105—Lease includes agricultural leases.

The definition of "lease" in S. 105. applies to agricultural leases in India. [P 169 C 1]

(b) Transfer of Property Act (1882), Ss. 105 and 108—Failure of lessee to pay premium stipulated—Lessor is not entitled to withhold possession unless possession is made conditional by deed.

A lease is not a mere contract but the transfer of an interest in immovable property and the lessor is not entitled to withhold possession from the lessee merely because the latter has failed to pay the stipulated premium, unless the document provides that the lessee is not to have possession until the fulfilment of a certain condition : 8 *I.C.* 364; 30 *Mad.* 524 and 16 *M.L.J.* 524, *Appl.*, 17 *I.C.* 340, *not Appr.* and 18 *Mad.* 126, *Expl.* [P 169 C 2]

(c) Contract Act (1872), S. 39—Applicability—Extent of, stated.

Per *Coutts-Trotter, J.* — Section 39 applies only to a state of things where there is a series of executory promises on both sides, and so soon as one part of the obligation has been performed by a complete transfer of the property in question, that section ceases to have any application. [P 172 C 1]

S. Parthasarathy Aiyar— for Appellants.

K. Rajah Aiyar—for Respondents.

Abdur Rahim, J.— I entirely agree with the judgment of the learned Chief Justice and will only shortly give my reasons for the conclusion I have arrived at. The plaintiffs obtained a lease for 17 years of a certain garden from the owner of the property, defendant 1 in the suit. The document provides that the plaintiffs are to discharge a prior encumbrance to the extent of Rs. 2,805 besides making two other small payments. They failed to discharge the encumbrance, and the mortgagee, whose debt they had bound themselves to discharge, brought a suit to enforce the mortgage and obtained a decree. In the meantime, while the suit was pending, defendant 1 granted a usufructuary mortgage to defendants 4 to 7 and with the money so realized the mortgage decree was paid off. The Subordinate Judge in the Court of trial held

that, since the plaintiffs failed to pay the amount stipulated for in this document, they were not entitled to possession of the properties, which was their chief prayer in the plaint. On appeal to this Court, the learned Chief Justice was of opinion that the fact that the plaintiffs had not paid the amount mentioned in the lease, was no answer to their suit for possession; while Kumaraswami Sastri, J., the other learned Judge who heard the appeal, disagreed and confirmed the decree of the Subordinate Judge.

On behalf of the respondents Mr. K. Rajah Aiyar, sough first of all to argue that the document in question, Ex. L, was not a lease at all, but a mere contract with respect to the future produce of certain trees. In the first place, this was not their case, up till now, and the written statement itself proceeds on the assumption that Ex. L is a lease. No doubt it is called a contract relating to coffee and plantain produce. But that description is not ipso facto conclusive. We find that the document goes on to state

"I have granted to you on lease the coffee, plantain, and jack produce belonging to me."

Further it says:

"You shall enjoy according to your choice the coffee, plantain and jack produce * * * * for 17 years from this date and on the expiry of the term, surrender the lands to me without any objection whatsoever. The assessment due for this land shall be paid by me;"

then it gives the boundaries of the land. There can be no doubt whatever that what the parties contemplated was a lease. We have got all the apt words of a conveyance by way of a lease. There would be no sense in talking about surrendering the lands, if it was only the future produce of certain trees apart from any interest in the land that was meant to be granted. Proceeding on that basis, there cannot be any doubt to my mind upou the authorities that the lessee is entitled to possession of the land demised to him, even though he has not paid the premium he bound himself to pay. This is an agricultural lease and therefore the Transfer of Property Act, in its terms does not apply. But the Transfer of Property Act, when it defines a lease of immovable property by S. 105, gives a definition which is undoubtedly applicable to agricultural leases as well in this country. Mr. Rajah Aiyar did not attempt to argue that the definition of a lease as contained in S. 105 is not applicable to agricultural leases. S. 105 says:

"A lease of immovable property is a transfer of a right to enjoy such property etc."

Now S. 108 lays down the rights and liabilities of the lessor and the lessee. Cl. (b) of that section provides that

"the lessor is bound on the lessee's request to put him in possession of the property,"

and Cl. (l) says that

"the lessee is bound to pay or tender at the proper time and place, the premium or rent to the lessor or his agent in this behalf."

And it is argued that this is a case of reciprocal contracts, and that the lessor is only bound to put the lessee in possession after the lessee has paid or is prepared to pay the premium that is agreed upon. This, to my mind, proceeds entirely on a misconception of the true nature of a lease and of the rights of the parties arising from such a transaction. It is not a mere contract; it is a transfer of a right to enjoy the property. That means it is a transfer of an interest in immovable property, and S. 108 assumes it is a transfer of such an interest. The right of the lessee to be put into possession arises from the words of the demise which imply that the right to possession is granted to the lessee, and the lessor is not entitled to refuse to give possession to the lessee unless the document provides that the latter is not to have possession until the fulfilment of a certain condition. It is found by both the Courts that no such condition exists in this case. No doubt there are also other rights and liabilities, both of the lessor and the lessee, which are set out in S. 108, T. P. Act, and which arise out of the general law governing the relations of landlord and tenant. The liability of the lessor to put the lessee in possession may be said to arise out of the implied covenant applying to leases, as put by my learned brother, Coutts-Trotter, J., in *Secy. of State* v. *Pemmaraju Venkayya Garu* (1). The distinction between executory and executed contracts is well known, as pointed out in *Wolverhampton and Walshall Railway* v. *L. & N. W. Ry.* (2). A lease is an executed contract; it is a transfer of property or of an interest in property; and all the considerations which apply to the enforcement of mere con-

(1) [1916] 40 Mad. 910=35 I. C. 254.
(2) [1873] 16 Eq. 433=43 L. J. Ch. 131.

tracts do not necessarily apply to a transfer.

We have been referred to a number of cases, both of this Court and other Courts in which it is laid down that a vendee of immovable property is entitled to possession of the property even though he has not paid the consideration mentioned in the deed of sale: see for instance *Velayutha Chetty* v. *Govindasami Naicker* (3), *Velayutha Chetty* v. *Govindaswami Naiken* (4), and *Govindammal* v. *Gopalachariar* (5) and this proposition Mr. Rajah Aiyar has not contested before us. But he says there is a distinction between a sale and a lease. His argument is that a lease for a term stands on no higher footing than a mere contract, and he has referred us for this position to the English law. In English law no doubt a lease for a term is a mere chattel interest and has been treated as such in some of the cases, for instance by Chitty, J., in *Wallis* v. *Hands* (6). But he has not been able to cite any Indian cases to show that these technical distinctions of English law between real and chattel interest in land obtain in India. Speaking for myself, I am not aware that the peculiarities of English law as regards leases for a term have ever been adopted in this country. The law regarding real property in India is, in many respects very different from that of England, and it is especially so regarding leases; for instance Indian law recognizes leases in perpetuity which are unknown to the English law, though it recognizes leases for such terms as for 99 years or 999 years. And I do not think I should be justified in importing the technicalities of English law relating to leases for terms into this country.

Mr. Rajah Aiyar's main argument has been that there is some sort of equity in his clients' favour and therefore we ought to deny the plaintiffs the remedy which they seek, viz., recovery of possession. What the plaintiffs seek is a remedy in law, and their rights to possession cannot be defeated by pleading laches or any other considerations of that kind which might be effective if the suit was one for some relief in equity. Reliance was placed on S. 39, Contract Act 9 of 1872. But this is not a case for enforcement of a contract. The plaintiffs' right to possession arises out of the interest which they have acquired in the land and the doctrine regarding mutual promises has therefore no application. Then we have also been referred to S. 35, Specific Relief Act, which deals with recission of contracts on grounds of misrepresentation, fraud and the like. Our attention was specially drawn to the illustrations which speak of rescission of sale and other transfers on the ground mentioned in the section. But the section deals with cases in which the contract is vitiated by reason of misrepresentation or fraud, and, if the contract which led to the transfer is voidable, that is, liable to be set aside, the transfer based upon it necessarily fails. But the plea of the respondents in this case is based, not upon anything which would make the contract relating to the lease liable to be set aside, but on something which happened after the grant of the lease, viz., nonpayment of a certain sum of money mentioned in the lease. S. 35, Specific Relief Act, has no application.

Reliance has been placed on two decisions, one of the Allahabad High Court in *Chhotku Rai* v. *Baldeo Shukul* (7); and another of this Court, in *Subba Rau* v. *Devu Shetti* (8), the former is referred to by Kumaraswami Sastri, J., in his judgment. In the Allahabad case, certain property was mortgaged and only a portion of the mortgage amount was paid. The mortgagor sold the mortgaged property and his assignees sued for redemption of the mortgage, before the expiry of the term of the mortgage, and it was held on equitable grounds that the plaintiffs should be allowed to redeem before the expiry of the specified term. The learned Judges do not however lay down any general principles of law which I should feel justified in adopting and applying to this case; all that they say is, that

"the defendants not having performed what we deemed to be a most essential part of the contract so far as they are concerned, the plaintiffs ought to be allowed to redeem the property before the expiration of ten years."

They cite no authority and do not enunciate any general and well-recognized principle of equity by which the case could be said to be governed. With all

(3) [1910] 34 Mad. 543=8 I. C. 364.
(4) [1907] 30 Mad. 524.
(5) [1906] 16 M. L. J. 524.
(6) [1893] 2 Ch. 75=62 L. J. Ch. 586.
(7) [1912] 34 All. 659=17 I. C. 340.
(8) [1895] 18 Mad. 126.

respect to the learned Judges, it is not open to us to proceed on some sort of vague equitable grounds, especially in a case like this, where the plaintiffs are seeking a remedy in law. As regards *Subba Rau* v. *Devu Shetti* (8) one of the learned Judges, Muthuswami Aiyar, J., says in his judgment :

" Upon the facts found the Subordinate Judge obviously considered the original mortgage as lawfully cancelled."

The facts of that case are not to be found in the report and it is not clear how the instrument came to be cancelled. I do not think that the judgment can be said to lay down any general proposition that can be applied to the present case. I am of opinion that the judgment of the learned Chief Justice is right. It was noticed during the course of the argument that the learned Chief Justice gave a decree to the plaintiffs on condition of their paying the prior mortgage and that respondents 4 to 7 were entitled to retain possession until they have been repaid. But the form of the decree has not been challenged before us by the learned pleader for the appellants. The result therefore will be that the judgment of Kumaraswami Sastri, J., is set aside and there will be a decree in favour of the plaintiffs to the effect that they will be entitled to possession of the property on paying the money due under the mortgage decree in Original Suit No. 87 of 1912, and until then respondents 4 to 7 will remain in possession. The appellants are entitled to their costs throughout.

Oldfield, J.—I agree.

Coutts-Trotter, J.—I agree and wish to add only a few words. The appellants (plaintiffs) were lessees under a deed of lease and I have no doubt that the deed of lease was a present demise and nothing else. As long ago as the case of *Holder* v. *Taylor* (9), which was decided in the beginning of the 17th century, it was laid down that the word " demise " in a lease involves by necessary implication a covenant or contract or call it what you will on behalf of the lessor to give instantaneous and complete possession to the lessee. In this case, the lessor was under an obligation to give possession to the lessees. Certain other obligations were cast on the lessees by the instrument of lease, and among them was an obligation to discharge an existing encumbrance by the payment of certain sums of money. The plaintiffs failed to do that. They broke their obligation to pay off this encumbrance and the result was that respondents 4 to 7 in this case stepped into the breach, paid off the old encumbrancer and took from the owners of the land a usufructuary mortgage. The mortgage paid off was not a usufructuary mortgage but a simple hypothecation without rights of possession The question is whether respondents 4 to 7 can be allowed to plead their usufructuary mortgage in derogation of the right claimed by the plaintiffs. Now, as I understand it, you can defeat the right to possession under a lease in various ways. If it is only an agreement for a lease all sorts of equitable pleas are open by way of reply to an action for specific performance, and any breach of contract by the person seeking to enforce the contract, and any breach by him of any of the provisions of the contract, might be a very excellent answer to his suit for specific performance. If it is a demise, you can show that there was a condition precedent to its taking effect as such. That is just what was attempted to be done in this case. That defence broke down and it was held that the obligations of the lessees were not conditions precedent, but were merely mutual concurrent contracts or covenants between lessor and lessee. Or you can show that the whole thing is void, because the making of the contract was vitiated by fraud, coercion or misapprehension.

That is not this case, and no such ground is suggested.. What is the result? The result is that the respondents are seeking to destroy the right to possession given by the instrument by setting up a breach of contract which arose subsequent to the obligation to give possession. That seems to be an obviously impossible defence. It is for the safeguarding of those rights of a lessor that covenants of re-entry are inserted in leases, whereby a breach of contract by the lessee subsequent to the lease may entitle the lessor to re-enter and get back possession of the land. But, in my opinion, that must be under a specific covenant of re-entry in the lease. If there is no such clause, there can be no right to get back possession of the land. If S. 39, Contract Act, applies, this document is not a transfer

(9) [1613] Hobert 12=80 E. R. 163.

of property or of any interest in the land but is a mere bundle of mutual obligations under a contract. I think much confusion has arisen from the fact that the English law of real property makes a very sharp distinction between those rights over property which are termed "real" rights and "chattel" interest in property which are mere personal rights.

I think that is a peculiar incident of the English law of property with its very curious history, and it seems to me that it is not necessary to complicate Indian law by seeking to import such technicalities of English law into India. In the case reported as *Secy. of State* v. *Pemmaraju Venkayya Garu* (1), I took very great care in deciding the question of the leasehold interest which then came up, not to base my judgment on technicalities peculiar to English real property law but on general principles which seemed to me to apply. I think that the introduction of the English conception of chattel interests in land might lead to the conclusion that nothing had passed by way of transfer, that there was a mere bundle of rights and that S. 39, Contract Act, applied. To my mind that could be arrived at only by importing the English doctrine and, speaking for myself, I must decline to adopt that course.

That being so, I regard this instrument not as a mere executory contract but as a transfer of an estate. S. 39, Contract Act, in my opinion, applies only to a state of things where there is a series of executory promises on both sides; and so soon as one part of the obligation has been performed by a complete transfer of the property in question, that section ceases to have any application. As regards the decision reported as *Chhotku Rai* v. *Baldeo Shukul* (7), all I can say is that I do not understand it as reported, nor do I gather upon what principle the learned Judges proceeded. With regard to the case in *Subba Rau* v. *Devu Shetti* (8), I have no hesitation in saying that unless it can be explained by an omission in the report as to the existence of an express power of cancellation, it must be regarded as contrary to the trend of authority. I think that the order of the learned Chief Justice is right. It may be that the appellants might have got further relief. But they have contented themselves with the Chief Justice's judgment.

S.N./R.K. *Appeal allowed.*

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AYLING AND SESHAGIRI AIYAR, JJ.

Alla Pichai Rowthan — Defendant—Appellant.

v.

Pappathiammal and *others*—Plaintiffs and Defendants—Respondents.

Civil Appeal No. 128 of 1917, Decided on 19th April 1918, against decree of Sub-Judge., Madura, in Original Suit No. 79 of 1914.

(a) Limitation Act (1908), S. 7 — Claim of Mahomedan heirs entitled to definite share —Cause of action of such heirs is not joint.

In a Mahomedan family, where the heirs are entitled to definite shares as tenants-in-common the cause of action of such heirs in respect of the estate cannot be said to be a joint one for purposes of limitation. [P 173 C 2]

(b) Administrator—Administrator de son tort is not liable to account.

An administrator de son tort is not responsible as an agent to render an account. He is only responsible to refund money which he has received on behalf of the estate. [P 173 C 1]

K. V. Krishnaswami Ayyar — for Appellant.

K. Jagannadha Ayyar—for Respondents.

Judgment.— Two Mahomedan brothers, Sanjiappa Rowthan and Sheik Muhammad Rowthan, acquired considerable properties. Sheik Muhammad died in 1894 and Sanjippa Rowthan in 1901. The three plaintiffs are the widow, the son and daughter respectively of Sanjiappa. Defendants 2 and 3, are the widow and daughter of Shiek Muhammad. Defendant 1 is the husband of defendant 3.

The case for the plaintiffs is that after the death of Sanjippa Rowthan the properties were entrusted to the management of defendant 1, on behalf of the members of the Mahomedan family, that during the management, defendant 1 misappropriated the properties, that thereupon certain mediators interceded and obtained the transfer of some of the properties to the plaintiffs and that defendant 1 is still retaining money belonging to the plaintiffs. Defendant 1 denied his agency and his liability to account. The Subordinate Judge in an unnecessarily long judgment has come to the conclusion that defendant 1 managed the properties honestly until 1909, that since then he had not been discharging his duties properly, and that therefore he should be

held accountable for money received by him since 1909. Defendant 1 and the plaintiffs have filed a memorandum of objections.

The legal position of defendant 1 has not been correctly appreciated in the Court below. We are satisfied that defendant 1 was asked to manage the properties belonging to the share of Sheik Muhammad. We do not agree with Mr. K. V. Krishaswami Ayyar that unless there is direct evidence of an appointment as agent, defendant 1 cannot be held liable; but the agency which is inferable from the course of conduct pursued by plaintiff 1 and defendant 1 cannot affect plaintiffs 2 and 3. It is now well settled in this Presidency that a Mahomedan mother is not the de jure guardian of her children: *Hyderman Kutti* v. *Syed Ali* (1). Consequently defendant 1 could not have been appointed either expressly or impliedly by plaintiff 1 to be the agent for the management of the properties of plaintiffs 2 and 3. The position occupied by defendant 1 must under the circumstances be taken to be as agent of plaintiff 1 and as administrator de son tort of the properties of plaintiffs 2 and 3. This being the legal relationship of the parties the question now for consideration is whether the claim for an account has become barred either wholly or in part. There can be no doubt that an administrator de son tort is not responsible as an agent to render an account. He is only responsible to refund money which he has received on behalf of the estate. See William's Law of Executors and Administrators, Vol. 1, p. 190; see also the observations in *Stevens, In re, Cooke* v. *Stevens* (2). Consequently defendant 1 is bound to restore to plaintiffs 2 and 3 all the money received by him from their estate. The estate consists of two classes of property: one consisting of lands which are in the possession of cultivating raiyats, the other consisting of bonds for money borrowed from the estate. As regards the former the finding of the Subordinate Judge which is supported by the evidence is that until 1909 defendant 1 had not misappropriated or retained any money belonging to the share of the two minor plaintiffs. Therefore he is liable to plaintiffs 2 and 3 only for money received by him since 1909 and up to the beginning of 1911, when the decision of the arbitrators was given. As regards the latter class of property, apparently all the bonds, whether renewed in the name of defendant 1 or still standing in the name of the minor plaintiffs were handed over to the mediators in 1911. The mediators decided that if defendant 1 was guilty of laches in collecting the money on the bonds and had thereby allowed them to be barred by limitation, he should make good to the various plaintiffs the loss occasioned by his conduct. Therefore the liability of defendant 1 so far as the bonds are concerned is regulated by the decision of the arbitrators by Ex. 11, and not by his liability as administrator de son tort. The result will be that so far as the bonds are concerned, defendant 1 should be held liable only in respect of any time-barred debts between 1909 and 1911. After 1911 defendant 1 having severed his connexion with the management, any laches on the part of the two plaintiffs to collect money due to them should not be charged against him. The decree of the Subordinate Judge as far as plaintiffs 2 and 3 are concerned will be modified as indicated above.

As regards plaintiff 1, the Subordinate Judge says that her right of suit is not barred, because the claim of plaintiffs 2 and 3 is not barred by limitation. We are unable to agree with him. It is true that the decision in *Ahinsa Bibi* v. *Abdul Kader Saheb* (3) lends support to the view taken by the Subordinate Judge. But we fail to see how in a Mahomedan family where the heirs are entitled to definite shares as tenants-in-common, the the cause of action of such heirs can be said to be a joint one. In the case of plaintiff 1 she was a major and she entrusted defendant 1 with the management of her property. She has not brought the suit within three years of the termination of the agency; consequently her claim so far as the income from landed properties is concerned is barred by limitation. So far as her right to get her share of the time-barred debts for which under the award of the arbitrators defendant 1 was held responsible is concerned, her claim is saved by Ex. 2. The decree in favour of plaintiff 1 can only be for the loss occasioned to her in respect of the bonds items 1 to 31 mentioned

(1) [1912] 37 Mad.514=15 I. C. 576.
(2) [1898] 1 Ch. 162=67 L. J. Ch 118.
(3) [1902] 25 Mad. 26.

in the plaint schedule. As regards the memorandum of objections, in the view we have taken of the legal relationship of the parties, the claim on behalf of plaintiff 1 and of the other plaintiffs is unsustainable. That is dismissed with costs. In the appeal parties will pay and receive proportionate costs.

S.N./R.K. *Decree modified.*

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SADASIVA AIYAR AND SPENCER, JJ.

Muthuvenkatanarayanan Chetty—Defendant—Appellant.

v.

Athipandurenga Naidu and *another*—Plaintiffs—Respondents.

Second Appeal No. 2018 of 1917, Decided on 3rd October 1918, against decree of Dist. Judge, Trichinopoly, in Appeal Suit No. 585 of 1916.

Hindu Law—Widow — Absolute estate—Gift by husband contemplating retirement from world to wife in lieu of maintenance—Deed conferring power of sale—Absolute estate is conferred.

A Hindu husband, while contemplating retirement from the world, executed a deed of gift to his childless wife in lieu of her maintenance. The deed recited: "I have gifted this day in lieu of maintenance the undermentioned house with rights of alienation by sale."

Held: that the deed conferred on the donee an absolute estate and not only a life-estate. 2 *I. A.* 7 and 5 *B. L. R.* 123, *Expl.*; 7 *Mad.* 387; 23 *Cal.* 670 (*P. C.*) and 30 *I. C.* 685, *Diss. from*; 17 *Bom.* 503 and 17 *M.L.J.* 622, *Dist.* [P 177 C 1]

Per *Sadasiva Aiyar, J.*—A Hindu husband is bound to make provision for the maintenance of his wife before retirement from temporal affairs. [P 174 C 2]

The grant of a power of sale in a deed of a gift executed in favour of a Hindu female fully and sufficiently indicates the grant of an absolute estate. [P 176 C 2]

Per *Spencer, J.*—Where words giving a power of alienation or absolute estate occur in a document, the ordinary presumption is that the grant is absolute in nature. [P 177 C 1]

T. R. Venkatarama Sastri and *S. Ramaswami Ayyangar*—for Appellant.

T. V. Muthukrishna Ayyar and *S. E. Sankara Ayyar*—for Respondents.

Sadasiva Aiyar, J.—Defendant 2 is the appellant. He purchased the plaint house from defendant 1, who is the plaintiff's father. The plaintiff is the son of defendant 1 by defendant 1's deceased first wife. Defendant 1 made a gift of the house in November 1903 to his first wife (that is plaintiff's mother) by Ex. 1. The plaintiff was born after the date of the gift deed and he claims the property as the heir of his mother and seeks to recover possession of it from the purchaser, defendant 2, after declaring that the sale deed by defendant 1 in September 1908 in favour of defendant 2 is not binding on the plaintiff. The defendants' contentions were that the gift deed to plaintiff's mother was a nominal transaction which was never acted upon and that the sale to defendant 2, by defendant 1 acting for himself and as guardian of the plaintiff, was made for proper purposes binding on the plaintiff.

When this suit was brought the plaintiff was a minor and the suit was therefore brought by his next friend, his paternal aunt's husband. (It is clear from the written statements that defendants 1 and 2 have been acting together, defendant 1 having married a second wife). The plaintiff also claims mesne profits for 3 years before suit and the only defence so far as the claim is concerned is that the claim is excessive. In the first Court no contention was raised in dispute of the allegation in para. 6 of the plaint that an absolute interest in the plaint house had vested in Kuppammal under the gift deed. The learned District Munsif found that the gift deed was a real transaction and that the plaintiff's mother did enjoy the house with full rights. He found also that the sale deed was not binding on the plaintiff as it was not executed for the advantage of the minor. In appeal a new contention seems to have been raised in the appeal memorandum that the deed Ex. 1, even if effective, gave the mother-in-law only a life interest and that the reversion came back to the plaintiff's father on plaintiff's mother's death. It does not however appear that this point was argued before the appellate Court, as no reference is made in the judgment of the learned District Judge to this contention. The contention however has been strongly pressed before us in second appeal and I shall at once deal with that contention. Ex. 1 states that the husband who is contemplating retirement from the world and pilgrimage to holy shrines, makes a gift of the suit house to his childless wife in lieu of her maintenance. A husband is bound to make provision for the maintenance of his wife before retirement from temporal affairs and that obligation is evidently intended to be discharged by this gift. Under the deed

the donor gives the house "with its site, water-courses, treasures and stones" with power of alienation by sale expressly conferred on the donee and recites that he gives also possession of the title-deeds. Construing this document in its ordinary sense according to the plain meaning of the language, I can find no difficulty whatever in arriving at the conclusion that it conferred an absolute heritable interest on the donee. It was however argued by Mr. T. R. Venkatarama Sastriar, on the strength of some judicial observations in the decisions he has quoted, that because the gift was made to a Hindu woman, more especially to a wife, we must construe the document restrictively having regard to the supposed intention of a person who makes a gift to a Hindu woman not to give her more than a life-interest. I shall refer to a few of those cases. The first case referred to is the decision of the Privy Council in *Moulvie Mohamed Shumsool Hooda* v. *Shewukram* (1). The facts and the course of decision in that case were rather peculiar. The document in that case was a disposition in favour of his daughter-in-law by a testator. He made her the heir and malik of his properties after his death. Then he said that her daughters shall be her heirs. There were no words of inheritance (such as putra poutradi) in the document and no powers of alienation were expressly conferred.

That document had been construed by Bayley and Hobhouse, JJ., in *Chutter Lall Singh* v. *Shewuk Ram* (2) as granting an absolute heritable estate to the daughter-in-law, where the learned Judges had to construe it in the first of the two suits in which the document had to be construed. In the later suit the decision of the High Court which is reported in the foot-note [see *Syad Mahomed Shumsal Hoola* v. *Shewakram* (3)] to *Srimati Pabitra Dasi* v. *Damudar Jana* (4), that same document was construed by two out of three Judges as giving only a life interest to the daughter-in-law (D. K.) having regard to the notions of Hindus about the extent of women's interest in the property inherited by them, but the third Judge [who was one of the Judges who took part in the decision in *Chutter Lail Singh* v. *Shewuk Ram* (2)] dissented and he adhered to his former opinion. Then the case went up to the Privy Council and their Lordships, on the particular facts of that case and having regard to the surrounding circumstances, thought that the majority of the Judges in *Srimati Pabitra Dasi* v. *Damudar Jana* (4) came to the right conclusion on the construction of a rather difficult deed. The decision of their Lordships of the Privy Council seems to have been considered in several decisions of the High Courts as if it laid down the broad proposition that a gift to a Hindu female (and especially to a wife or widow by her husband) should be construed with a prejudice in favour of the view that only a life-interest was intended. I must say with the greatest respect that no such rule of law can be deduced from the said decision of the Privy Council. On the other hand so long ago as in 1875, a very learned Judge, Romesh Chunder Mitter, laid down in *Kollany Kooer* v. *Luchmee Pershad* (5) that he was not aware of any provision of Hindu law that a gift to a Hindu female means a limited gift or carries with it only a limited estate. Even as regards the wife the text of Narada quoted in *Bhujanga Rau* v. *Ramayamma* (6), what has been given by an affectionate husband to his wife she may consume as she pleases when he is dead or may give it away except the immovable property, does not in my opinion mean that a gift even of immovable property, if accompanied with express power of disposal, cannot confer an absolute estate on the wife—of course Narada was not considering the case of a disposition by will in favour of a widow to take effect after the testator's death.

In *Bhujanga Rau* v. *Ramayamma* (6) it was held that a gift with the words putra poutra paryantam added did not confer on the wife a power of alienation though the land became her stridhanam. With the greatest respect I am not prepared to assent to the correctness of that decision, which, in my opinion, requires reconsideration when the same question arises again. So far as the cases in *Annaji Dattatraya* v. *Chandrabai* (7)

(1) [1874-75] 2 I. A. =14 B.L.R. 226 (P.C).
(2) [1870] 5 B. L. R. 123.
(3) [1871] 7 B. L. R. 700.
(4) [1871] 7 B. L. R. 697.
(5) [1875] 24 W. R. 395.
(6) [1884] 7 Mad. 387.
(7) [1893] 17 Bom. 503.

N. DAR, B. A. LL. B.,
High Court,

and *Nanjamma* v. *Nacharammal* (8) are concerned, the decisions rested upon particular words found in the deeds executed in favour of the female donee; in the one case that she should enjoy for her maintenance and in the other case that she could enjoy for her life. Their Lordships of the Privy Council have themselves indicated that they did not mean by their decision in *Moulvie Mohamed Shumsool Hooda* v. *Shewukram* (1), to lay down any such general rule as is contended for [see *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (9)] where even the words indicating that the gift was for maintenance were not held to detract from the absolute character of the estate given by the deed; also *Surajmoni* v. *Rabi Nath Ojha* (10). In *Vencataraju* v. *Kottayya* (11) I ventured to express the opinion that a gift by a female thould not be construed less liberally than a gift to a male: see also *Ramanuja Aiyangar* v. *Satagohacharar* (12). As regards the case in *Manika Mudali* v. *Muthachi Kavandan* (13) I respectfully dissent from the opinion of Ayling, J., that the words "sarva swathanthrathudan" did not confer an absolute estate on the female donee. The other learned Judge, Tyabji, J., was inclined to differ but naturally felt too deffident to differ, especially as two Hindu Judges in the lower Courts had expressed a contrary opinion. The decision in Appeal No. 26 of 1896 decided by Subrahmania Ayyar and Benson, JJ., was sought to be distinguished by Ayling, J., on the ground that, besides the words "sarva swathanthrathudan" there were other expressions in the document construed in Appeal No. 26 of 1896 which indicated the intention to grant an absolute estate.

I venture to think that "with full proprietary powers" the meaning of sarva swathanthrathudan, is the strongest expression that an alienor can employ to confer an absolute estate on the alienee and that the addition of other expressions is superfluous. Mr. Venkatarama Sastri tried to make a point of the fact that only the power of sale was given in the document now construed and not the general power of alienation by sale, gift, etc., words usually found in documents intended to confer an absolute title. I am not much impressed with this argument. The grant of a power of sale, in my opinion, fully and sufficiently indicates the grant of an absolute estate. I therefore agree with the lower Courts in their construction of the document Ex. 1. A minor point was urged that because the father, defendant 1, had obtained interest for some time on behalf of himself and the plaintiff on the amount of a mortgage deed which defendant 2 executed for the greater portion of the purchase money mentioned in the sale deed executed to him by defendant 1, the plaintiff is not entitled to claim rent till the date of the document executed by defendant 1, acknowledging receipt of such interest. In the first place this point seems not to have been taken in the first Court, or even in the ground of appeal to the lower appellate Court. In the next place, the money was obtained by defendant 1, not for the benefit of the plaintiff who is the only person entitled to the mesne profits, but was obtained as interest on the amount of a mortgage bond which was a part of the course of transactions created by defendant 1 with intention of acting adversely to and creating evidence against the plaintiff's claim as heir of his mother. This contention therefore must also be overruled. In the result I would dismiss the second appeal with plaintiff's costs. The time for removing the superstructure allowed to defendant 2 is extended till the expiry of 4 months from this date.

Spencer, J.—I agree. On the somewhat belated contention, that the gift deed in this case, Ex. 1, which contains the words:

"I have gifted this day in lieu of maintenance the undermentioned house with rights of alienation by sale,"

confers on the wife only a life-estate, I wish to add a few words in deference to the very full arguments we have listened to. In *Toolsi Dass Kurmokar* v. *Madan Gopal Day* (14) it was laid down by Harrington, J., that one of the tests which may be applied to see whether the estate given is intended to be absolute or not, is to see whether the donee has a power of disposition over it. I respectfully agree with this and adopt this test. In

(8) [1907] 17 M. L. J. 622.
(9) [1896] 23 Cal. 670=23 I. A. 37 (P. C.).
(10) [1908] 30 All. 84=35 I. A. 17 (P. C.).
(11) [1912] 16 I. C. 139.
(12) A. I. R. 1915 Mad. 331=24 I. C. 20.
(13) [1915] 30 I. C. 685.
(14) [1901] 28 Cal. 499.

Jogeswar Narain Deo v. *Ram Chandra Dutt* (9) the Judicial Committee of the Privy Council has no hesitation in construing a gift deed which contained an express power given to the donees of making alienations by sale or gift as conveying an absolute estate. There were other words in the deed which led to the same conclusion. But the decision supports the view that where words giving powers of alienation or of absolute estate occur in the document, the ordinary implication is that the grant is an absolute one. *Manika Mudali* v. *Muthachi Kavandan* (13) was a decision which turned mainly on the meaning of the words sarva swathanthrathundan, which do not occur in the document before us. If in that case there had been a distinct provision for alienation, it is clear from Ayling, J.'s remarks that he would have come to the conclusion that an absolute estate was gifted. But in that case only the words sarva swathanthrathudan occurred and the power of sale that occurs in the document before us was not present in that document. In *Annaji Dattatraya* v. *Chandrabai* (7) there were no words giving expressly the power to alienate the property. In *Nanjamma* v. *Nacharammal* (8) the question that arose was whether there was a grant of a life estate or a widow's estate. The learned Judges held that what was given in that case was a life-estate, and they came to this conclusion on account of the words "you shall enjoy the same all your life." They commented on the absence of apt words for the purpose of clothing the widow with powers of alienation for purposes of family necessity, and they decided that the mere expression "with power to sell and give away" did not necessarily indicate the grant of a widow's estate. On the construction of the suit gift deed I agree with my learned brother that the District Judge was right in his opinion that an absolute estate passed and that the second appeal should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

1919 M/23 & 24

A. I. R. 1919 Madras 177

PHILLIPS AND NAPIER, JJ.

Kalianarama Aiyar—Plaintiff—Appellant.

v.

Sivarama Chettiar and *others*—Defendants—Respondents.

Second Appeal No. 618 of 1917, Decided on 14th November 1918, against decree of Dist. Judge, Tanjore, in Appeal Suit No. 131 of 1915.

(a) Decree—Setting aside—Consent decree wrongly passed is not nullity—Wronged party can only take course prescribed for setting it aside.

A consent decree wrongly passed owing to some legal or technical defects is not a nullity ab initio. The Court has jurisdiction to pass a right as well as a wrong decree, and if it decides wrongly, the wronged party can only take the course prescribed by law for setting matters right: 40 *I. C* 611; 32 *M. L. J.* 434; (1917) *M. W. N.* 234 and 21 *M. L. T.* 229, *Foll.*

[P 179 C 1]

(b) Decree—Setting aside—Consent decree passed by Court having jurisdiction—Party consenting cannot impeach—Evidence Act. (1872), S. 115.

A party to a consent decree which the Court had jurisdiction to pass or anyone deriving title under him is estopped from going behind the terms to which he has voluntarily submitted on the ground that the decree was wrongly passed.

[P 179 C 1]

T. Rangachariar, T. V. Gopalasami Mudaliar, R. Gopalasami Ayyangar and *A. Ganesa Aiyer* for Appellant.

T. V. Muthukrishna Aiyer—for Respondents.

Judgment.—Defendant 3's husband, one Ramaswami Chetti, brought a suit in 1907 against defendants 1 and 2, who were the sons of his nephew, for partition. Defendant 2 was then a minor. Eventually, Ramaswami Chetty was allowed to withdraw the suit as against defendant 2 with liberty to bring another suit and the suit was compromised between him and defendant 1, and a decree was passed in terms of the compromise. Under this compromise defendant 1 took a certain share of the family property and separated himself from the family. This was on 17th November 1908. In 1912 defendant 1 sold certain properties which were the subject-matter of this suit to the plaintiff, these properties being certain properties which belonged to the family of Ramaswami Chetti and defendants 1 and 2, but which were alleged in the prior litigation by Ramaswami Chetti to have been dedicated to charity. The question we have to consider now

is whether defendant 1, at the date of sale had any interest in the plaint properties. In the prior original suit, No. 80 of 1907, Ramaswami Chetti expressly mentioned these charity properties in his plaint, but said that, as definite arrangements had been made in the family for their management, it was unnecessary to obtain any relief in respect of them and therefore they were not included in the suit. Defendant 1 in his written statement no doubt asked that the plaintiff's suit should be dismissed, but in para. 24 he claimed that if there were a partition those charity properties should also be divided, and defendant 2, put forward a similar plea.

The razinamah does not specifically relate to these charity properties, but we are clear, after a careful consideration of its terms, that they also formed the subject-matter of the compromise. The razinamah begins with the following words: "Whatever may be the claims of us both," and we see from the plaint and written statements in that suit that a claim had been put forward in respect of the charity properties by the defendants, and the plaintiff had pleaded that they were not divisible. The razinamah then goes on to deal in detail with several of the contentions in defendant 1's written statement, and in respect of one of them it says in para. 6 that the dispute had already been settled, and finally para. 7 reads as follows:

"That the parties herein . . . have no right against one another in respect of property."

It is clear that there had been no prior settlement between them about the charity properties and it is equally clear that the compromise was in respect of all their claims, and amongst these claims must be included the claim of defendant 1 to share in the charity properties. We are therefore of opinion that the charity properties formed part of the subject-matter of the compromise. The next contention of the appellant is that, even if the charity properties were included in the compromise, they were not affected by the decree passed thereon, because the properties not forming the subject-matter of the suit, the compromise decree could not affect them.

As these properties were referred to in the plaint as being family properties though not divisible, and in the written statements an allegation was made that they were divisible before giving a decree for partition, it would have been necessary for the Court to decide the question of their partibility, and if it found that they were partible, these properties must necessarily have been included in the partition decree. In this respect they undoubtedly formed the subject-matter of the suit. The contention that no stamp duty had been paid specifically in respect of these properties is not of much importance, for, even if the decree had been given without stamp duty being paid, it would not invalidate the decree, and we see that in valuing partition suits it has been held by this Court that the valuation is to be according to the amount at which the relief sought is valued in the plaint: vide *Boganadam Rangiah Chetty* v. *Boganadam Subramania Chetty* (1). In this view of the matter, we must hold that the razinamah decree did deal with the charity properties and consequently it is unnecessary for the respondent to fall back upon the razinamah itself. It is therefore unnecessary to decide the objection taken by the appellant that the razinamah not being registered cannot have effect as against the immovable property.

The next objection urged against the razinamah decree is that it is a decree which could not have been passed in that suit and consequently is an absolute nullity. Reliance is placed on *Lakshmana Chetti* v. *Chinnathambi Chetti* (2) and *Gobind Chandra Sardar* v. *Bhagabat Sardar* (3). The case of *Lakshmana Chetti* v. *Chinnathambi Chetti* (2) however does not seem to be authority for such a broad proposition, for all that was decided there was that when parties to a partition suit had submitted to arbitration, the award made upon their submission could not be passed into a decree because there were some minors who were parties to the suit and leave of the Court had not been obtained under S. 462, Civil P. C., either before the submission to arbitration or after the award. The case of *Gobind Chandra Sardar* v. *Bhagabat Sardar* (3) is somewhat more in favour of the appellant, though it does not in terms say that such a decree is a nullity, for the decree in that case had been based on a com-

(1) [1910] 8 I. C. 512.
(2) [1901] 24 Mad. 326.
(3) [1915] 27 I. C. 242.

promise to which several of the defendants had not been parties, and it was held that it would not be binding upon them and that no decree ought to have been given in accordance with its terms and consequently the consent dercree was set aside by the order in that case. Although this is authority for saying that the consent decree was wrongly made, it does not appear to be any authority for holding that that decree was a nullity ab initio. In order that the decree should be a nullity, it must be one passed without jurisdiction. If the Court had jurisdiction, the fact that it passed a wrong order would not make its order a nullity. A Court has jurisdiction to decide wrong as well as right, and if it decides wrong, the wronged party can only take the course prescribed by law of setting matters right. In this case the Court has jurisdiction to try the partition suit, and whether it was right or wrong in passing the decree it did, it certainly had jurisdiction to do so. This question has been considered in *Thuljaram Row* v. *Gopala Aiyan* (4) and we agree with Srinivasa Aiyangar, J., that the

"true rule is that if the Court has jurisdiction to pass orders of a particular kind, that in a particular case it passed, an order which it should not have passed is not a case of total want of jurisdiction so as to render that order a nullity."

If the decree is not a nullity, it must be binding, at any rate, on defendant 1, and under that decree he gave up all his rights to the plaint property and was therefore unable to pass any title to the present plaintiff. Whether that decree is binding on defendant 2 who was not actually a party to it, the suit as against him having been withdrawn previously, need not, we think, be decided now. It is open to him to question it if he so wishes, but whether he can do so effectually when the managing member of his family effected a partition between defendant 1 and the other members of the family is a doubtful point which he can be left for determination when necessary. In the result the second appeal fails and is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(4) [1917] 40 I. C. 611.

A. I. R. 1919 Madras 179

ABDUR RAHIM AND OLDFIELD, JJ.

Veerappa Chetty — Defendant — Appellant.

v.

Vellayan Ambalam and *others*—Plaintiffs and Defendants—Respondents.

Civil Appeal No. 307 of 1917, Decided on 11th December 1918, against decree of Temporary Sub-Judge, Sivaganga, in O. S. No. 117 of 1915.

(a) Negotiable Instruments Act (26 of 1881), Ss. 91 and 92—Bill of exchange payable at sight or demand—Dishonour by non-acceptance— Presentment for acceptance—Refusal to accept amounts to dishonour by non-payment—Notice is necessary.

In the case of a bill of exchange payable at sight or on demand there can be dishonour by non-acceptance, though the law does not require that, in the case of such bill, there should be a presentment for acceptance. But if the drawee of such a bill refuses to accept it, it practically amounts to a refusal to pay and becomes dishonour by non-payment. That is to say, there is nothing in law which precludes a bill payable on demand being presented for acceptance although that may not be necessary. In order however to sustain an action against the drawee, there must be dishonour and notice of dishonour given within reasonable time. [P 182 C 1, 2]

(b) Negotiable Instruments Act (26 of 1881), S. 119 — Presumption of dishonour arises on proof of protest—Certificate of protest is necessary.

Under S. 119 a Court is entitled to presume the fact of dishonour, but that is only so where there is a proper protest. No such presumption would arise from a mere entry by a notary public of the words "noted for non-payment" without giving the date of dishonour, and in the absence of a certificate of protest [P 180 C 2]

(c) Negotiable Instruments Act (26 of 1881), Ss. 91 and 92—Refusal to pay includes refusal to accept.

Per *Oldfield, J.*—The refusal to pay referred to in S. 92 includes a refusal to accept such as is contemplated in S. 91, which is a possible, though not an invariable or obligatory, preliminary to payment being demanded at all. [P 183 C 1]

(d) Negotiable Instruments Act (26 of 1881)—English Law.

The Negotiable Instruments Act should be read conformably to the provisions of the English law, which follows the general Commercial law of the rest of the world. [P 821 C 2]

L. A. Govindaraghava Ayyar and *K. N. Kumaraswamy Ayyar*—for Appellant.

R. Ganapathy Ayyar—for Respondents.

Abdur Rahim, J.—The suit which we are dealing with in this appeal was instituted with respect to a Hundi drawn by defendant 1, the appellant, on S. R. M. S. Ranganathan Chetty in Rangoon in favour of defendant 2, who assigned it to

defendant 3 and defendant 3 assigned it to defendant 4's father, who assigned it to the plaintiff. Several defences were raised but we need not deal with all of them. We wish to deal with the questions of fact whether there was presentment of the Hundi and in due time, whether there was dishonour and notice of dishonour, if any, given to the drawer as required by law. The question whether the Hundi was discharged by payment has also been argued before us.

The learned Advocate-General has also raised a rather interesting question of law based on the provisions of Ss. 61 and 74, Negotiable Instruments Act, read with Ss. 91, 92, 93 and 94. The case cannot be said to have been tried as satisfactorily as it might have been, but we have to come to a conclusion upon the evidence on record. The whole evidence regarding presentment and dishonour and the alleged discharge is of a very unsatisfactory kind. No witness from the firm of the drawer was examined in support of the case of the plaintiff as to presentment and no explanation is forthcoming for this omission. Nor has there been any attempt to produce the books of that firm which, it is likely, would have contained some record as to the fact of presentment of this bill if it was actually presented as is spoken to by P. W. 2. The bill is alleged to have been sent at the request of defendant 4's father by a firm in Madura, called V. E. R. M. Firm, for collection. One of the men from that firm, the son of the proprietor, was examined as P. W. 5. He says that he received a letter saying that the bill had been presented for payment and that it was dishonoured. But no attempt was made to produce that letter, nor has any book of account or anything in writing been produced in support of the plaintiff's allegation. It was quite easy for the plaintiff to produce absolutely conclusive evidence on this point.

It was argued by the learned Advocate-General that we ought to accept the evidence given by the plaintiff even though it is not the best evidence available, and such as it is, is unsatisfactory because the probabilities of the case, he contends, show that the allegations of the plaintiff are true. But the transaction to say the least was of very peculiar character. We do not find any proper explanation for the fact that although the bill was presented some time in May or June 1913, if the evidence of the plaintiff is to be accepted on that point, it was noted on only in 1915 and no action was taken on the bill for two years. Then there is really no evidence that any notice of dishonour was given to defendant 1 within a reasonable time after such dishonour. The plaintiff says that before instituting the suit, that is, some time in 1915 he asked defendant 1 for payment and that he promised to pay. That seems to me to be an absolute untruth. The defence of defendant 1 is that the bill had been long ago discharged. It is inconceivable that if the plaintiff made a demand upon him, he should have promised to pay. The learned Advocate-General has not really relied on the noting such as there is on this bill for the purpose of drawing any presumption of presentment and dishonour. It is a most peculiar entry by the Notary Public of Rangoon. All that it contains is "noted for non-payment." It does not give the date of dishonour as required by S. 99, Negotiable Intruments Act. Then there is no certificate of protest within the meaning of Ss. 100 and 101 of the Act. It is only where there is a proper protest that S. 119 would apply requiring the Court to presume the fact of dishonour.

As regards the question of discharge, it is one of the pleas of defendant 1. Of course the onus lies upon him to prove it. His allegation is that this bill was drawn in order to pay the price of some diamonds which he bought from defendant 2. He says that at his instance defendant 3 pledged these diamonds as well as some of his own jewels with one Puduvayal firm and that defendant 3 retained this hundi as a sort of security, although afterwards he (defendant 1) paid off the Puduvayal firm and redeemed the jewels by raising the money from one Thenappa Chetty. This Thenappa Chetty has not been examined, although he was present in Court being brought up under warrant. Nor is there any receipt to show payment either to defendant 2 or to the Puduvayal firm. While I am not prepared to say that the entire story of the defence in this connexion is unfounded since there is no explanation forthcoming as to why no action was taken nearly two years after the alleged dishonour, at the same time the onus being on defendant 1 to prove this

plea it cannot be said that the evidence, such as it is, has made it out. However defendant 1 seems to be entitled to succeed on the other points which I have dealt with. Then the learned Advocate-General drew our attention to the unhappy wording of Ss. 91 to 94, Negotiable Instruments Act. S. 91 defines dishonour by non-acceptance, S. 92 defines dishonor by non-payment and says :

" A promissory note, bill of exchange or cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same. "

Section 93 provides for notice being given in cases of dishonour by non-acceptance or non-payment. The learned Advocate-General's argument is that these sections cannot apply to the present case inasmuch as this is not a bill payable after sight or after a fixed date, and therefore there can be no question here of acceptance or non-acceptance. S. 92 which defines dishonour by non-payment only deals, it is said, with the default of the acceptor of the bill and not the default of the drawee in cases where the bill does not require to be accepted. But the effect of this argument, if sound, pushed to its logical conclusion must be that there was no dishonour at all in this case, and the suit must on that account fail, because the effect of S. 30 of the Act is that the drawer of a bill of exchange is bound to compensate the holder only in case of dishonour by the drawee or acceptor. We were referred to S. 37 as also defining the liability of the drawer. That section only says that the drawer of a bill of exchange until acceptance is liable as principal debtor. But if the argument of the Advocate-General is right, there could be no question of acceptance in this case and S. 39 would have no application.

Apart from that, I do not think that the legislature intended to lay down that in the case of a bill payable at sight or on demand there can be no dishonour by nonpayment. In fact such a position seems to me to be so untenable that the Court would not be justified in imputing any such intention to the legislature if it could be helped. As is well known, the Negotiable Instruments Act was based on the principles of English law. The drafting of some of these sections seems to be rather loose, especially as regards the collocation of certain important phrases. For instance S. 93, para. 2, is to this effect:

"Nothing in this section renders it necessary to give notice to the maker of the dishonoured promissory note or the drawee or acceptor of the dishonoured bill of exchange or cheque."

Now, if we were to proceed on the line of interpretation suggested by the learned Advocate-General, then we will have to apply the word "acceptor" to cheques, while in the case of cheques there could hardly have been any question of acceptance within the contemplation of the legislature. Similar wording occurs in other sections as well. For instance, S. 99 says

"when a promissory note or a bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may cause such dishonour to be noted by a Notary Public upon the instrument,"

surely the legislature could not have intended non-acceptance to be applicable to promissory notes and not to bills of exchange, although that will be the result of the order in which the words are allocated. I think the difficulty suggested by the arguments on behalf of the respondent may be met at least in two ways. S. 30 lays down that a drawee is liable to compensate the holder in case of dishonour, provided due notice of dishonour has been given as provided by the Act. Then S. 93 says that in case of non-acceptance or nonpayment of a promissory note, bill of exchange or cheque, the holder must give notice that the instrument has been dishonoured. I take it that what the legislature meant was that notice of dishonour should be given either of non-acceptance or nonpayment, whichever may be the case in the transaction in question. Then S. 94 lays down that such notice must be given within a reasonable time after dishonour. S. 93 indicates the parties to whom notice is to be given in cases where there is a succession of indorsers. But S. 30 is specifically applicable to the case of a drawer, and that read with S. 94 would be sufficient, so far as the liability of the drawer is concerned, to show that notice of dishonour is to be given in reasonable time. But it seems to me to be quite reasonable on the other hand to go further and say that Ss. 91, 92 and 93 were intended to be applicable to a bill payable on demand. It is quite true that the law does not require that in case of such bills there should be a presentment for

acceptance. But if the drawee of a bill payable on demand refused to accept it, its practical effect is refusal to pay and becomes dishonoured by nonpayment. That is to say, there is nothing in law which precludes a bill payable on demand being presented for acceptance, although that may not be necessary. The word "acceptance" is not defined, but "acceptor" is: the drawee becomes the acceptor when he has signed his assent upon the bill. The English Statute Bills of Exchange Act defines acceptance as the signification by the drawee of his assent to the order of the drawer. That is clearly what is implied in the definition of the word acceptor in the Negotiable Instruments Act, and I do not see why it should not apply as much to a bill payable on demand as to a bill payable after sight or on a fixed date. S. 18 of the English Act says that a bill may be accepted when it is overdue. That would apply as well to a bill payable on demand as to a bill payable after sight. S. 30 of the same Act corroborates this interpretation. It says that in the case of a bill payable after sight presentment for acceptance is necessary in order to fix the maturity of the instrument, but in no other case is presentment for acceptance necessary in order to render liable any party to the bill. That implies that there may be presentment for acceptance of a bill payable on demand although it is not required by the law. The Negotiable Instruments Act does not expressly lay down that bills payable on demand or bills other than those payable after sight need not be presented for payment. But this undoubtedly followed from Ss. 61 and 64 which describe the bills that are required to be presented for payment or acceptance.

I am fortified in my interpretation of the Act with respect to this matter by a decision of the Bombay High Court in *Ram Ravji Jambhekar* v. *Pralhaddas Subkarn* (1). That was a case of a bill payable after a fixed date, but it was presented for acceptance before the expiry of that date although the Negotiable Instruments Act does not contemplate such presentment. The drawee refused to accept the bill and it was never presented for payment afterwards. It was held that there was a good cause of action, and the learned Judges observe at pp. 141 and 142 that although the law does not require presentment for acceptance of a bill payable after a fixed date before such date has arrived, yet under the English law it was not only allowable but was strongly advisable to do so, and that the Negotiable Instruments Act made no alteration in that respect. They point out that presentment for acceptance must always and in every case precede presentment for payment, and that the drawer of a bill contracts that whenever a bill is duly presented it will, subject to the provisions of S. 63, be accepted. Then they say when it is dishonoured by non-acceptance, as well as when it is dishonoured by nonpayment, the provisions of Ch. 8 (in which Ss. 91 to 94 occur) come into play. They point out:

> "It is true that there is no explicit declaration of the law upon this subject as in S. 43 of the English Act. But the whole scope and tenor of Ch. 8 of the Indian Act appear to contemplate the same result as is there declared to follow from non-acceptance."

I may also refer to a ruling of the Calcutta High Court in *Jeetun Lall* v. *Sheo Churn* (2), which was before the passing of the Negotiable Instruments Act. It shows that the provisions of the Negotiable Instruments Act are really based on the principles of the English Common law relating to mercantile instruments, and there can be no doubt whatever that, as pointed out there, the law has always been both in England and in India that there must be dishonour and notice of dishonour given within reasonable time in order to sustain an action against the drawee or any other holder of the bill. The appeal of defendant 1 must therefore be allowed and the decree of the Subordinate Judge as against him will be set aside and the suit against him dismissed with costs here and in the Court below.

Oldfield, J.—I agree with my learned brother's decision on the questions of fact and of law. As regards the latter I wish to add only that the law of negotiable instruments is, as it has been described, cosmopolitan; and in the present case, where we have no special considerations arising with reference to the circumstances of Indian business we are justified in endeavouring to read the statute, if it is possible to do so, conformably to the provisions of the English law which

(1) [1896] 20 Bom. 133.

(2) [1865] 2 W. R. 214.

follows the general commercial law of the rest of the world. There is no dispute that under the English law the argument of the learned Advocate-General would be absolutely unsustainable, and a reference to the Bills of Exchange Act is sufficient to show that. In those circumstances it is our duty to scrutinize the language used in the Negotiable Instruments Act most carefully, and I am glad to be able to hold that the refusal to pay referred to in S. 92 includes the refusal to accept such as is contemplated in S. 91, which is a possible, though not an invariable or obligatory, preliminary to payment being demanded at all. That is shortly the ground on which I agree with my learned brother.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 183 (1)

SPENCER AND KRISHNAN, JJ.

Natesa Aiyar—Appellant.

v.

Sattaya Pillai and *another*—Respondents.

Letters Patent Appeal No. 91 of 1917, Decided on 28th July 1918, from judgment of Bakewell, J., in Civil Revision Petition No. 238 of 1916.

Negotiable Instruments Act (26 of 1881), S. 28—Agent of Nattukkotai Chetty firm executing pro-note—Vilasam of firm prefixed to signature—Principal debited with amount in body of note—Agent held not liable.

Defendant 2, who was the agent of a Nattukkottai Chetty, executed a pro-note in favour of the plaintiff to which he put his signature prefixing his principal's vilasam thereto. The amount was expressly debited to the principal, defendant 1, in the body of the note:

Held: that S. 28, Negotiable Instruments Act, did not apply as the executant expressly excluded his personal liability, and that defendant 2 was not therefore liable: 21 *I. C.* 417, *Dist.* [P 183 C 1, 2]

A. V. Viswanatha Sastri and *S. Vaidyanatha Aiyar*—for Appellants.

M. Raghavachari for *V. C. Seshachariar*—for Respondents.

Judgment.—The ruling in *Koneti Naicker* v. *Gopala Aiyar* (1) is not applicable to the present case, as here defendant 2 has signed his name with the initials of the firm of defendant 1 and has expressly stated in the note that the debit was to be against the firm. This is not a case of mere description of the executant as an agent in the body of the note. The words used here exclude the application of S. 28, Negotiable Instruments Act (16 of 1881), as there is sufficient indication in the note that defendant 2 was excluding his personal liability. The principal, defendant 1, has accepted his liability under the note. The plaintiff's case that defendant 2 was a partner of defendant 1 was not established, there being no evidence for it; we do not think the first Court meant to find any partnership. The Letters Patent appeal fails and is dismissed with costs of respondent 1.

S.N./R.K. *Appeal dismissed.*

(1) [1913] 38 Mad. 482=21 I. C. 417.

A. I. R. 1919 Madras 183 (2)

SESHAGIRI AIYAR, J.

Koppaka Chandrayya—Petitioner.

v.

F. W. R. Robertson and *others*—Opposite Parties.

Civil Revn. Petn. No. 4 of 1918, Decided on 6th January 1919, against decree of Dist. Judge, Vizagapatam, in Civil Miscellaneous Appeal No 3 of 1917.

(a) Civil P. C. (1908), O. 21, Rr. 89 and 90—Application by prior vendee of portion of property to set aside sale is not maintainable.

A purchaser at a private sale from a judgment-debtor of a portion only of certain properties, which are subsequently sold in execution of a decree, is not entitled to ask that the execution sale be set aside on the ground that the amount of the decree has been fully paid by himself and other purchasers of the rest of the property: 27 *I. C.* 952, *Foll.* [P 183 C 2; P 184 C 1]

(b) Civil P. C. (1908), O. 21, Rr. 89 and 90—Application by prior vendee of portion of property to set aside sale dismissed—High Court will not interfere.

An order dismissing an application does not give rise to any question of jurisdiction and is not open to interference by the High Court in revision. [P 184 C 1]

(c) Civil P. C. (1908), S. 115—Wrong decision on question of law is no ground to interfere.

A mere wrong decision on a question of law is not a ground for revision under S. 115: *A. I. R.* 1917 *P. C.* 71 (*P.C.*), *Foll.* [P 184 C 1]

R. Narasiham—for Petitioner.

V. Ramesam—for Opposite Parties.

Judgment.—In this case the petitioner purchased the property privately from the judgment-debtor. Other persons had purchased portions of the property before him; counter-petitioner 2 is an auction-purchaser. The contention of the petitioner is that as he himself and the previous vendees have paid the full amount of the decree the sale should be set aside. The lower appellate Court held, following the decision of this Court in *Karunakara Menon* v. *Krishna*

Menon (1), that as the petitioner paid only a portion of the amount he is not entitled to ask that the auction should be set aside. That decision has been sought to be distinguished before me. In my opinion the lower appellate Court is right in holding that the present case is covered by the authority cited by the lower appellate Court. Even apart from this view I fail to see what question of jurisdiction there can be for interference under S. 115, Civil P. C. As was pointed out by the Judicial Committee in *Balakrishna Udayar* v. *Vasudeva Aiyar* (2), the mere fact that a wrong decision has been given on a question of law would not enable an appellate Court to interfere with the order of the Court below under S. 115. For both these reasons I uphold the judgment of the Court below and dismiss the petition with costs of respondent 2.

S.N./R.K. *Petition dismissed.*

(1) [1915] 39 Mad 429=27 I. C. 952.
(2) A. I. R. 1917 P. C. 71=40 Mad. 793=40 I. C. 650=44 I. A. 26 (P.C.).

A. I. R. 1919 Madras 184

SADASIVA AIYAR AND NAPIER, JJ.

Abdur Samad Sahib—Plaintiff— Appellant.

v.

Chinnathambi Sahib and *others*—Defendants—Respondents.

Second Appeal No. 1512 of 1917, Decided on 14th August 1918.

(a) Mahomedan Law—Succession—Great-grandfather's greatgrandfather's descendant in agnatic line is preferred toDaughter's son.

Under Mahomedan Law the great-grandfather's great-grandfather's descendant in the agnatic line is entitled to succeed to the estate of the propositus as a residuary heir in preference to his daughter's son. [P 185 C 1]

(b) Mahomedan Law—Succession—Agnates—Residuary heirship extends to agnate descendants of a "true" grandfather however high.

Agnates, however remote, are entitled to inherit as residuaries in the absence of nearer agnates and residuary heirship is not confined either to the father's descendants or to grandfather's grandfather's descendants, but extends to the agnate descendants of a "true" grandfather, however high in scale. [P 185 1, C 2]

(c) Mahomedan Law—Succession—"Grandfather."

The word "grandfather" indicates, in Mahomedan Law, an ancestor in the paternal line, however remote. [P 185 C 2]

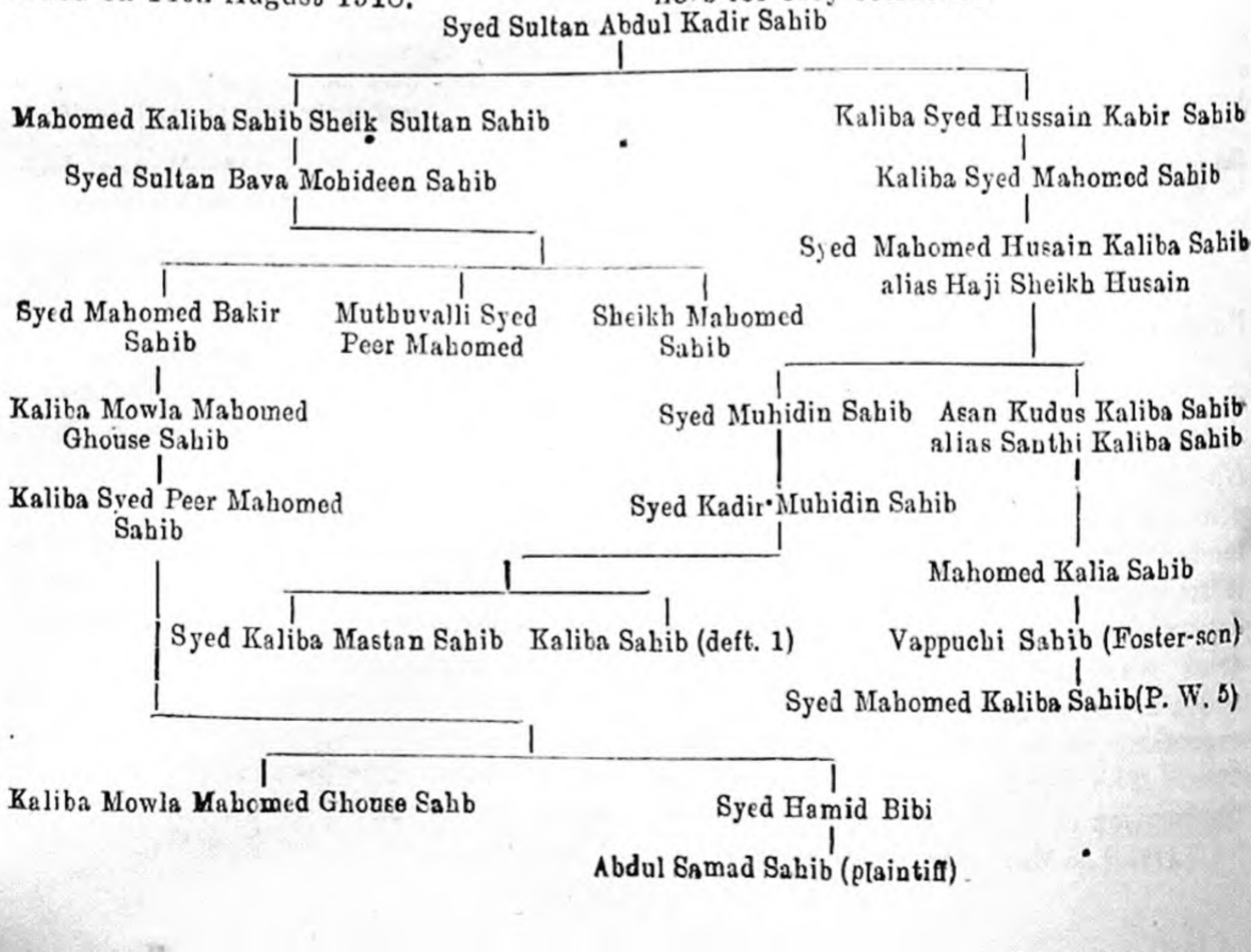
(d) Mahomedan Law — Succession — Examples are not exhaustive.

The examples given in the Mahomedan texts are only illustrative, not exhaustive. [P 185 C 2]

T. R. Ramachandra Aiyar and *N. M Malim Sahib*—for Appellants.

T. V. Venkatarama Aiyar, *R. Kuppuswami Aiyar* and *V. Pattabhirama Aiyar*—for Respondents.

Judgment.—The plaintiff is the appellant. The genealogical tree found at p. 16 of the printed papers is admitted to be correct and I shall reproduce it here for easy reference:



On one question of fact which was in dispute in this case, namely whether plaintiff was appointed by his maternal grandfather Syed Peer Mahomad Sahib to the office of Kalibath, I take it that the lower appellate Court finds against the plaintiff in the negative, and that finding being a finding of fact is binding on us in second appeal. I shall, now assume (without deciding) the validity of the plaintiff's contention that his maternal grandfather, Syed Peer Mahomed Sahib who held Kaliba office till 1913 for more than 50 years, was the full and sole owner of that office at his death and that it was a hereditary office to which Peer Mahomed Sahib's heir was entitled to succeed. On that assumption, the question of Mahomedan Law which arises for decision is, whether the plaintiff (the daughter's son of the last holder of the office) is entitled to inherit it as the nearest kindred or whether defendant 1, who is descended from the great-grandfather's great grandfather of the deceased in the agnate line, as residuary, is the next heir. The plaintiff's contention is that the great-grandfather's great-grandfather's descendant is not a residuary heir at all under the Mahomedan Law, it being admitted by him that the residuaries inherit under the Mahomedan Law, in priority to distant kindred. The contention of the appellant is that agnates who are descended from an ancestor more remote than the grandfather's grandfather are not residuaries in their own right according to the Mahomedan Law. So far as the descendants of the grandfather's grandfather are concerned, he is obliged to make the admission that they are residuaries because even the original texts relied on by him (from the Durrul Mukhtar, Sirajiya and Fatawa Alamgiri) do mention the descendants of the grandfather's grandfather as residuaries.

As regards the descendants of remoter ancestors, we have got two direct decisions one (so long ago as in 1805) in *Shah Ilahi Buksh* v. *Shah Gasim Ali* (1) and the other in *Mahomed Haneef* v. *Mahomed Masoom* (2). These decisions interpret the texts of the Mahomedan Law as laying down that agnates, however remote, are entitled to inherit as residuaries in the absence of nearer agnates, that residuary heirship is not confined either to the grandfather's (father's father's) descendants (as argued in some cases) or to grandfather's grandfather's descendants, but extends to the agnate descendants of a "true" grandfather however high in scale. In those two cases the right of a person descended from a remoter ancestor than the grandfather's grandfather was upheld. The learned Judges evidently treat the examples given in the texts (which extend only up to the grandfather's paternal uncle's descendants) as merely illustrative and not exhaustive. All the notable text-writers including Bailee, Ameer Ali, Sarcar and Wilson (see the table at p 291 of Wilson's Digest, 4th Edn.) adopt the same interpretation of the texts. In two decisions of this Court also: *Mohidin Ahmad Khan* v. *Sayyid Muhammad* (3) and Indian Jurist, Old Series the same interpretation is followed. The word "grandfather" seems to be used to indicate an ancestor in the paternal line however remote, in the Mahomedan Law books just, as the word "pitamaha" in Sanskrit is used to denote even the remotest ancestor of man, Brahma himself. I do not think I am competent to pass criticisms on all the above Mahomedan Law authorities, and the criticisms we have listened to from Mr. T. R. Ramachandra Aiyar on them have not satisfied me that they fell into any error in formulating their considered opinions as above. Following them, I hold that defendant 1, though descended from the great-grandfather's grandfather of the propositus, is (as an agnate descended from the nearest ancestor of Peer Mahomed who has left descendants in the male line) to be preferred as Peer Mahomed Sahib's heir to the plaintiff who is only a daughter's son (a cognate) and who comes therefore among the inferior class of distant kinsmen. I shall repeat that it is unnecessary to decide whether the Kalibath office was really a hereditary office in the hands of Peer Mahomed as the plaintiff's suit fails even if it was so. The Second appeal is therefore dismissed with costs, two sets.

The memorandum of objections is dismissed. There will be no costs.

S.N./R.K. *Appeal dismissed.*

(1) [1805] Sel. Rep. (Beng.) 131.
(2) [1874] 21 W. R. 371.
(3) [1862] 1 M. H. C. R. 92.

A. I. R. 1919 Madras 186 (1)

SADASIVA AIYAR AND SPENCER, JJ.

Narasimhayya—Plaintiff—Appellant.

v.

Srinivasayya and *others*—Defendants—Respondents.

Second Appeal No. 1561 of 1917, Decided on 30th October 1918, against decree of Sub-Judge, South Canara, in Appeal Suit No. 59 of 1917.

Interest—Post diem—Liability to pay—Intention of parties how to be considered stated.

Post diem interest is payable on a mortgage bond on the general promise by the debtor to be liable for interest, though a definite term is fixed in the bond for repayment of principal and interest. If the liability under that general undertaking to pay interest is further extended by another undertaking which may be called appurtenant to the principal undertaking to pay interest upon arrears of interest and this further undertaking is found in the same document following the provision to pay interest, the intention of the parties must be deemed to be that both the principal and appurtenant undertaking should apply to the question of liability for post diem interest : 19 *All.* 39 (*P. C.*) ; 20 *All.* 171 (*P. C.*) ; 23 *Mad.* 534 and 11 *M. L. J.* 183, *Foll.* ; 17 *All.* 511 (*P. C.*) and 26 *I. C.* 124, *Dist.* [P 186 C 1]

B. Sitarama Rao—for Appellant.

K. Y. Adiga—for Respondent.

Judgment.—We think we are bound by the Privy Council decisions in *Mathura Das* v. *Raja Narindar Bahadur* (1) and *Bindesri Naik* v. *Ganga Saran Sahu* (2) and the decisions of this Court in *Ghantayya* v. *Papayya* (3) and *Ramanathan Chetty* v. *Nur Muhamad Marakayar* (4) to hold that post diem interest is payable on the general promise by the debtor to be liable for interest, though a definite term is fixed in the bond for repayment of the principal and interest. If the liability under that general undertaking to pay interest is further extended by another undertaking (which may be called appurtenant to the principal undertaking) to pay interest, upon arrears of interest and which further undertaking is found in the same document following the provision to pay interest, it is difficult to hold that the parties intended that only the principal undertaking should apply to the question of the liability for post diem interest and not the appurtenant undertaking also. As regards *Chajmal Das* v. *Brij Bhukan Lal* (5) that was decided before *Mathura Das* v. *Raja Narindar Bahadur* (1) and their Lordships, after reluctantly agreeing with the High Court that there was no covenant to pay post diem interest, gave interest by way of damages taking the principal undertaking alone as a guide for the measure of damages and not the appurtenant undertaking also. *Thaithottathil Pokkar* v. *Ramchandra Shenoy* (6) is a similar case. These decisions are of no assistance when considering the question as to whether compound interest is allowable where post diem interest is granted on the covenant and not as damages in the absence of a covenant. On the other hand, the decisions in *Bindesri Naik* v. *Ganga Saran Sahu* (2) and *Ramanathan Chetty* v. *Muhamad Marakayar* (4) proceed on the view that both the covenants can be availed of by the creditor in respect of post diem interest.

We therefore allow the second appeal and restore the decision of the District Munsif dismissing with costs the defendants' appeal to the lower appellate Court. The respondents will pay appellant's costs in this Court. Six months' time will be allowed for payment from this date.

S.N./R.K. *Appeal allowed.*

(1) [1897] 19 All. 39=23 I. A. 138 (P. C.).
(2) [1898] 20 All. 171=25 I. A. 9 (P. C.).
(3) [1900] 23 Mad. 534.
(4) [1901] 11 M. L. J. 183.
(5) [1895] 17 All. 511=22 I. A. 199 (P. C.).
(6) [1915] 26 I. C. 124.

A. I. R. 1919 Madras 186 (2)

KUMARASWAMI SASTRI, J.

V. S. Santhanam Aiyangar—Petitioner.

v.

Srinivasaraghavan and *others*—Opposite Parties.

Civil Misc. Petn. No. 1790 of 1918, Decided on 23rd August 1918.

Civil P. C. (5 of 1908), O. 41-A, R. 2—Party not served with notice of appeal has right to apply to set aside ex parte order—Madras High Court (Appellate Side) Rules. R. 42.

Rule 42 of the Appellate Side Rules of the Madras High Court does not prevent a party who has not been served with notice of appeal, from applying to set aside any order passed ex parte in the appeal on the ground that he has not entered appearance. He cannot be penalized for not entering appearance by losing his right to receive notice of interlocutory applications, when such applications are made within the time limited for his entering appearance. [P 187 C 2]

K. S. Jayarama Aiyar—for Petitioner.

T. R. Ramachandra Aiyar, *P. R. Ramakrishna Aiyar* and *K. Bhashyam*—for Opposite Parties.

Judgment.—This is an application to set aside the order passed by me on 12th July 1918, allowing the appellants to file an additional ground of appeal and to amend the valuation of the appeal. Notice of the application to amend was not given to respondent 6, and the order was passed without hearing him. O. 41-A, R. 2, Cl. 2, Civil P. C., provides that, unless otherwise ordered, the period for respondent to enter appearance shall be 25 days from the service of notice upon him, and that if he wants to appear and defend the appeal, he should enter appearance within that period. R. 42 of the Appellate Side Rules provides that notice of an application to amend a memorandum of appeal should be given to all parties who have entered appearance. I do not think that R. 42 prevents a party, who has not been served with the notice on the ground that he has not entered appearance, from applying to set aside the order passed ex parte. If any penalty is attached for his not entering appearance within the time limited, that penalty can only arise when the period fixed for entering appearance has expired. It will be against all principles of equity to hold that a person should be punished for not entering appearance by losing his rights to receive notice of all interlocutory applications, when such applications are made within the time limited for his entering appearance. In the present case the applicant was declared a major on 27th March 1918 and he got notice of appeal in the usual course entitling him to enter appearance on 8th July. The petition to amend the memorandum of appeal was filed on 25th April and no notice was sent to him, the appellant relying on R. 42 referred to above.

I am of opinion that respondent 6 ought to have had notice of the application and that he is entitled to have the ex parte order set aside so far as he is concerned and to be heard on the merits. I accordingly set aside the order of 12th July. As the pleadings and grounds of appeal have been printed, I think the best thing to do will be to direct that the application for leave to file additional grounds and amend the valuation be posted before the Bench hearing the appeal. The additional ground need no additional printing, as the ground raises a pure question of law, and as the appeal is filed in forma pauperis, no delay need be caused by the amendment of the valuation. There will be thus no necessity for any adjournment of the appeal by reason of the petition being posted for hearing with it. Leave is granted to all the parties to file such additional affidavits as they may consider necessary in one month. I make no order as to costs.

S.N.R.K. *Petition allowed.*

A. I. R. 1919 Madras 187

KRISHNAN, J.

K. Venkatarama Chetty In re—Defendant—Petitioner.

Civil Revn. Petn. No. 74 of 1918, Decided on 15th February 1918, from order of Small Cause Court, Madras, in Ejectment Suit No. 36 of 1918.

Presidency Small Cause Courts Act (1882), S. 41—Suit to eject from portion of house—Rent of portion being less than Rs. 1000 - Suit is cognizable by Small Cause Court—Decision of question of title for exercise of jurisdiction—Revision is incompetent—Civil P. C. S. 115, Govt. of India Act S. 107.

A suit to eject a tenant of a portion of a house, the rent of which is less than Rs 1,000 per annum, is cognizable by a Presidency Small Cause Court, though the annual rent of the whole building exceeds Rs. 1,000. [P 187 C 2]

In such a suit, where the Court goes into the question of title to enable it to exercise jurisdiction, its order cannot be set aside by the High Court as being without jurisdiction. [P 188 C 1]

V. C. Seshachariar and *Raghavachariar*—for Petitioner.

Judgment.—The first point taken is that the learned Judge has not found that plaintiff is the next reversioner. There is no suggestion that there are any other reversioners and I take the finding of the lower Court that plaintiff is the reversioner to mean that he is the next reversioner. It is argued that though the rent payable by the defendant is only Rs. 6 a month, the annual rent of the whole building of which defendant is occupying a part should be taken into consideration for deciding the jurisdiction of the Small Cause Court under S. 41 of the Act. Defendant having become a tenant of only one or two rooms, this suit has reference only to those rooms and it seems to me that as the rent payable by him annually is much less than Rs. 1,000, the suit comes within the cognizance of the Presidency Small Cause Court.

It is also argued that the Small Cause Court should not have gone into any question of title but where the Court goes into the question to enable it to exercise

its jurisdiction, its order cannot be set aside as being without jurisdiction. There is no ground for interference under S. 115, Civil P. C., nor under S. 107, Government of India Act. The civil revision petition is dismissed.

S.N./R.K. *Petition dismissed.*

A. I. R. 1919 Madras 188

MOORE, J.

Pullannavara Hanumantha, In re.—Accused—Petitioner.

Criminal Revn. No. 282 of 1919, and Criminal Revn. Petn. No. 236 of 1919. Decided on 15th September 1919, against judgment of Sess. Judge, Bellary, in Criminal Appeal No. 22 of 1919.

Criminal P. C. (1898), S. 423—Altering finding though maintaining sentence should not be done if prejudice is caused by alteration in charge.

Although an appellate Court has power under S. 423 to alter the finding of a lower Court, while maintaining the sentence, it ought not to use such power if the accused would be prejudiced by the omission to prove the altered charge and if the defence might have been of a different character had the altered charge been framed in the first Court. [P 189 C 1]

S. Swaminathan—for Petitioner.

Public Prosecutor—for the Crown.

Judgment.—The petitioner and five other persons were convicted of the offence of rioting armed with deadly weapons (S. 148, I. P. C). On appeal the Sessions Judge of Bellary altered the finding in the case of the petitioner (accused 1) to one under Ss. 326 and 511, I. P. C., and maintained the sentence but reversed the convictions of the other accused. The facts, as found by the lower Courts, are shortly these: There had been ill feeling between accused 6 and P. W. 4, the Sub-Inspector of Police of Kowtalam, and there was a charge against accused 6 of having wrongfully confined P. W. 4 and P. W. 8. The Sub-Inspector of Adoni, who had been deputed to investigate the case, learning that accused 6 had sent for some bad characters from Halvy to commit offences against the police, deputed a party of Head Constables and Constables with instructions to watch the path from Halvy, and to catch any Halvy people or strangers who might pass that way. Soon after midnight on 7th May 1918 the police, who were lying in ambush, saw ten or fifteen persons approaching armed with weapons, and surrounded them. In the melee the petitioner aimed a blow with a battle axe at one of the Constables (P. W. 2). The latter warded off the blow with his lathi which was cut, but no hurt was actually caused to P. W. 2. Five persons including the petitioner were illegally arrested by the police. The Subdivisional Magistrate framing a charge under S. 148, I. P. C., against accused 1 to 5 improperly omitted to state in the charge what the common object of the unlawful assembly was. The charge as framed was in these terms:

"Iha you at Halvy armed with deadly weapons, i. e., battle axes, taxes, and sticks, committed rioting and attempted to strike P. Ws. 1, 2, 3 and 5, and that accused 1 aimed a blow with his battle axe at P. W. 2".

The Sessions Judge came to the conclusion that it was not proved that the accused were members of an unlawful assembly, that the conduct of the accused showed that it was not their intention to attack the police, that the police had no right to arrest the accused merely because they saw them coming along the road and that no offence had been committed by accused 2 to 6. The Sessions Judge was however of opinion that a clear case under Ss. 226 and 511, I. P. C., had been made out against the petitioner and that the petitioner was not justified in using violence and aiming a blow with an axe before any arrest had been effected by the police. Dr. Swaminathan for the petitioner contended that the Sessions Judge acted illegally in altering the conviction under S. 148, I. P. C., into one of more serious offences under Ss. 326 and 511, I. P. C., that such an alteration of finding is not warranted by the provisions of S. 423, Criminal P. C., and that the facts found would not justify a conviction under S. 326, I. P. C., read with S. 511, I. P. C. Under S. 423 (1) (b), Criminal P. C., an appellate Court has the power to alter the finding of the lower Court maintaining the sentence.

It is urged that in cases not falling under Ss. 237 and 238, Criminal P. C., the appellate Court cannot convict a person of an offence with which he was not charged in the first Court, and reliance is placed on the decisions in *Padmanabha Payi Panniah* v. *Emperor* (1), Criminal Revision Case No. 83 of 1919, *Mongalu Aorodhone Hathi*, *In re* (2) and *Golla Hanumappa* v. *Emperor* (3). In *Mangalu*

(1) [1910] 33 Mad. 264=5 I. C. 145.
(2) [1917] 41 I. C. 828.
(3) [1912] 35 Mad. 243=10 I. C. 372.

Aorodhone Hathi v. *Emperor* (2) it was held by a Bench of this Court, following *Dasarath Mandal* v. *Emperor* (4), that when persons were convicted of rioting and acquitted on appeal, but were convicted by the appellate Court of house trespass and hurt (Ss. 448 and 323, I. P. C.), the convictions were illegal on the ground that the accused could not be convicted of offences with which they were never charged. It is no doubt true that although hurt is generally caused in rioting, it does not necessarily follow that hurt is so caused. In this case however the charge, although it was carelessly drawn up, distinctly sets out that accused aimed a blow with his axe at P. W. 2. The true principle appears to be that laid down in *Yakub Ali* v. *Lethu Thakur* (5), namely that if the accused have been prejudiced by the omission to prove the altered charge and if the defence might have been of a different character had the altered charge been framed in the first Court, the appellate Court should not use the power vested in it by S. 423, Criminal P. C., to give such an altered finding. This was the view taken by Sadasiva Aiyar, J., in *Mannar Krishnan Chetty, In re* (6) and I respectfully adopt it. It is suggested that the petitioner was prejudiced in his defence, as he had no opportunity of pleading that he was justified in resisting the illegal arrest and that in attempting to cause hurt he acted in the exercise of the right of private defence. It was open however to the petitioner to put forward this plea in the lower Court. He denied having used violence and in fact the defence was that accused 1 to 5 were arrested not on the Halvy path but while they were passing the police station at Kowtalam. The lower Court found that the petitioner commenced the assault and aimed a blow at P. W. 2, which struck the lathi he was carrying.

The conviction of the petitioner under Ss. 326 and 511, I. P. C., is not, I think, bad in law, but the sentence, one year's rigorous imprisonment, is, in my opinion, much too severe. The police appear to have acted in a high-handed and illegal manner. I confirm the conviction but reduce the sentence to one of three months' rigorous imprisonment. The petitioner must surrender to his bail and serve the unexpired portion of the sentence. I see no reason to interfere with the order directing the petitioner to give security under S. 106, Criminal P. C.

S.N./R.K. *Sentence reduced.*

(4) [1907] 34 Cal. 325.
(5) [1903] 30 Cal. 288.
(6) [1916] 35 I. C. 816.

A. I. R. 1919 Madras 189

AYLING AND KRISHNAN, JJ.

Wallace Sitha Bai—Petitioner.

v.

Wallace Radha Bai—Opposite Party.

Civil Revn. Petn. No. 35 of 1918, Decided on 8th October 1918, from order of Dist. Judge, Tanjore, in Interlocutory Appeal No. 363 of 1917 (in Original Petn. No. 775 of 1916).

(a) Guardians and Wards Act (1890), S. 4 (2)—De facto guardian is guardian.

A de facto guardian is a guardian within the meaning of S. 4 (2). [P 189 C 2]

(b) Guardians and Wards Act (1890), Ss. 4 (2) and 7 (2)—Appointment of statutory guardian removes de facto guardian.

The appointment of a statutory guardian under the Act, ipso facto removes a de facto guardian from guardianship under S. 7 (2) of the Act. [P 189 C 2]

(c) Guardians and Wards Act (1890), S. 41 (3)—Court can require de facto guardian to deliver minor's property to statutory guardian.

It is competent to the Court to require a de facto guardian under S. 41 (3) to deliver the minor's property in his possession to a guardian appointed or declared under the Act. [P 189 C 2]

(d) Guardians and Wards Act (1890), Ss 48 and 41 (3)—"Orders made under the Act" does not cover requisition.

Section 48, which refers to "orders made under the Act", does not cover the case of a requisition" under S. 41 (3) of the Act. [P 190 C 1]

B. Narasimha Row—for Petitioner.

K. V. Krishnaswami Aiyar and *C. A. Seshagiri Sastri*—for Opposite Party.

Judgment.—In this petition we are asked to interfere in revision with the proceedings of the District Judge of Tanjore requiring a de facto guardian (grandmother) of a minor under S. 41 (3), Guardians and Wards Act, to hand over a house as one belonging to the minor. We can find no ground for interference. The term "guardian" in the sections must be understood in the light of the definitions in S. 4 (2) and would include the present petitioner. The latter was ipso facto removed from guardianship under S. 7 (2) by the Court's order appointing the minor's mother to be guardian. The District Judge has not exceeded his jurisdiction and petitioner must be referred to a suit to establish, if she can, her title to the house. We may remark that S. 48, Guardians and Wards

Act, which refers to "orders made under the Act" would not cover the case of a "requisition" under S. 41 (3), of the Act: vide reference to the latter in S. 45 (1)(c).

The petition is dismissed with costs.

S.N./R.K. *Petition dismissed.*

A. I. R. 1919 Madras 190

SADASIVA AIYAR AND NAPIER, JJ.

The Sessions Judge of Tanjore, In re.

Criminal Misc. Petn. No. 169 of 1918, Decided on 9th July 1918, against order of Sess. Judge, Tanjore, D/- 11th April 1918.

(a) **Criminal P. C. (1898), S. 233—S. 233 does not apply to inquiry by committing Magistrate.**

An inquiry before a committing Magistrate is not a trial and does not come within the prohibition contained in S. 233. [P 191 C 1]

(b) **Criminal P.C. (1898), Ss. 195, 197, 531 and 537—Commitment without sanction to prosecute in case requiring sanction—Order of commitment cannot be quashed—Sessions Judge can acquit accused on ground of want of sanction.**

An order of commitment to the Sessions Court cannot be quashed on the ground that the Magistrate took cognizance of the complaint without the sanction required by Ss. 195 and 197. Ss. 531 and 537 apply to such cases, and their applicability is not affected by the fact that objection to want of sanction was taken at the earliest possible opportunity: 35 *I. C.* 826, *Diss. from.* [P 190 C 2]

Semble.—A Sessions Court has power to acquit the accused in a case committed to it on the ground of want of sanction. [P 190 C 2]

G. Krishnaswami Aiyar and *K. S. Jayarama Aiyar*—for Accused.

Public Prosecutor—for the Crown.

Sadasiva Aiyar, J.—This is a reference by the Sessions Judge of Tanjore asking us to quash the commitment made to his Court by the Third Class Magistrate of Arantangi. The accused are four in number, the charge against accused 1 and 3 being that they committed offences under Ss. 193, 465, 466 and 471, I. P. C., in connexion with the document Ex. D and the charge against accused 1, 2 and 4 being that they committed similar offences in connexion with the document Ex. N. The order of the Magistrate committing the accused falls under S. 213 (1), Criminal P. C. Before the Sessions Judge it was argued by the Public Prosecutor that under the provisions of Ss. 531 and 537, Criminal P. C., a superior Court had no power to set aside the Magistrate's order of commitment, granting that the Arantangi Magistrate had no territorial jurisdiction over the place where accused 3 and 4 are alleged to have committed the offences, and granting further that sanctions under Ss. 195 and 197, Criminal P. C., were required as regards some or all of the accused. The Sessions Judge overruled the above contention founded on Ss. 531 and 537. I am however unable to agree with the Sessions Judge that Ss. 531 and 537, Criminal P. C., are not applicable.

I further respectfully dissent from the decision in *Zahir Singh* v. *Emperor* (1), in which it was held that where the objection based on want of sanction is taken at the earliest opportunity, S. 537 would not cover the case of proceedings conducted by a Magistrate in the absence of necessary sanction against the accused. In the case of *Sankaralinga Tevan* v. *Avudai Ammal* (2) the provisions of S. 537 were evidently not brought to the notice of the learned Judge who decided it. The committing Magistrate himself might have refused to take cognizance of the case in the absence of sanction. It may also be that the Sessions Judge is entitled to acquit the accused on the ground of want of sanction, as S. 537 prohibits only the Court before whom the case comes on appeal or revision from treating the want of sanction as material, unless it had occasioned a failure of justice. (It could only be in very exceptional cases that mere want of sanction could itself occasion a failure of justice). It is next urged that as regards Ex. N

"there is no evidence to show that it was not drawn up as it stands now on the date it bears, and that Ss. 465 and 471, I. P. C., have no application to the manufacture of such a document as there is no legal evidence before the committing Magistrate on which a conviction could be based under these sections."

This Court has got the power to set aside a commitment only on a question of law. I was at first inclined to hold that the commitment of accused 1, 2 and 4, so far as it related to the acts alleged against them in connexion with Ex. N, might, under the peculiar circumstances of this case, be so set aside. But my learned brother thinks that this a matter which ought to be more appropriately dealt with by the Sessions Judge himself

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(1) A. I. R. 1915 All. 110=37 All. 283=28 I.C. 646.

(2) [1916] 35 I. C. 826.

in the proceedings before him, and I do not wish to press my own view of the matter. (We express no opinion on the question whether sanction is or is not required as that question does not properly arise before us at this stage of the case.)

As regards misjoinder, S.233, Criminal P. C., no doubt prohibits the joint trial of separate charges with respect to separate transactions. But an inquiry before a committing Magistrate is not a trial and does not come within the prohibition contained in S. 233, and we are asked by this reference to deal only with the proceedings of the committing Magistrate, the trial itself having to take place before the Sessions Judge hereafter. Of course, the Sessions Judge has got power in a proper case to hold separate trials as regards separate offences so as not to contravene the provisions of S. 233. He has also got the power to acquit if there is no legal evidence, and the Public Prosecutor also would no doubt in a proper case withdraw the prosecution if there is no legal evidence to support it. But all this has to be done in the proceedings before the Sessions Judge and so far as the order of the Magistrate committing the accused is concerned, I do not think that sufficient reason has been shown for quashing that order.

I would therefore decline to accept the reference and would order the records to be returned to the Sessions Judge.

Napier, J.—I agree.

S.N./R.K. *Records returned.*

A. I. R. 1919 Madras 191

OLDFIELD AND SESHAGIRI AIYAR, JJ.

Chowkaran Pazhe Parambath Cheria Kunhi Pocker—Defendant—Appellant.

v.

Chowkaran Pazhe Parambath Malikaimmal Valia Bappolty — Plaintiff — Respondent.

Second Appeal No. 1998 of 1918, Decided on 22nd August 1919, against the decree of Temporary Sub-Judge, Tellicherry, in Appeal Suit No. 699 of 1916.

(a) Malabar Law — Tarwad—Kanom by karnavan found not binding—Junior member can sue on behalf of Tarwad for not merely declaration but possession.

Where a karnavan of a Malabar tarwad grants a kanom which is found not to be binding on the tarward, and the tenants of the tarwad attorn to the alienee, an anandravan or a junior member of the tarwad has the right to sue for possession of the alienated properties on behalf of the tarwad, and his remedy is not confined to merely suing for a declaration. [P 191 C 2]

(b) Possession—Receipt of rent is possession—Rival claimants can sue for possession without impleading tenants in possession.

Receipt of rent is possession which can be recovered in a suit. Where tenants are in actual possession rival claimants to the property can sue for possession without impleading the tenants as defendants: 33 *Mad.* 452, *Appl.*; 17 *Mad* 232 and 3 *I. C.* 41, *Dist.* [P 192 C 1]

(c) Malabar Law—Tarwad—Alienee of tarwad is stranger and can be sued by other members.

The position of an anandravan who gets an alienation of the tarwad properties is not different from that of a stranger. If he ousts the tarwad, he may be sued by the other members just as if he was a stranger. [P 192 C 2]

K. P. M. Menon—for Appellant.

C. Madhavan Nair—far Respondent.

Judgment.—This is a suit by a junior member of a tarwad who obtained permission to conduct the suit on behalf of all its members for possession of certain tarwad properties. The predecessor of the present karnavan, defendant 1, gave a kanom in 1904 to defendant 2 under Ex. 10. Thereupon the tenants of the tarwad attorned to defendant 2 and paid him rent. It was found by both the lower Courts that there was no consideration for the kanom and that it is not binding on the tarwad. The only ground urged by Mr. Menon in second appeal is that the possession of the defendant, if any, must be deemed to be possession of the tarwad and that the only remedy open to an anandravan under the circumstances is to sue for a declaration. He also contended that this is a subterfuge to evade the law of limitation as a suit for declaration would have been barred. Strong reliance was placed upon *Padammah* v. *Themona Ammah* (1) for this contention. There can be no doubt that, on the facts found by the lower Courts and accepted in second appeal by the High Court, that judgment was right. It was found in that case that the karnavathi, although she executed certain deeds in favour of her daughters, did not part with possession of the alienated properties. There was no finding that the tenants paid any rent to the transferees. In these circumstances it was held that an anandravan can secure the rights of the tarwad by suing for a declaration without any consequential relief as to possession.

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(1) [1894] 17 Mad. 232.

There are no doubt observations in that judgment about "unity of possession" and about the possession of the tenant being the possession of the tarwad, etc. But they must be read with the facts of the case and do not support the contention that under no circumstances can a junior member of a tarwad sue for possession if the tarwad had parted with possession, The next case, *Parakandyolparkun Kishakkayil* v. *Kilath Puthiya Purayil Ahmad* (2), is clearly distinguishable from the present case. In that case what stood between the tarwad and defendant 3, the alienee, was a piece of paper under which no possession passed. The learned Judges must be taken to have held that this impediment in the way of the tarwad, which might at any time endanger its rights, might best be removed by obtaining a declaration that the document was invalid. Neither of the two decisions quoted by the learned counsel is authority for the broad proposition that a rightful owner can never sue for possession unless he wants physical possession.

The acceptance of such a contention would mean that, in cases where tenants are actually in possession, rival claimants cannot seek to recover possession unless all the tenants are impleaded as defendants. R. 36, O. 21, Civil P. C., to which Mr. Madavan Nair drew our attention negatives this proposition. It has been held in *Rathnasabapathi Pillai* v. *Ramasami Aiyar* (3) that a receipt of rent by a trustee is possession which can be recovered in a suit. In *Jagannatha Charry* v. *Rama Rayer* (4) it was held that where tenants are actually on the land, and the defendant collected rent from them, it was a matter to which the provisions of S. 9, Specific Relief Act, relating to possession applied. These decisions support the view taken by the Courts below that a suit like the present one is maintainable. Mr. Menon suggested that the position of an anandravan who obtains a kanom and gets attornment is different from that of a stranger. The character in which an alienee anandravan holds possession will depend upon how far he ousts the tarwad, and not upon whether he is a member of it or not. If the tarwad is ousted then the possession of the ouster, whether he be a member of it or not, is as injurious to the tarwad as ouster by a stranger and the member in possession must be sued as if he was a stranger. The principle is not inconsistent with the observations in *Padammah* v. *Themana Ammah* (1). For these reasons the second appeal fails and must be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(2) [1909] 3 I. C. 41.
(3) [1910] 33 Mad. 452=5 I. C. 630.
(4) [1905] 28 Mad. 238.

A. I. R. 1919 Madras 192

AYLING AND KRISHNAN, JJ.

Venkatasawmi Naik and *another*—Defendants—Appellants.

v.

Sivanu Mudali and *another*—Plaintiffs and Defendants—Respondents.

Civil Misc. Appeal No. 174 of 1918, Decided on 27th November 1918, against order of Dist. Judge, Tinnevelly, in Appeal Suit No. 86 of 1917, D/- 26th November 1917.

(a) Civil P. C. (5 of 1908), Ss. 37, 38—Mortgage decree passed by Court having no territorial jurisdiction over hypotheca—Application for execution cannot be presented to Court having jurisdiction without transfer of decree from Court which passed it.

A mortgage decree was passed by the Additional Munsif's Court of Tinnevelly, which had no jurisdiction over the hypotheca but which was established only to aid the other Courts. An application for execution was made to the Koilpatti Munsif's Court which had jurisdiction over the hypotheca, but without a transfer of the decree from the Additional Munsif's Court which had not ceased to exist:

Held: that the Koilpatti Munsif's Court had no jurisdiction to execute until the decree was transferred to it by the Court which had passed it. [P 193 C 1]

(b) Civil P. C., (1908), Ss. 38 and 39—Transfer cannot be made to validate invalid application.

No transfer of a decree should be made for execution so as to evade the provisions of the Limitation Act or to validate an invalid application. [P 193 C 1]

L. A. Govindaraghava Aiyar—for Appellants.

M. D. Devadoss—for Respodents.

Judgment.—The appeal turns solely on the question of whether the District Munsif of Koilpatti had jurisdiction to entertain a petition (Execution Petition No. 190 of 1916) presented to him for execution of a mortgage decree passed by the Additional District Munsif of Tinnevelly in Original Suit No. 280 of 1906 on his file. Territorial jurisdiction over the hypotheca sought to be brought to

sale in execution of the mortgage decree admittedly lay with the Koilpatti Court while the Tinnevelly Court had no local jurisdiction at all, but was established simply to aid the other Courts of the District, by disposing of suits transferred from their file. There had been a transfer of territorial jurisdiction to the Koilpatti Court from that of Srivilliputtur in which the suit had originally been filed; but it is agreed that this circumstance makes no difference to the question for disposal, and we may consider the latter as if territorial jurisdiction had always been with the Koilpatti Court. No order had been passed transferring the decree under S. 24 or S. 39, Civil P. C., and the question is whether in these circumstances the Koilpatti Court had jurisdiction to execute it under S. 38, Civil P. C., as the Court which passed it. In our opinion the answer must be in the negative. S. 37, Civil P. C., gives an extended significance to the term "Court which passed a decree," but contains nothing applicable to the present case.

The Tinnevelly Court has certainly not ceased to exist and it cannot be said to have ceased to have jurisdiction to execute its own decree. Whatever jurisdiction as regards execution it possessed at the time of passing the decree, it still possesses. In fact this portion of S. 37, Civil P. C., clearly has reference to transfers of territorial jurisdiction from one Court to another. We must therefore hold that the Koilpatti Court had no jurisdiction to execute the decree, unless and until the decree-holder got the decree transferred to it for execution. The order of the Koilpatti District Munsif rejecting the execution petition was therefore right. In the concluding portion of his judgment, the District Judge directs that his order allowing execution should operate as a transfer of the decree to the Koilpatti Court's file; but, in so doing, he appears to have overlooked the fact that at the date of his order an application for execution would apparently have been time-barred unless petitioner could claim the benefit of S. 14, the Lim. Act, a point which has not been considered. No transfer order should be made so as to evade the provisions of Lim. Act, or to validate an invalid application. The District Judge's order must be set aside and that of the District Munsif restored with costs to the appellant throughout.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 193

AYLING AND NAPIER, JJ.

Parappati Chinna—Petitioner.

v.

T. P. K. Shankunni Menon—Opposite Party.

Criminal Revn. No. 698 of 1918, and Criminal Revn. Petn. No. 563 of 1918, Decided on 26th March 1919, against order of Subdivl. Magistrate, Malapuram, in Misc. Case No. 28 of 1918.

(a) Criminal P. C. (5 of 1898), S. 488—Offspring of Malabar Sambandam marriage are not entitled to maintenance where mother can be maintained by tavazhi.

The offspring of a Malabar Sambandam marriage are not entitled to an order for maintenance under S. 488, where the tavazhi or tarwad to which their mother is attached has sufficient funds to maintain them: 39 *Mad.* 957, *Foll. Case-law reviewed.* [P 193 C 2]

(b) Criminal P. C. (5 of 1898), S. 488—Words "unable to maintain itself" refer to not only its age but financial dependency.

Per *Napier, J.*—The words "unable to maintain itself" in S. 488, Criminal P. C., cannot be confined to the tender age of the child but must also have reference to its financial dependency. [P 194 C 2]

(c) Criminal P. C. (1898), S. 489—Tarwad funds becoming insufficient is change of circumstances within S. 489.

Where the amount available from the tavazhi or tarwad funds becomes insufficient to maintain the children, that would be a change of circumstances within the meaning of S. 489 of the Code. [P 195 C 1]

(d) Criminal P. C. (1898), S. 1—Term Special law has no reference to local family law.

The expression "special law" in S. 1, has reference to statutory enactments and not to local family law. [P 194 C 2]

C. Madhavan Nair—for Petitioner.

S. Swaminathan—for Opposite Party.

Public Prosecutor—for the Crown.

Ayling, J.—Petitioner and respondent in this case are both Nairs following Marumakatayam law, and the four children in respect of whom petitioner claims maintenance are the offspring of a sambandam between them. The Subdivisional Magistrate finding that petitioner's tavazhi, from which the children admittedly had a right to maintenance, was able to maintain them, has dismissed the petition relying on the ruling in *Chantan* v. *Chakkapayyan Mathu* (1). I was a party to that decision and after hearing the matter re-argued I see no reason to change

(1) [1916] 39 Mad. 957=32 I. C. 144.

my mind. It seems to me that the object of including the maintenance sections (Ch. 36) in the Criminal P. C., can only have been the prevention of destitution on public grounds; and that it should only be applied in cases where, in the absence of these provisions or the more cumbrous process of civil law, the wife or children would be destitute. Its unrestricted application to a society governed by a system of law like the Marumakatayam system is open to the peculiar objection and danger that it runs counter to the central i leas underlying the matriarchal system and should in my opinion only be allowed to the extent absolutely necessary to secure the object at which it is aimed. I would therefore dismiss the petition.

Napier, J.—This petition arises out of an order passed by the Subdivisional Magistrate of South Malabar, dismissing a petition by a certain Nair lady asking for an order for maintenance for her children against the respondent. The findings are that the petitioner is a Nair and has been observing the Marumakatayam system, that she began sambandam with the respondent in 1908-09 and between the years 1908 to 1917 four children were born, all of whom were to the respondent. The respondent denied the paternity, but the Magistrate has found it and I certainly accept that finding. The petitioner belongs to a tavazhi consisting of her mother, herself and her family and one Achutan Nair. The lower Court has not found what the income of the tavazhi is nor has it given any finding as to the income of the tarwad. All it finds is that the tavazhi lands are of some value and able to maintain the children, though not well. On this finding the Magistrate applies a decision of this Court in *Chantan* v. *Chakkapayan Mathu* (1) and holds that no order can be made. *Chantan* v. *Chakkapayyan Mathu* (1) entirely holds that the words "unable to maintain itself" mean "not having a right to be maintained." It is argued before us that this decision is wrong as being in conflict with other decisions of this Court, and it is pointed out that in the last reported case no one appeared for the petitioner. The question has now been fully re-argued before us and we have examined those cases. The first contention argued is that the section does not apply to persons following Marumakatayam law, as that is a special law within the meaning of S. 1, Criminal P. C. This view has been directly negatived in *Ayya Patter* v. *Kaliani Ammal* (2), *Kariyadan Pokkar* v. *Kayat Beeran Kutti* (3) and *Venkatakrishna Patter* v. *Chimmukutti* (4) and I have no doubt that those words in S. 1 have reference to statutory enactments and not to local family law.

I have therefore to consider whether apart from S. 1, Ch. 36 is applicable. In my opinion we must read the section in such a manner as to be properly applicable to the various social conditions of this country. The section is certainly old, as is to be found in the Act of 1861. But we have to bear in mind its origin. In so far as illegitimate children are concerned, it owes its origin to the old English Act, 7 and 8 Vic. C. 101, which gave a right to a woman either before or after the birth of her illegitimate child to apply for an order against the father, and it has been held that the origin of this law is the prevention of vagrancy.

Bearing this in mind I think that we should give a meaning to the words "unable to maintain itself" which is in keeping with the legal position of the parties who are affected. There is no doubt as to the position of the children of a sambandam in Malabar. That system of law is matriarchal and the children are entitled to be maintained by their tavazhi or tarwad. Whatever other rights they have there can be no doubt that in this respect the Marumakatayam system differs completely from the Hindu law in the rest of the Presidency, the Mahomedan law and the English law. I am therefore strongly inclined to think that the words "unable to maintain itself" cannot be confined, as suggested, to the tender age of the child but must also have reference to its financial dependency. This view seems to me to gain support from other words in the section. The first are the words almost directly after those words "a monthly allowance for the maintenance." That clearly points to the object of the payment which is to be ordered, and it seems to me that if the payment is not required for maintenance it necessarily follows that the payment

(2) [1899] 22 Mad. 247=3 M. L. J. 281.=2 Weir 624.
(3) [1896] 19 Mad. 461=2 Weir 621.
(4) [1899] 22 Mad. 246=2 Weir 625.

should not be ordered. Then there are the words in S. 489, "change in the circumstances." If the words "child unable to maintain itself" had reference only to the tender age of the child, it seems to me that so wide a word as "circumstances" would not have been used in this latter section. If it is only a question of age a child cannot grow younger, it can only grow older, and that change can hardly be called a change of circumstances. The word is very applicable if a wider scope is intended. If, for instance, in this case the tavazhi lost all its money and there was nothing left for the child for maintenance, that would undoubtedly be a change of circumstances. In the same way if an order had originally been made in consequence of the poverty of the tavazhi and it was brought to the notice of the Court that the tavazhi had become possessed of wealth, that would be a change of circumstances. So far for the words of the section. Now for the cases.

The first is one of 1893 reported as *Ayya Patter* v. *Paliani* (2). That was also a case of sambandam between a Nair woman and a Brahmin. The Magistrate found that the tarwad was too poor to take the responsibility off the shoulders of the respondent, but he also held that the words in question had only reference to age. The revision petition was heard by Collins, C. J., and Shephard, J. The judgment however is very short. The Bench negatives the suggestion that the law enacted by the Code does not apply to Malabar and says that on the facts found there is no doubt that the order is right. The next case is *Kariyadan Pokkar* v. *Kayat Beeran Kutti* (3). The parties were Moplahs, but the Magistrate did not find whether they followed the Mahomedan or the Marumakatayam law. The Magistrate found that the defendant was willing to maintain the mother and the child if they lived with him, and on that finding held that no order could be made. The petition was heard by Collins, C. J., and Parker, J., and it appears that the complainant was the karnavan of the mother's tarwad and was acting as de facto guardian of the children. The Bench negatived the proposition that S. 488 did not apply to Malabar and held that S. 1 was not a bar to the petition. The learned Judges then formulated two questions: (1) Are the children legitimate or illegitimate children of the defendant; and (2) has he neglected or refused to maintain them. They decided nothing but raised the following question:

> "If the parties follow Marumakatayam law, the question will arise whether the father could be held to have neglected his duty to provide for his children if they were being actually maintained by the karnavan of their mother's tarwad who is bound by law to maintain them."

It seems to me that the Bench rather assumed that the words "unable to maintain itself" were not confined to the question of the tender age of the child. The next case is *Venkatakrishna Pattar* v. *Chimmukutti* (4) That was also a case of sambandam between persons governed by the Marumakatayam law. The Magistrate held that the petitioner, the mother, had no means of maintenance for her child and made an order against the father for Rs. 5 a month. The revision petition was heard by Collins, C. J. and Benson. J., and the judgment is as short as in *Ayya Patter's* case (2), which was expressly followed without any reference to *Kariyadan Pokhar* v. *Kayat Beeran Kutti* (3):

> "We have no doubt but that the Magistrate believed the woman and found that the petitioner before the High Court was the father of the child. He is therefore liable."

I certainly find it impossible to reconcile the wide language of this judgment with the doubts expressed in *Kariyadan Pokkar* v. *Kayat Beeran Kutti* (3) and I have little doubt that the learned Chief Justice took a strong view of the matter and that Parker, J., who sat with Collins, C. J., in the case reported as *Kariyadan Pokkar* v. *Kayat Beeran Kutti* (3) did not agree with him. The next case is *In re Parathy Valappil Moideen* (5). In that case the parties were Moplahs governed by Marumakatayam law. The petitioner had been divorced and was living in her own tarwad house with her children and it was assumed that they were being maintained. It was also found that the father was willing to take the boy and maintain him. The father petitioned this Court and the case was heard by Sadasiva Aiyar, J. He directly held that the inability referred to in the section relates to the absence of sufficient maturity of physical and mental development in the child rendering it in consequence unable to earn its living by its own efforts, and does not re-

(5) [1913] 21 I. C. 469.

for to inability through poverty or absence of means.

That this is the considered view of our learned brother has been demonstrated to us by the quotation of a decision of his as Chief Justice of the Travancore State which we have carefully considered. The last case is that reported as *Chantan* v. *Chakkapayyan Mathu* (1). There it was found that the children were in fact maintained by the tavazhi, but the Magistrate made the order. The petitioner applied to the High Court and his case was argued by a vakil, no one appearing for the mother. Abdur Rahim, J., in his judgment refers to the judgment of Sadasiva Aiyar, J., and says that he was unable to accept the narrow meaning of the words "unable to maintain itself" and holds that where the child is in fact maintained by some other person as of right, the section does not apply. The learned Judge also points out that the procedure is summary and does not cover the same ground as the civil liability of a father to maintain his child, and is of opinion that the legislature did not contemplate a summary order of this sort in a case where a child is well to do. He points out that in the case of *Kariyadan Pokkar* v. *Kayat Beeran Kutti* (3) the Bench did seem to suggest that children who were actually being maintained by their mother's tarwad were not entitled to maintenance. My learned brother concurred in this view.

On an examination of these cases there is no doubt that there ia a difference of opinion. Collins, C. J., seems to have taken a very strong view in two cases, but he was a party to *Kariyadan Pokkar* v. *Kayat Beeran Kutti* (3) where the opposite view was suggested. The decision of my learned brother Sadasiva Aiyar, J., is entitled to great respect, but it is the decision of a single Judge; whereas the decision in *Kariyadan Pokkar* v. *Kayat Beeran Kutti* (3) is that of a Bench. If I thought the latter decision was wrong I should have asked my learned brother to agree to its being referred to a Full Bench. But as on the policy of the provision and on the language of S. 1, I concur with the latter ruling, I would follow it and dismiss the petition. I would however point out that if the mother of the child can at any time show that the amount available from the tavazhi or possibly from the tarwad funds is insufficient to maintain the child it is open to her to renew her application.

S.N./R.K. *Petition dismissed.*

A. I. R. 1919 Madras 196

SESHAGIRI AIYAR AND PHILIPS, JJ.

Mukku Venkataramiah—Plaintiff—Appellant.

v.

Mukku Chinnaiah and *others*—Defendants—Respondents.

Second Appeal No. 1091 of 1918, Decided on 24th April 1919, against decree of Dist. Judge, Nellore, in Appeal Suit No. 278 of 1917.

(a) Civil P. C. (1908), O. 41, R. 33—Scope and object of R. 33 stated—Though order against person not party to appeal should be interfered with great care and caution relief to non-appealing party can be granted.

The object of O. 41, R 33, is to enable an appellate Court to pass judgments or orders which would give consistency to its decisions and although the power to interefere with an order against a person who is not before it should be exercissd with great care and caution, the discretion of the Court to grant relief which benefits a party who has not appealed is not hampered. 28 *I. C.* 694 and *A. I. R.* 1915 *Mad.* 227, *Foll*; 42 *I. C.* 972 *Expl.*

The principle that no decree or order should be passed against a person without hearing him does not apply where the non-appealing party is benefited by the order. [P 197 C1]

(b) Civil P. C. (5 of 1908), O. 41, R. 33—Illustration is not exhaustive.

The illustration to O. 41, R. 33, is not exhaustive of the scope of the rule. [P 197 C 1]

(c) Civil P C. (5 of 1908) O. 41, R. 33—Interference benefiting party necessary—He may be impleaded to enable him to execute decree in his favour.

Where interference with a decree in favour of a party not before the Court is deemed necessary, the Court should implead him in the exercise of its plenary powers so that he may avail himself of the benefit of the decree in execution. [P 197 C1]

Y. Adiga—for Appellant.

T. V. Vencatramier—for Respondents.

Judgment.—The first question argued by Mr. Adiga is that as Rs. 10,000 was paid in furtherance of an agreement which fell through, that sum should not be regarded as having been paid in satisfaction of the common decree. The answer to this is that in the application for execution as regards the balance of Rs. 5,000 the Rs. 10,000 was referred to as having been paid in part satisfaction, and the present plaintiff did not object to this statement. It is not open to him now to contend that the Rs. 10,000 was not paid

towards the decree. We must therefore uphold the order of the District Judge.

It was next objected that as the District Munsif passed several decrees against each of the defendants and as only some of them appealed against the decrees so passed, it was not competent to the District Judge to act under O. 41, R. 33, Civil P. C., in favour of the defendants who did not appeal. The language of the rule is wide enough to cover the case. The use of the two words "respondents" and "parties" shows that the legislature contemplated interference by the appellate Court even though some of the parties to the suit were not before it. This was the view taken in *Venkatachela Pillai* v. *Ranga Pillai* (1) and in *Peria Krishnasami Naik* v *Aiyappa Naik* (2). As against these cases, the learned vakil relied on the judgment of Kumaraswami Sastri, J., in *Ramachandra Mallya* v. *Narayana Hegade* (3). The learned Judge rightly enough points out that no decree should be passed against a person without hearing him; but we do not think that this principle is applicable where the party who is not heard is not prejudiced by the order but if benefited by it. The learned Judge relies upon the illustration to R. 33; but that illustration is not exhaustive of the scope of the rule. The very object of the rule is to enable a Court to pass judgments or orders which would give consistency to its decisions and although the power to interfere with the order against a person who is not before it should be exercised with great care and caution, there is no ground for introducing into the language of the rule words which would unnecessarily hamper the Court's discretion. We may also say that in the majority of cases where interference with a decree in favour of a person not before the Court is deemed necessary, the Court should implead him in the exercise of the plenary powers possessed by it, so that the benefit of the decree may be availed of in execution. We think the order of the District Judge is right and dismiss the second appeal with costs.

S.N./R. K. *Appeal dismissed.*

(1) [1915] 28 I. C. 694.
(2) A. I. R. 1915 Mad. 227=24 I. C. 924.
(3) [1917] 42 I. C. 972.

A. I. R. 1919 Madras 197

SESHAGIRI AIYAR AND BURN, JJ.

S. M. Mydeen Rowther—Defendant—Appellant.

v.

H. M. A. Abdul Gaffur Rowther—Plaintiff—Respondent.

Appeals Nos. 6 and 7 of 1919, Decided on 28th July 1919, against appellate orders of Dist. Judge, Tinnevelly, in Appeal Suits Nos. 91 and 95 of 1918.

(a) Civil P. C. (1908), S. 48 (2)—Use of fraud or force to extend time need not be of within three years.

A decree-holder, availing himself of the plea of force or fraud under S. 48, (2) as saving limitation in respect of an execution application made after 12 years after date of decree, is not restricted to proving that the fraud or force occurred within three years of the application. He is entitled to the benefit of the proviso even if the fraud or force was long anterior in date: 8 *M. L. J.* 203, *not Appr.*; 22 *Mad* 320 and 35 *Mad* 670, *Foll.*; 34 *All* 20, *Appr.* [P 198 C 1]

(b) Civil P. C. (1908), S. 11—Failure to plead saving of limitation does not bar pleading in subsequent execution application.

The failure to plead the saving of the limitation bar in an application for execution will not operate as res judicata for a subsequent application. [P 198 C 1]

K. Ramachandra Aiyar—for Appellant.

M. D. Devadoss—for Respondent.

Judgment.—The decree under execution was passed on 2nd March 1905. The present application for execution was made on 4th October 1917, clearly more than 12 years after the date of the decree. The question is whether the bar is saved by the operation of Cl. (2), S 48, Civil P.C. The lower appellate Court held in favour of the decree-holder. Mr. Ramachandra Aiyar for the appellant contended, first, that the respondent is barred by res judicata from presenting the application under execution On 11th April 1917 the decree-holder applied to the Court to allow him to convert an execution application filed by him for the arrest of the judgment-debtor into one for the attachment of his property. In the appellate Court it was held that the application to amend was a fresh application and that in that view it was barred by limitation. The learned vakil contends that it was open to the decree-holder to have pleaded in that application that he was prevented by force or fraud from filing his application earlier and that this failure operates as res judicata now. Even granting that to execution applications all the dis-

abilities which attach to a plaintiff failing to plead are applicable, we are clear that, when an applicant wants his application to be treated as one in time, it cannot be said that he ought to have pleaded that there was fraud or force which prevented him from applying in time. We overrule this contention.

The second point was that the fraud which was pleaded in extenuation of the failure to apply in time was a long time anterior to the date of the last application and that consequently the decree holder is not entitled to the benefit of Cl. (2), S. 48. Even granting that the rigid test insisted on by Shephard, J., in *Seshachalam Chetti* v. *Rajam Chetty* (1) is the proper one, we are of opinion that the application to arrest the judgment-debtor on 14th February 1916 satisfied that test. The matter was not disposed of till March 1917. Further in *Venkayya* v. *Raghavacharlu* (2) impliedly and in *Abdul Khadir* v. *Ajiyar Ahammad* (3) Sundara Aiyar expressedly did not act on the view taken by Shephard, J. We are inclined to agree with the view taken in the later cases. We are supported by *Moshin Ali* v. *Masoom Ali* (4) in our conclusion. We think the lower appellate Court is right and dismiss Civil Miscellaneous Second Appeal No. 6 of 1919 with costs and Civil Miscellaneous Second Appeal No. 7 of 1919 without costs.

S N./R K. *Appeals dismissed.*

(1) [1898] 8 M. L. J. 203.
(2) [1899] 22 Mad. 320=8 M. L J. 79.
(3) [1912] 35 Mad. 670=12 I. C. 679.
(4) [1912] 34 All. 20=11 I. C. 672.

A. I. R. 1919 Madras 198 (1)

AYLING AND KRISHNAN, JJ.

Durugamma Poojari Bheemappa—Defendant—Appellant.

v.

Durugamma Poojari Timakka—Plaintiff—Respondent.

Second Appeal No. 918 of 1917, Decided on 16th August 1918, against decree of Temporary Sub-Judge, Bellary, in Appeal Suit No. 153 of 1916.

Hindu Law—Religious endowment—Performance of puja—Woman can get puja performed by proxy.

Under Hindu law a woman can get puja performed in a temple by a proper proxy. The choice of the proxy is not limited to the other sharers who are entitled to perform puja in their turn. [P 198 C 2]

V. S. Narasimha Ayyangar—for Appellant.

T Rangachariar—for Respondent.

Judgment.—The question whether a woman can get puja performed in a temple by a proper proxy is now settled by the ruling ef the Full Bench in *Annaya Tantri* v. *Ammaka Hengsu* (1). The appellant contends that the plaintiff's choice of proxy must be limited to the other sharers who were entitled to perform puja in their turn. This was put as a matter of special custom in the plaint temple in the lower appellate Court, but that Court has found against it and we must accept the finding. It is now argued before us that it is a rule of Hindu law. Colebrook's Digest, Book 2, Ch. 3, S. 2, R. 21. is relied on. We do not think that rule has anything to do with the choice of proxies at all; nor is it shown to be in force in this Presidency. The second appeal fails and is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1918] 41 Mad. 886=47 I. C. 341.

A. I. R. 1919 Madras 198 (2)

SESHAGIRI AIYAR, J.

Somu Pathar and *another*—Defendants—Petitioners.

v.

Rangasawmi Reddiar and *another*—Opposite Parties.

Civil Revn. Petn. No. 813 of 1917, Decided on 16th April 1918, from decree of Dist. Judge, Tanjore, in Appeal Suit No. 423.

(a) Civil P. C. (1908), O. 21, Rr. 2 and 3—Attachment of decree held by judgment-debtor—Application for entering of satisfaction of decree attached opposed as collusive by attaching creditor—He must prove fraud.

Where a decree-holder attaches a decree held by his judgment-debtor and an application by the latter for entering up satisfaction of such decree is opposed by the attaching creditor on the ground that it is collusive and fraudulent, the onus lies on him to prove the fraud, and not on the judgment-debtor to prove the bona fides of the certificate. [P 199 C 1]

(b) Civil P. C. (1908) O. 21, Rr. 2 and 3—Court seised of application to enter up satisfaction—Inquiry must be made—Grant of permission to withdraw justifies revision

When once a Court is seised of an application to enter up satisfaction of a decree it is bound to make an inquiry and see whether the decree has been satisfied, and it will not be justified in allowing the application to be withdrawn. [P 199 C 1]

The permission to withdraw in such a case is a grave irregularity warranting the interference of the High Court in revision. [P 199 C 2]

(c) Civil P. C. (1908), S. 115—Scope.

Where injustice is done in the exercise of jurisdiction the High Court should interfere.

[P 199 C 2]

R. Seturama Sastri—for Petitioners.

S. Muthiah Mudaliar—for Opposite Parties.

Judgment. — Although the point argued is not free from difficulty and I have a doubt whether S. 115, Civil P. C., is applicable to the case, I shall express my opinion fully so that if the matter be taken in appeal it can be properly dealt with then. The petitioners in this case are the judgment-debtors in Original Suit No. 333 of 1912. One Rangaswami Reddi obtained in a small cause suit a decree against the decree-holder in Original Suit No. 333 of 1912 and attached the decree in the latter suit. That was in August 1914. In December 1915 the decree-holder in Original Suit No. 333 of 1912 applied to the District Munsif's Court to enter up satisfaction of his decree. At this time the attachment at the instance of the decree-holder in the small cause suit had been effected. This application for satisfaction being entered up was opposed by the attaching decree-holder. In consequence of the opposition by the attaching creditor the decree-holder in Original Suit No. 333 of 1912 withdrew the application. The attachment proceedings were allowed to continue.

I find from the papers that notice was served upon defendant 1 in Original Suit No. 333 of 1912, the father of the petitioners, and that he stated in person that the decree was satisfied. In these circumstances it was the duty of the attaching decree-holder to have adduced evidence to show that the decree was not satisfied. I cannot accede to the contention of Mr. Muthia Mudaliar that the burden of proving the bona fides of the certificate is upon the judgment-debtor who said that he had paid the money and the decree-holder who said that he had received the money; and in these circumstances it is upon persons, who allege that the certificate was collusive and was intended to defraud them, to adduce evidence to establish the facts. The District Munsif and in appeal the District Judge have come to the conclusion that as the application for satisfaction was withdrawn it is not open to the petitioners to plead that the decree in Original Suit No. 333 of 1912 was satisfied. The learned vakil for the petitioners drew my attention to O. 21, R. 2, Cls. 1 and 3.

The first clause makes it the duty of the decree-holder to certify the payment, and when that application is before the Court the Court is directed to record satisfaction. Cl. 3 says that a payment or adjustment which has not been certified or recorded shall not be recognized by the executing Court thereby implying that if there is either a certificate by the decree-holder or the recording of satisfaction by the Court, the executing Court is bound to take notice of the fact. The decision in *Tarak Nath Sarkar* v. *Natabar Mondal* (1), which I respectfully follow, holds that a mere certificate is enough to enable the judgment-debtor to plead that the decree has been satisfied. As myself and Kumaraswami Sastri, J., held in *Lodd Govinda Doss* v. *Rajah of Karvetnagar* (2), when once a Court is seised of an application to enter up satisfaction, it is bound to make an enquiry and see whether the decree has been satisfied. I do not think that the Court will be justified under the circumstances in allowing the application to be withdrawn.

It seems to me that in this case the Courts below ought to have made an inquiry whether the application to enter up satisfaction was made bona fide and whether the payment allsged to have been made by the judgment-debtor to the decree-holder in Original Suit No. 333 of 1912 was actually made. In my opinion this is an irregularity which will warrant the interference of this Court under S. 115, Civil P. C. What the Courts below have done is practically to refuse to exercise the powers given to them under O. 21, R 2. That would amount to a refusal to exercise the jurisdiction vested in them. I am free to confess that S. 115 can be invoked in this case. Some Judges may hold that this is straining the language of S. 115. I have always held that wherever there is injustice done in the exercise of jurisdiction, the High Court should interfere. Therefore I incline to the view that S. 115 is applicable to this case. I would reverse the orders of the Courts below and send the case back to the District Munsif for proper inquiry regarding the question whether the payment was really made by the

(1) [1915] 30 I. C. 45.
(2) [1915] 30 I. C. 357.

judgment-debtor to the decree-holder in Original Suit No. 333 of 1912, and if so whether there was any subsisting interest capable of being attached by the attaching decree-holder. Costs will abide the result

S.N./R.K. *Case remanded.*

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*A. I. R. 1919 Madras 200

COUTTS-TROTTER, J.

Sukkulal Sowcar—Plaintiff.

v.

A V. Tirumala Row Sahib—Defendant.

Civil Suit No. 278 of 1917, Decided on 27th February 1918.

***Contract Act (1872), S. 74—"Penal"—Meaning explained—Agreement by borrower in return for smaller sum to repay larger one on given day representing principal and interest is not penal.**

An agreement by a borrower, in return for a smaller sum to repay a larger one on a given day representing the original principal and interest, is not contrary to law [P 202 C 1]

In such a case the Court cannot award relief under S. 74 as the transaction is not penal in its nature: *Willingford* v. *Mutual Society*, (1880) 5 *A. C.* 685, *Foll*; 13 *I.C.* 853, *Diss. from.*

"The word "penal" in S. 74 has a bearing only when there is a main contract and a subsidiary contract providing for some more drastic consequences in the event of the breach of the original and main contract It is totally inapplicable to a term of the original contract or consequence of the original contract not owing to breach but owing to fulfilment. [P 201 C 1,2]

Defendant executed a pro-note to plaintiff for Rs. 10,000 promising to repay the amount with interest at 24 per cent. per annum. On the same day he gave a letter to plaintiff in which he agreed to discharge the said loan by monthly payments of Rs. 500, for which he executed 20 hundis, one to be cashed each month. The amount paid by plaintiff in cash was only Rs. 6,000. In a suit to enforce the pro-note:

Held: that the transaction, though oppressive, was not penal within the meaning of S. 74, Contract Act. [P 201 C 2]

M. A. Tirunarayanachari and *P. Kandaswami*—for Plaintiff.

V. Ramesam—for Defendant.

Judgment.—This is a suit on a promissory note and an equitable mortgage of properties securing it. The plaintiff is a Sowcar and the defendant is the Jagirdar of Arni represented by the manager of his estate as his guardian. It is an estate under the Court of Wards and his interests are represented by Mr. V. Ramesam, the Government Pleader. The contract is this: It is a promissory note, dated 18th July 1915, in the ordinary form for Rs. 10,000.

"On demand I promise to pay Sukkulal Sowcar or order at Madras, the sum of rupees ten thousand only with interest at 24 per cent per annum for value received in cash."

That is the promissory note and that is accompanied by two other contemporaneous documents one of which is not of very great importance, because it only shows what was done, which I am going to describe presently. The other is a letter signed by the defendant in which he says this:

"I have this day borrowed and received from you the sum of Rs. 10,000 upon the equitable mortgage of the stable No. 2110 Madaran Paracherry, Egmore, Madras, for the repayment of the amount of the promissory note payable on demand with interest at 24 per cent. per annum. I have this day executed for the repayment of the amount of the said promissory note, 20 hundis of Rs. 500 each authorizing you to cash each hundi every month on the due date and credit the sum so realized towards the said pro-note. If the amount of the said hundis is not paid by me you are at liberty to proceed against me for the recovery of the amount of the said hundis and credit the same on footing of the said promissory note".

And then a document is executed which shows what was done. There was paid Rs. 4,500 in cash and a balance of Rupees 1,500 outstanding on an old promissory note of 1914 was wiped out. The remaining Rs. 4,000 is described in this way:

"Paid interest for 20 months in respect of the promissory note for Rs. 10,000 dated this day on condition of repayment of the amount of the said pro-note by monthly instalments of Rs. 500 for which 20 hundis of Rs. 500 each and executed this day in your favour'

This is the transaction on the documents. One has to see what the real transaction was. Treating the extinction of the old promissory note as cash, he did not get Rs. 10,000 at all, but only Rs. 6,000, and he agreed to pay all the interest on Rs. 10,000 to treat that as paid in advance, and to repay Rs. 10,000 by 20 hundis of Rs. 500 each. So that on the face of it at best he got a loan of Rs. 6,000 with an obligation to repay Rs. 10,000 in 20 months which worked out at something like 40 per cent, and not 24 per cent, as described in the contract. But there are two other features about this matter which make the interest, though it would require an expert mathematician to work it out, very much more oppressive than that. In the first place, but for the payment of the interest as a whole in advance, the defendant would have had the advantage of having in his hands all the interest at

any given time which remained unpaid. If he paid it as stipulated he would have the use of it for the whole ol the gradually diminishing period during the 20 months instead of the user passing forthwith to the plaintiff. In the second place, while he is paying—consider that the interest was paid at the end instead of at the beginning—month by month Rs. 200, in fact what he is doing is to pay a consolidated interest on the total which is in fact constantly diminishing. So that every month he is in fact paying a higher rate of interest because, whereas he pays on Rs. 10,000 for the first month, the next month he pays off Rs. 500 and still pays interest on Rs. 10,000 although the captial has been reduced by the payment of Rs. 500 and so on. That will have the effect of spreading a little more interest over smaller sums and the rate of interest will increase until you get the astounding result in the last month that he pays Rs. 200 for the month's use of Rs. 500 which works out at very nearly 500 per cent. In this state of things the question I have to consider is, whether the plaintiff is entitled to enforce this contract as it stands, or whether there is any provision of law which enables me to give relief to the defendant. It is an unconscionable bargain but I have not got a Money-lenders Act to give relief against a bargain merely because it is oppressive and catching and no plea has been raised here of undue influence or pressure or anything of that kind. So that the sole question I have to ask myself is: Is there any provision of law administered in this country that enables me to attack or give relief against this transaction? I need hardly say that if I possibly could I would have done so.

The first way in which Mr. Ramesam puts his case is that put down in his pleadings. He says this case comes under S. 74, Contract Act, being penal. I asked him what was penal. He said what is penal is to treat a loan of Rs. 6,000 as a loan of Rs. 10,000 and make the interest payable in advance. I think that both the English and the Indian Courts have finally established the principle that the word penal or penalty has a bearing, as Ayling, J., puts it, only when there is a main contract and a subsidiary contract providing for some more drastic consequences in the event of the breach of the original and main contract. That seems to me what is meant by penalty, and I do not think anything can be brought under the operation of S. 74 which is a term and stipulation of the main contract between the parties. A common instance of such a penal stipulation is the familiar one that on failure of payment of one instalment the whole shall become due. That is the penalty for the breach of what the contracting party has undertaken to do. Against such penalties the Courts can, if they choose, give relief. But it seems to me that the word penalty is totally inapplicable to a term of the original contract or consequence of the original contract not owing to breach but owing to fulfilment, and what Mr. Ramesam complains against is not in consequence of the breach but in consequence of the fulfilment of the contract; if I fulfil this contract according to its tenor, he says, these are the consequences and these I say are penal. They may be oppressive, but in my opinion they are not penal within the meaning of the Contract Act and the decided cases.

In relation to this a decision of Sir Basil Scott and Bachelor, J., *Velchand Chhaganlal* v. *A. Flagg* (1), was referred to. It does certainly appear from the decree there that where a larger sum was recited to have been lent—Rs. 6,000—but in fact by the deduction of interest a smaller sum was lent, the Court undoubtedly seems to have treated the loan in its judgment as being a loan for the lesser amount. There is no report of the arguments and the judgment gives no reasons whatever for the result arrived at and does not discuss the matter in the least. All I can say is that the result of the case which is apparently embodied in the headnote is one that is absolutely unintelligible to me. No reasons, as I say are given and it is not necessary for me to say that I think the case is wrongly decided. I can only say that as reported, it is absolutely unintelligible and I see that my brother Ayling in *Suryadevara Seetaramayya* v. *Suryadevara Katayya* (2) made similar observations with regard to this very same case at p. 114. I therefore think that it is impossible to give relief under

(1) [1912] 36 Bom. 164=13 I. C. 853.
(2) [1916] 25 I. C. 111.

this contract to the defendant under S. 74.

Mr. Ramesam puts forward a most ingenious argument and one which if I thought verged on soundness I should certainly give effect to. It is this. All through—neglect the fact that I paid interest at the start—I was paying interest on money which I had not got because the moment I paid off Rs. 500 for the first hundi there was only Rs. 9,500 to pay interest on but I paid interest on Rs. 10,000 and so on until the capital has gone to Rs. 500 and the interest is still on Rs. 10,000, that is, quoad Rs. 9,500 as it was discharged there was total failure of consideration. I think he wants me to go so far as to say that the whole stipulation to pay interest was vitiated by that feature. It seems to me that you cannot break up this contract into bits and treat each monthly payment as a separate contract. It seems to me that the contract is indivisible. I do not think it can reasonably be described as a loan of Rs. 10,000 —I think in truth it is a loan of Rs. 6 000 with an agreement to pay Rs. 500 a month which goes in reduction of principal and interest until the sum of Rs. 10,000 has been paid off.

Whether you regard one particular portion of it as re payment of interest and another as re-payment of principal does not matter. I think there is no law in this country which either forbids such a transaction or allows a Court to give relief against it. It simply is a re-payment of Rs. 10,000 spread over a certain period in return for a loan of Rs. 6,000 and I am totally unable to see that there is anything illegal or improper about such a matter according to the law of this country and I think that the well known observations of Lord Hatherley in *Wallingford* v. *Mutual Society* (3) apply, where in a decision before the Money-lenders Act in English and after the repeal of the Usury Acts the House of Lords held that an agreement in return for a smaller sum to repay a larger one on a given day representing the original principal and interest was not contrary to law. I must hold the same with regard to this agreement and I must give judgment for the plaintiff for the amount claimed with costs and interest at the contract rate till the date of plaint and 6 per cent thereafter. Usual mortgage decree. Time six months. Plaintiff must give credit to the defendant for the payment already made.

S.N./R.K. *Suit decreed.*

(3) [1880] 5 A. C. 685.

A. I. R. 1919 Madras 202

ABDUR RAHIM AND SESHAGIRI AIYAR, JJ.

Munnavaru Begam Sahibu—Plaintiff —Appellant.

v.

Mir Mahapalli Sahib aud *others*—Defendants—Respondents.

Appeal No. 64 of 1917, Decided on 20th March 1918, against decree of Temporary Sub-Judge, Masulipatam, in Original Suit No. 71 of 1908, D/- 11th August 1916.

Mahomedan Law—Wakf—Woman can be head of mujavar of astana.

Under Mahomedan law it is not incompetent for a woman to be a head mujavar of an astana.

Per *Abdur Rahim, J.* — Excepting for local usages and customs to the contrary, there is no general provision of Mahomedan law against a woman specializing in any form of religious teaching and propagating any doctrines of Mahomedan religion, either of orthodox Mahomedan religion or of Sufi-ism. The disability of woman to hold a religious office arises from certain local usages and customs and not by any absolute injunction of Mahomedan law. A religious office can be held by a woman unless there are duties of a religious nature which she cannot perform in person or by deputy, the burden of establishing which is on those who plead the exclusion, and in the absence of anything in the rules by the founder, the usage of the institution governs the case. [P 205 C 1]

Per *Seshagiri Aiyar, J.*—Except in cases of grants given for the express purpose of performing religious duties which are dependent on personal or sex capacity, there is no reason why a female, whether Hindu or Mahomedan, should be disentitled to perform those duties. Wherever there are profits which are payable to an heir in the discharge of duties appertaining to a religious office, it must be taken as a general rule, subject to some exceptions, that women are competent to inherit these offices and to perform the duties appertaining to them. [P 207 C 1]

T. Ramchandra Rao—for Appellant.

P. Nagabushanam—for Respondents.

Abdur Rahim, J.—The appeal is by plaintiff 3, daughter of plaintiff 1, who died since the institution of the suit. The suit was to recover certain lands which are attached to what is described in the plaint as the Astana Bara Imam at Inuguduru, a suburb of Masulipatam, from the defendants who are in possession. Plaintiff 3's case is that she is entitled to the office of Head Mujavar of the Astana in succession to her mother,

plaintiff 1. What is the nature of the institution is one of the important questions we have to consider in the appeal. There was a grant made by Nizam-ul-Mulk, Nizam of Hyderabad, in 1725, which is the root of the title of the parties, and one of the questions for consideration is as to the true interpretation of that document. The grant is in Persian, and when properly translated the material portions of it are to this effect. It purports to confirm previous grants by ancient rulers made by way of Madad-Mash, or (literally translated) subsistence allowance of Mir Ali Akbar and others, sons of Mir Syed Mahomed Madani, who are to recite Darood or blessings on the Prophet and Fatiha in the name of the Imams and the martyrs, the descendants of the Prophet. Then it gees on to say:

"It is necessary that the said lands should be left in the possession of the aforesaid persons so that they should utilize the incomes thereof towards their maintenance and along with their descendants, literally children and grandchildren (aulad and ahfad), should engage themselves in offering prayers for the perpetuity of the State."

If the matter stood merely upon the interpretation of this document, it might be contended that the grant was in absolute terms to the persons mentioned therein, Mir Ali Akbar and others, sons of Mir Syed Mahomedan Madani, who were expected to perform certain religious ceremonies. Upon such an interpretation the grant would be of an absolute estate to the persons named in the sanad. But the evidence clearly shows that the parties concerned have put their own interpretation upon the document and the practice and usage has been in accordance with that interpretation. That is to say, they have treated the grant as creating a public religious trust for the performance of Fatiha and certain other ceremonies during the Muharram, and though it might be possible to hold that the grant was of an absolute estate to Mir Ali Akbar and others, sons of Mir Syed Mahomed Madani, I am not prepared to say that the parties' interpretation of the sanad as creating a wakf is unreasonable. In any case, so far as this appeal is concerned we must proceed upon that interpretation, for it is upon it that the parties base their claim.

Both the parties are descendants of Mir Syed Mahomed Madani's sons and they are, according to the interpretation placed by themselves on the grant entitled to allowances for maintenance, provided they keep up and perform the religious duties mentioned in the sanad. There has been previous litigation with respect to rights of the parties, some time in 1869, when a suit was instituted by the father of defendants 1 and 2 in the present suit against plaintiff 1 and another lady. That suit was compromised and a decree passed in the terms of the Rajinama marked Ex. B. By that compromise it was provided that:

"defendant 2 (that is the mother of the appellant) should be Head Mujavar henceforward, the plaintiff should give up the remaining lands for which he had brought the suit in excess heretofore and the part produce, etc. . . . . business should be carried on from generation to generation (not lineally as wrongly translated in the paper book) according to the terms of this agreement."

There cannot be any doubt that if this Rajinama is binding on the parties, the appellant is entitled to the office of Head Mujavar. This is what has been held by the lower Courts and is undoubtedly in accordance with the correct interpretation of Ex. B. The lower Court however is of opinion that Ex. B is in violation of or contrary to the provisions of the sanad already referred to (Ex. 6) and cannot bind the parties; and that we have therefore to fall back on the terms of the sanad and in the light of the general Mahomedan law to ascertain whether the plaintiff or the defendant is entitled to the office of Head Mujavar. The use of the words Astana and Mujavar prima facie indicates as if there was a shrine or tomb of some holy person which had to be kept up by the endowment. But the evidence shows that these words are used merely to indicate a sort of place in the form of a raised platform where a "Panja" and a "Peer" (staffs which are carried about in a Muharram procession) is planted and where certain ceremonies in connexion with the Muharram are performed. There is no evidence to show that there is any tomb of any well-known Sufi or fakir where any initiation of fakirs takes place, as may be the case in some Khankah or Astanad. If we look to the pleadings of the parties, there can be no doubt that all the religious ceremonies which are performed at the place called Astana Bara Imam are in connexion with Muharram, and the defendants in their written statement never

alleged that any Sufi or other doctrines are propigated at this place or any fakirs are initiated into any particular order or brotherhood. It was by the words Astana or Mujavar that the Subordinate Judge who originally tried the case as well as the learned Judge against whose judgment this appeal has been preferred, were misled into thinking that there were some particular religious teachings associated with this so called Astana. Then unfortunately when the matter came up on a previous occasion before this Court, arguments were addressed on the assumption that there might possibly be certain ceremonies connected with this institution which a woman was not capable of performing. In order to ascertain if this was so, the appeal was remanded to the lower Court for inquiry into this matter. As was to be expected, some of the defendants have now put forward some sort of evidence suggesting that initiation of fakirs actually takes place in this institution in order to make out that the appellant is not fit to be at its head.

The evidence however is that by "fakirs" all that is meant is some persons, Hindus or Mahomedans, who are engaged to carry in the procession the "Panja" and the "Peer" during the ten days of the Muharram. That is to say, these so called fakirs are no more than persons taking part in a Muharram procession.

It is not suggested, nor could it well be, that these men have to be initiated into any particular doctrines or they have to perform any ceremonies requiring particular religious status. To describe such a state of things as equivalent to initiation into a religious brotherhood is absolute misuse of words. So is the use of the words Astana and Head Mujavar in this case, for these terms properly used are connected with institutions for the upkeep of a shrine of a reputed saint or for the teaching of certain doctrines connected with Sufi ism. The evidence amply makes out that the parties are absolutely illiterate and know nothing about any religious order or any religious teaching connected with any brotherhood of fakirs, properly so called. The duties connected with this Astana are nothing more than the organizing and carrying out of certain processions in which the Hindus, according to the evidence, participate equally with the Mahomedan, of the locality.

Many authorities have been quoted to us in connexion with the question whether a woman can properly be a Head Mujavar of an Astana or not. None of those cases or authorities call for any serious consideration, having regard to the fact that there is no Astana in the proper sense of the word and the Mujavar's duties are only purely of a secular character so far as the evidence shows. We can take it to be the law, as laid down by the Privy Council in the case of *Shahoo Banoo* v. *Aga Mahomed Jaffer Bindaneem* (1), that if the religious duties connected with a religious office are such that a woman cannot properly discharge in person or by deputy, then she cannot be appointed to that office. The well-known cases referred to relate to the office of Sajjadanashins of certain Khankabs and also of Mujavar of certain shrines. The word "Mujavar" literally means a sweeper or the person who cleans the place, but it is conventionally used to denote a person who is looking after a shrine or tomb of a holy person, generally called Astana. "Astana" is a word which is often used to denote a place inspiring respect and reverence. It need not necessarily indicate a tomb or shrine, though in popular use it indicates a shrine or tomb of a holy person. The term Sajjadanashin or Gaddinashin is conventionally used to denote the person in charge of a Khankah or an institution where religious enthusiasts and fakirs congregate and where the superior or the head of the institution has certain doctrines of Sufi-ism to teach. But there is absolutely nothing in connexion with Astana Bara Imam which has anything in common either with a Khankah or an Astana properly so called. That a woman cannot be a Sajjadanashin may, for the present case, be taken to be sound law, if the duties involve the teaching of certain doctrines to fakirs, necessitating her coming into daily contact with them. It is not however the fact that a woman cannot be a Sufi or that she is not competent to teach the tenets of Sufi-ism. Sufi-ism, as a school of Mahomedan religion is equally open to men and women. But having regard to the custom and usage of the country by which women observe

(1) [1907] 34 Cal. 118=34 I. A. 46 (P. C.).

seclusion, it is not ordinarily to be expected that women could satisfactorily perform the duties connected with the head of an institution like Khankah which would bring her into contact with fakirs and other men not being her own close relations. Excepting for this local usage and custom I am not aware of any general provision of Mahomedan law against a women specializing in any form of religious teaching and propagating any doctrines of the Mahomedan religion, either of orthodox Mahomedan religion or of Sufi-ism. The rule prohibiting women from being appointed to such offices is not confined to the office of Sajjanadashin, but there may be other offices which she may not be able to perform, for instance, that of an Imam in a mosque where she would have to lead the congregation. At any rate in practice women are not known to have officiated as Imams in mosques any more than Christian women are known to have officiated as priests or clegry in Christian churches. It is not necessary for us to consider in this case the extent of the application of the rule precluding the appointment of women to an office like that of Sajjadanashin and the limitations of such a rule. So far as I have been able to trace the history of the question, it had its origin in certain passages in Macnaghten's Principles and Precedents of Mahomedan Law, p. 332. It is stated there:

"Females are not competent to assume the office of superior of an endowment and such an act is at variance with the usages of the country, because it is the duty of the superior to instruct and guide his disciples, to teach his scholars, and to keep their company continually, in private and in public, and this cannot be done with propriety by a woman, whose duty it is to live retired and secluded."

I think that seems to be a perfectly reasonable proposition so long as it is understood that the prohibition or the disability arises from certain local usages and customs and not by any absolute injunction of Mahomedan religion or law. Mr. Ameer Ali in stating the law on the subject at p. 443, Edn. 4, Vol. 1, of his Mahomedan Law, states it in similar terms. He also bases it on custom and not on any rule of Mahomedan theology or canonical law, which has in fact very little to do with Sufi-ism, Khankahs and Astanas. One of the earliest decisions on the subject is to be found in *Shah Imam Buksh* v. *Mt. Beebee Shahee* (2). There the learned Judges of the Sadder Diwany Adawlut rely upon the passage in Macnaghten already recited as authority for the proposition in question. There are also some rulings of the Madras High Court on the point: *Hussain Beebee* v. *Hussain Sherif* (3). *Mujavar Ibrambibi* v. *Mujavar Husain Sherif* (4). In *Mujavar Ibrambibi* v. *Mujavar Hussain Sheriff* (4) what is laid down is that a woman is not competent to perform the duties of Mujavar of a Durga which are not of a secular nature. What the learned Judges say is that it was established by evidence that the office of Mujavar entailed the discharge of duties of a spiritual character, such as reading the Fatiha, offering prayers and incense, etc., which could not conveniently be performed by a woman, and that there was no satisfactory evidence that the office had ever been held by a woman. Apart from what the special evidence in that case was, I do not think the learned Judges meant to lay down a general proposition that any religious office which entails the performance of Fatiha and other prayers or the offering of incense could not be performed by women, for I do not think they could have meant that Fatiha, which consists in reciting certain Suras of the Koran, could not be said by women and that a woman could not say prayers according to the Mahomedan religion. Such a proposition would be incorrect; and apart from the special facts of that particular case, I cannot accept the decision as laying down any such general rules of law as contended for.

In *Hussain Beebee* v. *Hussain Sherif* (3) it was held that according to Mahomedan law a woman may manage the temporal affairs of a mosque, but not the spiritual affairs connected with it, the management of the latter requiring peculiar personal qualifications. There the institution to which the office in dispute related was called Shakh Fareed Shukkurgunj Mosque. If it was a mosque in its proper and ordinary sense of the word, that is, a place where prayers are said by Mahomedans, then there are no duties connected with it which a woman could not perform, at least through a deputy. But from the

(2) 6 Sel. Rep. 24.
(3) [1868-69] 4 M. H. C. R. 28.
(4) [1881] 3 Mad. 95.

evidence in this case and from what we have noticed in other cases, we know that the word "mosque" or "musjid" is applied to all sorts of places may be a mere tomb or an Imam Bara. The learned Judges in dealing with the law in *Hussain Bebee* v. *Hussain Sherif* (3) cite cases connected with the office of Guddeenishin. If that was the real nature of the institution, probably it was from the name, it might have been a replica of the tomb or a shrine containing some relics of that well known saint. In that case it would perhaps properly be called a Durga. Ths report does not give what the actual duties were in connexion with the office then in question, and if the office required any peculiar personal qualifications which might be wanting in a woman, that is to say duties which could not be performed by her either personally or through a proxy then undoubtedly the decision was right. The facts do not appear sufficiently fully to enable me to say what the exact scope of that decision is. On the other hand I entirely agree with a recent decision of this Court in *Imam Bee* v. *Molla Khasim Sahib* (5), that a religious office can be held by a woman unless there are duties of a religious nature which she cannot perform in person or by deputy and the burden of establishing that a woman is precluded from holding a particular office is on those who plead the exclusion and in the absence of anything in the rules by the founder, the usage of the institution governs the case. In that case the office was that of a mujavar in a mosque. I believe the duties attached to the office were simply those of a muttawali, though the word used there is mujavar. In this Presidency the word "mujavar" is not seldom used in the sense of muttawali of an ordinary religious trust.

Here the appellant, as a member of the family of the descendants of Mir Ali Akbar and his brother, is admittedly entitled to certain allowance by way of maintenance, and she does not dispute that the defendants are also entitled to similar allowance. The dispute is solely about the office of Head Mujavar in virtue of which she claims to be entitled to possession of the property in dispute, that is the lands of the institution concerned. As Head Mujavar she would also be entitled to an additional share of the income. The Subordinate Judge in my opinion was entirely wrong in holding that the compromise was in valuation of the terms of the sanad and therefore could not be given effect to. He has also gone wrong in thinking that the appellant is disqualified to hold the office she claims. The evidence clearly shows that this was never the consciousness of the parties, in fact the consciousness of the parties themselves was just the other way. Before the appellant her mother held the office and the written statement never raised any doubt as to the competency of the appellant to hold the office on the ground of sex, if she was not precluded from holding it, as alleged, by the terms of the sanad. I reverse the decree of the Subordinate Judge and there will be a decree in favour of plaintiff 3 giving her possession of the property in dispute. The Subordinate Judge will inquire into the mesne profits she is entitled to from the date of suit to the date when she obtains possession under the decree. The respondents will pay plaintiff 3's costs in this and the lower Court and they will also pay the court-fee payable to Government.

Seshagiri Aiyar, J. — I entirely agree. In a very recent reference to the Full Bench which I made in conjunction with Napier, J., I went fully into the question of the capacity of a Hindu female to succeed to religious offices and to discharge the duties of those offices. I am glad to find that my learned brother's exposition of the Mahomedan law is in complete accordance with my views with regard to the position of Hindu women. Except in cases of grants given for the express purpose of performing religious duties which are dependent on personal or sex capacity, I fail to see why a female whether Hindu or Mahomedan, should be disentitled to perform those duties. In the language of the Judicial Committee in *Shaboo Banoo* v. *Agha Mahomed Jaffer Bindaneem* (1), a woman holding an office of a religious trust, which by its nature involves no spiritual duties such as a woman could never properly discharge in person or by deputy, is competent to hold such an office. Or it may be, as in the case in *Mohan Lalaji* v. *Madhsudan Lala* (6), that the peculiar doctrines of a sect may preclude women married into a different sect from per-

(5) [1917] 37 I. C. 889.

(6) [1910] 32 All. 461=6 I. C. 77.

forming the duties of the temple or religious institution belong to the former sect. Except in these two classes of cases, in my opinion there is no warrant for holding that women are incompetent to inherit a religious office connected with a religious institution. It has always been held that in the case of secular duties pertaining to a religious trust, women are competent to perform them. For example as my learned brother has pointed out, the muttawaliship in a Mahomedan mosque can be held by women. So also it has been held in the *Dhuncooverbai* v. *Advocate-General* (7) that a mohuntship can be held by a female. Whereover there are profits which are payable to an heir in the discharge of duties appertaining to a religious office, it must be taken as a general rule, subject to some exceptions, that women are competent to inherit those offices and to perform the duties appertaining to them.

In the present case the course of devolution and the way in which the parties have been enjoying show that women have been held competent to discharge the duties pertaining to this particular Astana. As my learned brother has pointed out, the original grant confers an absolute right in the property. I am inclined to think that its dedication as a wakf must have been by the successors of the original grantee. Anyway there can be no doubt that the duties connected with the Astana were mostly secular. As has just been pointed out, the way in which Hindus and Mahomedans have initiated into Fakirship during the Muharram shows that there are really no religious duties to be performed by the Head Mujavar. And further in my opinion the parties are bound by the compromise, as the matter had been litigated in a competent Court and the parties agreed that plaintiff 1 and her descendants are entitled from generation to generation to the Head Mujavarship. The Subordinate Judge seems to think that this compromise is not consistent with the original sanad. I fail to see how there is any inconsistency between the sanad and the compromise. Even if there were any inconsistencies, I am not prepared to say that the compromise is not binding upon the parties and upon those who claim under the parties to the compromise.

(7) [1899] 1 Bom. L. R. 743.

And lastly I would say that the fact that in the written statement no objection is taken to plaintiff 3 succeeding to the Head Mujavarship on the ground of her being a female is clear evidence that in the opinion of the litigants and of their co-religionists women are not incompetent to perform the duties of Head Mujavarship. For these reasons, I entirely agree with the conclusion arrived at by my learned brother.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 207

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Secretary of State — Defendant — Appellant.

v

M. E. Srirangachariar and *others* — Plaintiffs and Defendants — Respondents.

Civil Appeal No. 220 of 1917, Decided on 20th August 1918, from decree of Temporary Sub. Judge., Chingleput, in Original Suit No 12 of 1916.

Easement — Water rights — Irrigation of lands from Government tank — Lands already under cultivation have preferential rights to supply over waste lands subsequently brought under cultivation.

In the case of lands irrigated by a Government tank, the owners of wet lands have a preferential right to the supply of water in seasons when the tank connot yield the normal supply over the assignees of waste lands which were subsequently brought under cultivation.

[P 203 C 1]

V. Ramesam—for Appellant.

T. Narasimha Aiyangar—for Respondents.

Judgment.—This is an appeal by the Secretary of State against the decision of the Subordinate Judge of Chingleput granting the Mirasidars of the village of Damal certain preferential rights in regard to the water supply of their lands. The suit of the Mirasidars was based on the allegation that, as Mirasidars, they were entitled to certain immemorial rights. In this Court the claim was limited to easement rights arising from long use of the water of the channel and of the tank.

There are two sources of irrigation for the village. One is a Kasam or spring channel taking its source in the North Arcot District and irrigating solely the fields in Damal. In regard to this channel it was admitted by the learned Government Pleader that the Mirasidars of the village have all along been maintaining it in proper condition. The other

source of irrigation is the tank. The Kasam or the channel passes along the northern bund of this tank. During the flood season when the tank is full the channel does not appear as a separate source of irrigation. But during the major portion of the year it is distinct from the tank and irrigates certain lands exclusively. When the tank is full no question of preferential right can arise. It is only when water goes below a particular level that difficulties are felt about the water supply. It was conceded that when there is the normal rainfall no difficulty is felt throughout the year in irrigating all the fields properly. But during the years when the rainfall is below the average, which happens only once in ten years or more, the question arises as to which of the fields in the village should have a priority of water supply. It is common ground that originally the village had only 520 acres of cultivable land, which were divided into about 163 shares among the Mirasidars of the village. In addition to these lands the Mirasidars had also some Samudayam lands, the income of which was shared by them in proportion to their holding. There was a long tract of unassigned waste in the beginning. These lands were subsequently assigned by Government on Darkhast. These have been technically known as Kaipath lands as opposed to the Pangu lands, which term denoted the 520 acres already referred to. At first the Mirasidars had practically all the waste lands assigned to them. We find in the year 1860 the total average of these lands was about 730 acres. Since then further assignments have been made and the present Ayacut of the village is nearly 2,500 acres. In these circumstances it seems to us that the presumption is the owners of the lands which were originally wet acquired a preferential right to water supply over lands which were subsequently brought under cultivation.

Looking at the question from another point of view the same result follows. Mr. Narasimha Aiyangar, in his very clear analysis of the nature of the cultivation in this village, drew our attention to the following facts. There are five blocks of land into which the original Pangu lands were divided. The blocks were known as Thenkazhani Keezhkazhani, Velangadu, Perithipattu and Puthucherry. In Thenkazhani which is more favourably situated than the other blocks, there are about a hundred acres of double crop lands. The first crop cultivation in this block begins in or about April and is harvested in September. The second crop begins in October. In Keezhkazhani there are about two hundred acres of double crop lands. In this block the first crop is cultivated in July or August and is reaped in November. The second crop cultivation begins in December. In the other three blocks there are no second crop lands. In these lands and in the Kaipath lands cultivation begins in September for the only crop grown on them. It was said that in the Pangu lands of the three remaining blocks, the cultivation is a few days earlier than in the Kaipath lands. Thus we find that about February, which is generally the season when the water begins to go down in the tank, the cultivators have to depend largely upon the spring channel. At this period the second crop in Thenkazhani will be about four months old, and the single crop in the other block and in the Kaipath lands will be five months old. Therefore the necessity for a regular supply of water will be felt more in Thenkazhani and Keezhkazhani than in the Kaipath lands. The mode of cultivation being as we have above indicated, it seems to us that if there is to be a claim for preferential treatment, as there must be when the supply is insufficient, the three and four months' crops should have the preference over crops which are very nearly ready for harvesting. Looking at the question from any point of view, it seems to us that the claim of the Mirasidars to a preferential right in respect of their double crop lands is established. They are also entitled to take water to the single crop lands in the three other blocks in preference to the Kaipath lands.

The learned Government Pleader suggested that, whatever may be the right of the Mirasidars to the exclusive use of the Kasam water, the tank water should be equally distributed. His contention was that when the water falls below the fourth sluice, all the sluices in the tank should be kept open and that no attempt should be made to shut any of these sluices with a view to taking more water through the fourth sluice. If we accede to this contention, it would result in

denying the preferential right which we have held that the mirasidars possess. We therefore think that the Subordinate Judge, who has written a careful judgment, has come to the right conclusion on the question. The only modification that we think necessary to make in his decree is to define more precisely the meaning of the expression "in time of scarcity." In order that there may be no future disputes, we substitute the words "when the water goes below the fourth sluice" for the words "in times of scarcity" in line 11 of p. 14 in the decree of the Subordinate Judge. In other respects we dismiss the appeal with costs. We also dismiss the memoranda of objections with costs of the Secretary of State. The order of the Subordinate Judge, directing that non-mirasidars should receive their costs from the mirasidars who are in turn directed to receive some costs from the non-mirasidars, would lead to difficulties. We think, under the circumstances, that the mirasidars and non-mirasidars should each be directed to bear their own costs in the Court below. The order as to costs in favour of the Secretary of State will stand. Subject to the above modification the appeal is dismissed with costs of the mirasidar respondents.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 209

WALLIS, C. J. AND NAPIER, J.

Municipal Council of Cocanada—Defendant—Appellant.

v.

"Clan" Line Steamers, Ltd. — Plaintiffs—Respondents.

Original Side Appeal No. 2 of 1918, Decided on 8th November 1918, from judgment of Coutts-Trotter, J., D/- 2nd November 1917.

Madras District Municipalities Act (1884), S. 53 — Exercising trade or calling within municipality—Carriage by sea — Ship-owner unloading cargo at port — Contracts not entered into at that port — Levy of profession tax on shipping agent in that port is not legal.

A shipowner exercises his trade at all the ports at which his steamers habitually call to discharge or load cargo, which latter operation may involve entering there and then into contracts with shippers. Where therefore the freight-earning contracts with shippers which enable profits to be earned by sea carriage are not entered into at a port by the ship's master or the local agent of the shipowner, but elsewhere, the shipowner cannot be held to exercise his trade at the port merely because he employs a shipping agent there to attend to other matters, such as issuing shipping orders and signing bills of lading ursuant to contracts already made and receiving payment of advance freight. [P 211 C 2]

The test is, where, in substance, the business of making contracts is carried on and controlled. [P 211 C 1]

The Clan Line Steamers, having their registered office at Glasgow, called at Cocanada to take in cargo for Europe and also unload any cargo consigned to Cocanada. They were represented by a firm of sub-agents at Cocanada engaged by the Clan Line's Agents at Madras. The sub-agents had no authority to contract with shippers and acted only under instructions from the agents; they issued shipping orders to shippers, signed bills of lading for cargo, supplied and collected any freight that might be payable on the cargo unloaded at Cocanada. The question in this case being whether this was such an exercise of the trade of the Clan Line or carrying on business within the Municipality of Cocanada as to render them liable to the payment of profession tax under S. 53, Madras District Municipalities Act, 1884.

Held: that the Clan Line, being a shipping company which earned profits by the carriage of goods by sea, and in the course of its business traded with, but not necessarily within, port towns in various parts of the world, one of these being Cocanada, could not be said to exercise a trade at that port so as to make the company liable for the payment of profession tax. [P 211 C 1]

Venkatasubba Row and *Radhakrishnaya*—for Appellant.

D. Chamier for *King* and *Partridge*—for Respondents.

Wallis, C. J.—The question in this appeal is whether the Clan Line of Steamers, who have their registered office in Glasgow, are liable under S. 53, Madras District Municipalities Act, 1884, to pay profession tax in Cocanada on the ground that they are persons exercising within that municipality one of the professions, trades or callings specified in the schedule, which includes persons "carrying on business as a company" and also "ship-owners." The Clan Line Steamers call at Cocanada to take in cargo for Europe and also unload there any cargo consigned to Cocanada, of which there is very little. They are represented in various matters by Messrs. Ripley and Co., sub agents engaged by Messrs. Gordon Woodroffe and Co., the Clan Line's Agents at Madras. Messrs. Ripley have no authority to contract with shippers for the allotment of cargo space under letters of engagement such as are now common. Shippers apply dircct to Gordon Woodroffe and Co,. if they apply to Messrs. Ripley and Co., the latter for

ward the application to be dealt with by Gordon Woodroffe and Co., or take their instructions by telegraph if the time is short. They issue shipping orders to shippers who have secured space, sign the bills of lading for cargo shipped, and receive the freight where it is payable in advance, as it is in all cases where the goods are consigned to London for transhipment to America. They also settle the bills of the Dubash who is employed by Gordon Woodroffe and Co., to supply the ships with necessities, and pay the Doctor who is similarly employed. They apparently collect any freight that may be payable on the small quantity of cargo landed. Having regard to these facts, it may be said that in one sense the Clan Line carry on business at Cocanada through Messrs. Ripley, but what we have to see is whether it is such an exercise of their trade or carrying on business within the Municipality as to bring the case within the language of the statute, which is indistinguishable from that of similar taxing Acts both in England and the colonies.

Those cases have been reviewed by the learned Judge and have again been considered by us, but it is unnecessary to go behind the decision of the House of Lords in *Grainger* v. *Gough* (1) and the more recent decision of the Privy Council in *Lovell & Christmas* v. *Commissioner of Taxes* (2). In *Grainger* v. *Gough* (1) the fact that Louis Roederer, who carried on business at Rheims in France, employed an agent and a large number of sub-agents in England to canvass for orders for his champagne, which were sent to Rheims for acceptance, was held not to make him a person exercising a trade within the United Kingdom, even when coupled with the further facts that the agents in England sometimes received the price of the goods sold for transmission to their principal, and that the principal's name appeared in the London Directory as carrying on business at 21, Mincing Lane, London. Lord Herschell, L. C., pointed out that in previous cases of this nature where liability was established, the contracts of sale had been habitually made in the United Kingdom and observed that there was a broad distinction between trading with a country and carrying on a trade within the country, and that it was impossible to say that merchants and manufacturers who export their goods to all parts of the world exercise or carry on their trade in every country in which their goods find purchasers. A wine merchant, he said, exercised his trade by making or buying a wine and selling it again with a view to profit, and if all he did was to solicit orders in England he could not be said to exercise his trade there. Lord Watson reviewed the earlier decisions and observed :

"there may, in my opinion, be transactions by or on behalf of a foreign merchant in this country so intimately connected with his business abroad, that without them it could not be successfully carried on, which are nevertheless insufficient to constitute an exercise of his trade here within the meaning of Sch. D."

He referred in this connexion, as did Lord Davey, to *Sully* v. *Attorney-General* (3), where it was held that the purchase of goods in England by a branch of an American firm established there of goods which it is intended to resell at a profit in New York :

"does not, of itself, constitute an exercise of the trade in the United Kingdom, when that department of the business from which profits or gains are directly realized is carried on in another country."

These two cases were followed and applied by the Judicial Committee in *Lovell & Christmas* v. *Commissioner of Taxes* (2). In that case the question was whether any of the profits of the appellant's business, which consisted of the sale of provisions on commission in London were "derived from New Zealand" within the meaning of the New Zealand Statute because the appellants had agents in New Zealand, who contracted with shippers there that they should consign their goods to the appellants in London for sale on commission in consideration of advances made to them against the bills of lading. The New Zealand Court held the appellants liable on the ground that these contracts from which profits resulted were made in New Zealand but the Judicial Committee reversed the decision. Their Lordships, after referring to *Grainger* v. *Gough* (1) and distinguishing *Erichsen* v. *Last* (4) and citing *Sully* v. *Attorney-General* (3) with approval observed that the decisions did not furnish authority for going further back for the purpose of taxation, than the busi-

(1) [1896] A. C. 325.
(2) [1908] A. C. 46.
(3) [1860] 5 H. & N. 711.
(4) [1882] 8 Q. B. D. 414.

ness from which profits are directly derived, and the contracts which form the essence of that business. In the case before them they were of opinion that the business which yielded profit was the business of selling goods on commission in London and that the earlier arrangements entered into in New Zealand, were merely transactions, the object and effect of which was to bring goods from New Zealand within the net of the business which was to yield a profit.

Looking at the facts of the present case in the light of these decisions, I think there is no ground for holding that the Clan Line exercise a trade at Cocanada. It is a shipping company which earns profits by the carriage of goods by sea, and in the course of its business trades. in Lord Herschell's language, with, but not necessarily within, port towns in various parts of the world. It has not been contended before us that a shipowner exercises his trade at all the ports at which his steamers habitually call to discharge or load cargo, which latter operation may involve entering there and then into contracts with shippers. In the absence of other arrangements, the shipowner is represented by the ship's master in all the business incidental to loading and unloading, and it is open to question whether the fact that this business is done by a resident agent himself carrying a business there and not by the master, makes any difference. It is unnecessary to pursue this question, because it is, I think, clear upon the authorities that where, as in the present case, the freight-earning contracts with shippers which enable profits to be earned by sea carriage are not entered into at the port in question by the shipmaster or the local agent of the shipowner, but elsewhere, the shipowner cannot be held to exercise his trade at the port merely because he employs a shipping agent there to attend to other matters, such as issuing shipping orders and signing bills of lading pursuant to contracts already, made, and receiving payment of advance freight. It was however argued that such contracts were made in Cocanada in some instance because Messrs. Ripley and Co. delivered to shippers their letters of engagement sent by Gordon Woodroffe and Co. from Madras. I agree with Coutts-Trotter, J., that this is not shown to have happened, and that even if it did happen in a few instances, what we have to see is where, in substance the business of making contracts was carried on and controlled and that this was not at Cocanada. The appeal fails and must be dismissed with costs.

Napier, J.—I entirely agree with the judgment just delivered by the learned Chief Justice, but as the case is one of great importance I would like to add a few words with regard to the contentions of the appellant. We were asked to examine a certain number of old cases, in which the carrying on of business had been found, to ascertain what facts were there proved and if we found some of those facts to exist in this case, to hold that carrying on business is established. I agree with the learned Judge that it is not open to us to do so in a case of this class. It may be that some of the learned Judges in *Tischler* v. *Apthorpe* (5), *Pommey* v. *Apthorpe* (6), *Erichsen* v. *Last* (4) and *Werle* v. *Colquhoun* (7) have used the language indicating their application of tests other than those applied in *Grainger* v. *Gough* (1). But the House of Lords in this last case have distinctly ignored those tests and treated those cases as decisions turning on the question, where was the contract made. In two of those cases Brett, L. J., has used this as the test, and, as pointed out by the learned Chief Justice, both Lord Herschell and Lord Watson in the House of Lords case accept this test and the Privy Council in *Lovell & Christmas* v. *Commissioner of Taxes* (2) have followed this.case. Whatever therefore may have been the view of Jessel, M. R., or Fry, L. J., in two of those earlier cases we must accept this proposition as established by the House of Lords and the Privy Council that in this class of cases, if the contract out of which the profit arises is not made in the place where the tax is sought to be imposed, the liability does not arise. I do not mean that if any contract is shown to have been made in the course of a business from which profits are eventually earned, that is sufficient to impose the liability, for the decisions in *Sully* v. *Attorney-General* (3) by the Exchequer Chamber and in *Lovell & Christmas* v. *Commissioner of Taxes* (2) show that this test cannot be

(5) [1885] 52 L. T. 314.
(6) [1886] 56 L. J.Q. B. 155.
(7) [1888] 20 Q. B. D. 753.

S. N. DAR,
Vakil High Court,
SRINAGAR (Kashmir)

broadly applied. I may add that in a case of production or manufacture in the country by a person sought to be assessed the question where the contracts for sale of the proceeds are made may be immaterial. But in this class, after the above rulings I do not think it is open to us to consider any other aspect and I, therefore agree with Coutts-Trotter, J., that the plaintiffs are entitled to recover the amount paid.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 212

AYLING AND KRISHNAN, JJ.

Meethala Veetil Kaitheri Kelu Nambiar—Plaintiff—Appellant.

v.

Narikott Parambath Kaitheri Chathu Nambiar and *another* — Defendants — Respondents.

Second Appeal No. 908 of 1917, Decided on 11th September 1918, against decree of Dist Judge, North Malabar, in Appeal Suit No. 239 of 1916.

(a) Civil P. C. (5 of 1908), S. 11—Decree passed in favour even in spite of decision on question being against—No res judicata.

A decision on a question in an appealable suit, when the decree is in favour of the party against whom that decision is given is not a final decision within the meaning of S. 11. [P 213 C 2]

(b) Civil P. C. (5 of 1908), S 11—Finding on matter not necessary for disposal of suit and not basis of decree—Matter is not substantially in issue.

To constitute a finding on an issue res judicata in a later suit between the parties it is necessary, under S. 11 that the matter should have been directly and substantially in issue between them and should also have been heard and finally decided. Where a finding has been arrived at on a matter which is not necessary for the disposal of the suit and it is not made the basis of the decree which is given in spite of it, that matter cannot be said to have been substantially in issue between the parties, it can only be said to have been incidentally in issue. Such findings are more in the nature of obiter dicta than of res judicata. Nor can the question be said to have been finally decided by such a finding. [P 213 C 2]

(c) Civil P. C. (5 of 1908), S. 11—Decree in spite of finding against party—Finding is not res judicata.

Where a decree is given to a party in spite of a finding against him that finding is not res judicata in subsequent litigation: 11 *Cal.* 201 (*P.C.*), *Foll.* and 45 *I. C.* 975, *Expl.* [P 213 C 1]

(d) Civil P. C. (5 of 1908), S. 11—Decision must be necessary.

For a matter to be in issue under S. 11, Civil P. C., it is not necessary that an express issue should be framed about it. It is enough if a decision about it is necessary for the decree. [P 215 C 1]

(e) Civil P. C. (1908), S. 11—Co-defendants—There must be active controversy inter se.

As between co-defendants there must be an active controversy inter se before a finding can be treated as res judicata. [P 215 C 1]

C. V. Ananthakrishna Aiyar—for Appellant.

C. Madhavan Nair—for Respondents.

Judgment.—The question for decision in this case is one of res judicata. By the suit from which the second appeal arises plaintiff, one Kelu Nambiar, sought to recover as karnavan of one Meethala Veetil Tavazhi certain lands and arrears of rent from the tenant in possession, defendant 1. It was stated that this was a separate and distinct tavazhi under the Mani Madathil Kaitheri Tarwad, having its own properties and its own karnavan, and that the plaint lands were some of its properties. The tenant denied the existence of any such tavazhi and pleaded that the lands belonged to the main tarwad of which one Chattu Nambiar was the karnavan and not the plaintiff, and that the latter was not entitled to sue; he also pleaded payment of rent to the karnavan Chathu Nambiar. On these pleas Chathu Nambiar was added as defendant 2 and he supported defendant 1's contentions. Issue 1 in the case was:

"whether a tavazhi called Methala Veetil Tavazhi existed with separate properties and management."

As however both the plaintiff and defendant 2 claimed that this question was res judicata by reason of previous decisions between the parties, two further issues were framed, viz.:

"whether the plaintiff was estopped from setting up the Meethala Veetil Tavazhi by reason of the decrees in Original Suits Nos. 38 of 1890 and 203 of 1893 of the Courts of the District Munsifs of Nadapuram and Panur respectively and their appeals" and "whether the main tarwad of which defendant was the karnavan was estopped from denying the existence of the Meethala Veetil Tavazhi by reason of the decrees in Original Suit No. 168 of 1893 of that Court (Court of the Principal District Munsif of Tellicherry) and of Original Suit No. 3 of 1895 on the file of the Sub-Court, North Malabar."

On these issues both the lower Courts have agreed that the decree in Original Suit No. 168 of 1893 was of no value on the question of res judicata and the point has not been re-agitated before us. But they have differed in their opinions as regards the effect of the other judgments; and both the plaintiff-appellant and the defendants-respondents have contended before us that the judgments in his or their

own favour constitute res judicata whereas the judgments against him or them do not. We have therefore to examine each of those judgments separately to see its effect on the question at issue. Before doing so it may be observed that the question as to res judicata has to be considered as between the tavazhi and the tarwad and not as between the plaintiff and defendant 2 personally, as they are parties to this suit in their representative capacities as karnavans. Taking the judgment in Original Suit No. 3 of 1895, Ex. L, first which is relied on by the plaintiff as settling that the Meethala Veetil Tavazhi does exist, it will be seen that the suit in which that judgment was given was one brought by one Sankaran Nambiar, a junior member of the family to remove one Ambu Nambiar from karnavanship for alleged misconduct and for recovering from the tarwad certain properties said to have been improperly alienated by him. Permission was asked for under S. 30 of the old Civil P. C., to sue on behalf of the tarwad and on the publication of the notice required by the section a large number of the members of the tarwad had joined as defendants. Plaintiff had asserted in the plaint that Ambu Nambiar was the karnavan of the Meethala Veetil Tavazhi also and had asked him to be removed from that position as well. Ambu Nambiar as well as several other defendants had, among other pleas, denied the existence of such a tavazhi and an issue was framed as to:

"whether there was in fact an independent branch called Meethala Veedu subordinate to the Meethil Tarwad,"

The finding on this issue was, no doubt in plaintiff's favour that such a tavazhi did exist. But in spite of that finding the suit, as far as it prayed for the removal of the karnavan, was dismissed and Ambu Nambiar was not removed from the karnavanship of either the tarwad or the tavazhi. Nor was the finding embodied in the decree. The finding was not necessary for the disposal of the suit, and we agree with the District Judge that it cannot be held to have the force of res judicata against the tarwad. It has been settled by the ruling of the Privy Council in *Run Bahadar Singh* v. *Lucho Loer* (1) that where a decree is given to the party in spite of a finding against him, that finding is not res judicata in subsequent litigation. This view has been consistently followed since: see *Thakur Magundeo* v. *Thakur Mahadeo Singh* (2), *Parbatti Debya* v. *Mathura Nath Banerjee* (3), *Ahmedbhoy* v. *Sir Dinshaw* (4), *Venkatasuryanarayana* v. *Shiva Sankara Narayana* (5) and *Mittar Poddar* v. *Jadab Chandra* (6). To constitute the finding on an issue res judicata in a later suit between the parties it is necessary under S. 11 of the Code that the matter should have been directly and substantially in issue between them and should also have been heard and finally decided. Where a finding has been arrived at on a matter which is not necessary for the disposal of the suit and it is not made the basis of the decree which is given in spite of it, that matter cannot be said to have been substantially in issue between the parties; it can only be said to have been incidentally in issue. Such findings are more in the nature of obiter dicta than of res judicata. Nor can the question be said to have been finally decided by such a finding. As observed by Beaman, J., in *Ahmedbhoy* v. *Sir Dinshaw* (4) above cited:

"a decision upon any question that does not open the door to the parties aggrieved to carry it to the next Court (in appeal) is not in any sense a final decision, unless the Court which has decided it is itself the Court of final jurisdiction for that suit."

Otherwise, as pointed out by the learned Judge, it would lie with his adversary to decide whether a finding against a party when the decree is in his favour should remain res judicata against him or not; for if he, the adversary appealed, as he could do, the finality would be gone. We must therefore hold that a decision on a question in an appealable suit, when the decree is in favour of the party against whom that decision is given, is not a final decision. Expl. 2 which has been newly added to S 11 of the present Code, Act 5 of 1908, does not affect this question, as it deals only with the competency of the Court and not with the finality of its decision That explanation was added to put an end to the controversy whether a finding arrived at or a decree passed by a Court

(1) [1885] 11 Cal. 801=12 I. A. 23 (P.C.).

(2) [1891] 18 Cal. 647.
(3) [1912] 40 Cal. 29=15 I. C. 453.
(4) [1909] 3 I. C. 124.
(5) [1915] 27 I. C. 861.
(6) [1917] 38 I. C. 211.

in a suit is or is not res judicata in the same Court in a subsequent suit when the decree in the first suit is not appealable to the same tribunal as that in the second suit. That happens, for example, in the Subordinate Judge's Court when the first suit is below Rupees 5,000 in value and the second suit is above that value.

The learned vakil for the appellant relied on the judgment of Seshagiri Aiyar, J., in *Muthaya Shetti* v. *Kanthoppa Shetti* (7) and contended that this was a case which fell within the fourth class referred to by the learned Judge and therefore the finding was res judicata. It seems to be very doubtful if there is such a fourth class of cases at all distinct from the first class; the cases which seem to fall in that class will probably, on careful examination be found to fall in the first class. In the very case which the learned Judge had before him it would seem, with all respect to him, that on the facts stated in p. 484, of (7 *M. L. W.*) it was quite immaterial for the District Judge to decide if the alienation was a mortgage or a sale so long as it was valid against the plaintiff; for in the view taken by him the suit failed whether it was a mortgage or a sale. It has been pointed out to us that Bakewell, J., who sat with Seshagiri Aiyar, J., in that case did not adopt this classification, and we are not prepared to follow the learned Judge's view as to the fourth class of cases. Moreover, we think the present case falls in the first class. It is argued that it was necessary to decide in this case if a tavazhi existed at all before deciding whether its karnavan should be removed. It was not strictly necessary to do so, as in any event the suit failed as the Court found there were no grounds for his removal. In any view therefore the ruling in *Muthaya Shetti* v. *Kanthappa Shetti* (7) is no authority in the plaintiff's favour. The judgment in Original Suit No. 3 of 1895 cannot thus be held to render issue 1 in this case res judicata.

Passing on to the decree in Original Suit No. 38 of 1890 we think the District Judge is wrong in holding that it operated as res judicata in favour of the tarwad. It has not been relied on by the learned counsel for the respondents. That was a suit brought by some junior members of the tarwad for maintenance against Ambu Nambiar as the karnavan of the tarwad. The District Judge considers that Ambu Nambiar might and ought to have pleaded that some of the properties belonged to Meethala Veetil Tavazhi and their income should have been excluded from calculation in assessing the rate of maintenance and as Ambu Nambiar was the karnavan of the tavazhi according to the plaintiff's case and as he failed to set up the tavazhi's claim, the tavazhi should be taken as barred by res judicata, presumably under Expl. 4, S. 11, Civil P. C., from setting up his existence thereafter. This view cannot be supported. Ambu Nambiar was sued only as the karnavan of the tarwad and not as the karnavan of the tavazhi and as he was always strenuously denying the very existence of the tavazhi, he could not be expected to raise any pleas in its favour, and his failure to put forward any particular plea cannot be treated as concluding the tavazhi as to it. The last two judgments we have to deal with are those in Original Suit No. 203 of 1893 on the file of the Court of the District Munsif of Panoor and its appeal, Exs. 1 and 2. The suit was brought by one Chappari as the holder of a melcharth granted by the tarwad karnavan, the same Ambu Nambiar, to redeem a kanom and recover possession of a paramba from the kanomdar, defendant 2. The karanavan, defendant 1, remained ex parte, but defendant 2, though he admitted the kanom, pleaded that the property belonged to the tavazhi of which Sankaran Nambiar was the karnavan, and not to the tarwad, and the melcharth by the tarwad karnavan was therefore invalid. Sankaran Nambiar was added as defendant 3 and he supported defendant 2's case. As notice of suit was published in the District Gazette and in a local paper, 50 other members, including the present plaintiff and defendant 2, joined as defendants. 28 of them supported defendant 3, while the rest opposed the claim of the tavazhi. The issue framed in the case was:

"Has plaintiff a valid melcharth right in the plaintiff paramba? and can he maintain this ejectment suit on the strength of it?"

No separate issue was framed about the existence of the tavazhi, but as the validity of the melcharth was challenged solely on the ground that the karnavan

(7) [1918] 45 I. C. 975.

of such a tavazhi alone could have granted a valid one, the question of the existence of the tavazhi was involved in the issue framed and was clearly a matter in issue within the meaning of S. 11, Civil P. C. For a matter to be in issue under that section it is not necessary that an express issue should be framed about it; it is enough if a decision about it is necessary for the decree. The District Munsif found that there was no such separate tavazhi as Meethala Veedu as alleged by defendant 3 and his party, and he overruled the plea of the invalidity of the melcharth and gave a decree in plaintiff's favour. Defendant 3 and his party thereupon appealed to the District Judge making the plaintiff and defendant 1 and his supporters respondents and again raised the same contentions. The District Judge however confirmed the findings in appeal. It would therefore seem that the question of the existence of the tavazhi is res judicata against the tavazhi. Both the karnavans were parties to the suit as well as a large number of members of the family. We must therefore hold that both the tarwad and the tavazhi were properly represented in that litigation. Mr. Ananthakrishna Aiyar however points out that defendant 1, the karnavan of the tarwad, remained ex parte, and he argues that as the question arose between the tarwad and the tavazhi as co-defendants in the suit, and as there was no active contest between defendant 1, the karnavan of the tarwad, and the members of the tavazhi, the finding should not be treated as res judicata.

He relies on *Kondiyil Cheriya Chandu* v. *Zamorin of Calicut* (8). In that case it was held that the matter was res judicata as the defendant against whom the plea was urged took an active part in the controversy as against his co-defendant. We think it must be taken as the view of our High Court that as between co-defendants there must be active controversy inter se before a finding can be treated as res judicata: See also *Ramanuja Ayyangar* v. *Narayana Ayyangar* (9). In this case however there are good reasons why the appellant's argument cannot be accepted. The tarwad was represented not merely by the karnavan but by all or nearly all the members of it, who certainly took an active part in the dispute; the res judicata pleaded is against the tavazhi, the karnavan, and members of which undoubtedly actively disputed the claim of the plaintiff and the other defendants. Furthermore, the controversy did not stop with the first Court. The karnavan and members of the tavazhi, as already stated, appealed to the District Court making the plaintiff as well as defendant 1 and the other members of the tarwad respondents. When the District Judge confirmed the finding that there was no tavazhi, he did so as between the two sets of members on opposite sides of the record. With reference to his finding, which is a final one in the case, no question of res judicata between co-respondents arises.

We must therefore hold that the District Judge was right in considering that the finding that there was no tavazhi is binding on the appellant in this suit. A question was raised that defendant, the tenant, was estopped from disputing the title of the plaintiff as his landlord. But this plea, even if valid, is of no effect in this case as defendant is also a party and against him there can be no such estoppel. The second appeal fails and must be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(8) [1906] 29 Mad. 515.
(9) [1895] 18 Mad. 374.

A. I. R. 1919 Madras 215

WALLIS, C.J. AND SPENCER, J.

(*Addaganti*) *Chinna Venkata Subba Row* and *another*—Appellants.

v.

Yemmanur Venkatramayya and *others*—Respondents.

Appeal No. 167 of 1917, Decided on 9th October 1918 against decree of Dist. Judge, Cuddapah, in Original Suit No. 13 of 1915.

(a) Grant—Inam—Enfranchisement—Inam attached to hereditary office is converted into ordinary property.

The effect of the enfranchisement of an inam attached to a hereditary office is to disannex the inam from the property and to convert it into ordinary property, with the result that the lands, after enfranchisement, are held by the family which was entitled to the office.

[P 217 C 1]

(b) Grant—Inam—Registered holders of hereditary office before enfranchisement—Suit for recovery of lands attached to office after enfranchisement is maintainable without impleading other members of family.

The registered holders of an hereditary office, whose names had been registered before enfranchisement, represent the inam for the purpose of

recovering it after enfranchisement and are entitled to institute a suit for the purpose without joining the other members of the family as parties to the suit. [P 217 C 2]

P. Narayanmurthy—for Appellants.

T. V. Vencatrama Aiyar and *C. Rama Rau*—for Respondents.

Judgment.—This is an appeal from the judgment of the District Judge of Cuddapah in a suit brought by the plaintiffs, who were the registered holders of the Karnam's office in this particular Inam village, to recover from the Shrotriemdars certain lands which, they contend, were emoluments of the Karnam's office. The District Judge has found, and his finding has not been and could not be seriously disputed, that these lands were Karnam's Inam and that they were excluded from the Shrotriem lands when the Shrotriem Inam was confirmed by the Inam Commission. Prima facie, the title to these lands was undoubtedly before the enfranchisement in the holders of the Karnam's office for the time being. The Karnam's office was a hereditary office, and these lands were annexed to the office for its emoluments and the holders of the office for the time being were entitled to them. The District Judge has however found in this case that the plaintiffs' suit is barred by limitation on the ground that these lands have, for a very long time, been in possession of the Shrotriemdars. On the other side reliance is placed upon the fact that the Shrotriemdars have all along been making payments of Rs. 25 annually to the Karnam in office, and the Shrotriemdars have not proved by affirmative evidence that they were trespassers and in possession as such. Having regard to the fact that this was a Karnam's Inam and to the annual payments to the Karnam for the time being and to the fact that they might very well have got into possession by some arrangement as to management owing to the incapacity of the Karnam, we think that the District Judge has placed the onus on the wrong side, and that the onus is strongly upon the Shrotriemdars to show that their possession was not permissive but adverse and they failed to discharge that onus. It is not necessary to rely on the oral evidence on either side which, in a case like this is often exceedingly inconclusive. There is a document Ex. P-1, which throws considerable light upon this case. It is an order by the Settlement Officer for the enfranchisement of the Karnam's Inam, and it affords evidence of certain transactions of which other evidence is not forthcoming. It is found by the Settlement Officer that, for 21 years from 1877 to 1898, Narasinga Row was the Karnam, that under Regn. 6 of 1831, he sued the Shrotriemdars for possession of these very lands and that he obtained a consent judgment in a summary suit in a Revenue Court. It is said that this was never executed because all the Shrotriemdars were not parties, but the fact that many of them consented to the restoration of the lands goes far to support the case for the plaintiffs that their occupation was permissive. We have been referred to Exs. K and L, but they do not help us. Ex. K is simply a takid from the Tahsildar to the Shrotriemdars telling them to see that the Karnam, who had acted during the suspension of the holder of the office, should be paid by the principal Karnam for his work out of the Inam Taram. Similarly Ex. L is a receipt given by the acting Karnam to the Karnam for such a payment. It is said on the other side that it is unlikely, if there had really been a lease and if the possession had been permissive the Shrotriemdars would have been allowed to continue in possession for such a small payment as Rs. 25 annually. There is no doubt some force in this contention, but the facts of the case are very obscure, and as we have said, we do not think that this is sufficient to rebut the inference which arises from some of the outstanding facts that the defendants' possession was permissive.

The other question is that of misjoinder or non-joinder. It is said that this suit ought to have been brought by the mother of the plaintiffs, who was the daughter of Narasinga Row, the last Karnam. That is a complete misconception. The office under the Madras Regn. 2 of 1894 devolves upon the next male heirs. Therefore this woman, the plaintiffs' mother, never succeeded to the office. At the time of the enfranchisement, the plaintiffs were minors, but the office had been registered in their names, omitting their elder brother, who was entitled to some other Karnam's office and was held not capable of holding two Karnam's offices at the same

time. The plaintiffs were minors and the effect of the registry was only to keep alive their claims to the office as soon as either of them became capable of filling it. In these circumstances the Karnam's Inam was enfranchised, but it was in their favour. As we have said, up to the time of enfranchisement, the lands were annexed to the Karnam's office and enjoyed by the holder of the office for the time being, who was the only person who had any right to them. In a Full Bench case in *Pingala Lakshmipati* v. *Bommireddipalli Chalamayya* (1) overruling several other cases, and following the judgment of Bhashyam Aiyangar, J., in *Gunnaiyan* v. *Kamakchi Ayyar* (2), it was held that

"the enfranchisement disannexes the Inam from the office, converts it into ordinary property and releases the reversionary rights of the Crown in the Inam, but does not confer on the persons named in the title deed any right in derogation of those possessed by other persons in the Inam at the time of the enfranchisement."

Applying that to this case, the result is that the land which had been an endowment of a hereditary office came to be held by the family which was entitled to the office. The registered holders of the Inam were plaintiffs and there can be no doubt that they would have been entitled to sue to recover the Inam before the enfranchisement. We do not think that they ceased by virtue of the enfranchisement to represent the Inam for the purpose of recovering it. As we hold that the possession was permissive on the date of the suit, there will be no question of limitation. As regards the question of mesne profits, Mr. Venkatarama Aiyar has pointed out that on the date of the enfranchisement, the plaintiffs' elder brother was a major and would have been entitled to sue to recover the Inam and also to recover mesne profits, and that so far as mesne profits are concerned, time should be considered to have run as against him and against the plaintiffs also and therefore their claim for mesne profits must be considered to be barred except as to three years, before the suit. We accordingly give judgment for possession with mesne profits for three years before suit and subsequent mesne profits until delivery of possession.

As there is no finding on issue 5 we have decided to call for a finding on that issue on the evidence on record, and also for a finding as to the rate of mesne profits as to which fresh evidence may be taken. Findings should be submitted in two months. Seven days are allowed for objections.

[In compliance with the above order in the judgment, the District Judge, Cuddapah submitted the following]

FINDING.—I am directed to record a finding on the evidence on record on issue 5:

"Whether the plaintiffs are entitled to the madava rights claimed in the plaint schedule for the plaint lands or any of them."

and also on the issue:

"What is the rate of mesne profits to which the plaintiffs are entitled per year."

On this issue the parties were allowed to adduce further evidence. The issue as to mesne profits can be easily disposed of. P. W. 5, the plaintiff 2's uncle, says that during the three years before suit and the three years after the institution of the suit, the net income of the lands has been Rs. 75 per annum. Defendant 1, in the witness box, says the net income has been about Rs. 70 to 75, not more than Rs. 75. There is no more evidence. I find that the rate of mesne profits to which the plaintiffs are entitled per year is Rs. 75. The other question is not so easy. The madava right is claimed only for item 8, i. e., wet Paimash number 17. The plaintiffs aver that this land is entitled to irrigation, under the Dasabandham channel. The defendants now admit this, though nothing is said about this in the written statements. But the plaintiffs in their schedule have described the channel as No. 3 channel and the defendants in their written statements deny that plaintiffs are entitled to any right in that channel, and some of the defendants specifically say that No. 3 channel is a private channel belonging to the Shrotriemdar. Defendants 6 and 7 say that there are two channels for the wet Inams namely Dasabandham channel and their own channel, and the Dasabandham channel ceased to flow and therefore the defendants alone are entitled to the private channel.

The question therefore seems to be whether the No. 3 channel is a private channel of the Shrotriemdars or whether it is the Dasabandham channel. I do not

(1) [1907] 30 Mad. 434 (F.B.).
(2) [1903] 26 Mad. 339.

think the documentary evidence throws much light on this question. It shows that the land is double crop wet, but it does not show that the source of irrigation is No. 3 channel. Ex. 1 requires some consideration. This is a maintenance deed and it shows that Vengamagari Madi, the paimash number in question, is under No. 3 channel. But the defendants point out that the land referred to in Ex. 1 is dry land, and they say that the grant of the madava right in that case was a mere matter of grace in favour of a relation. They also point out that the source of irrigation for the wet land referred to in Ex. 1 is the river channel and they want me therefore to infer that the river channel is the Dasabandham channel as distinct from the No. 3 channel. But I do not think it is safe to draw that inference. It cannot be presumed that the river channel is the Dasabandham channel. The defendants rely upon Ex. 14, an endorsement given by the Tahsildar stating that the Dasabandham channel is in a ruined condition, but that endorsement is scarcely sufficient by itself. The facts contained therein should be properly proved. Moreover, that Dasabandham channel is one that feeds the blacksmith Inam lands and may be a different channel.

It is necessary therefore to examine the oral evidence to determine the question. The parties do not seem to have made a real effort to thresh out this question properly. P. W. 1 in examination-in-chief says that the Dasabandham channel irrigates the wet land. In cross-examination he says that this channel is otherwise known as No. 3 channel. He is the only witness on the side of the plaintiffs who speaks about this matter. D. W. 1 is defendant 1. He says that the channel which now runs through the Shrotriem is their own channel and not a Dasabandham channel. In November 1903 the Dasabandham channel, he says, became ruined and silted up on account of floods and is not in use now. Then he refers to Ex. 14. With regard to Ex. 1 he says that No. 77 therein is a mistake for 73. In cross-examination he says that the Shrotriemdars were given Dasabandham Inam by the Sircar and they are still enjoying that Inam which was granted for keeping the channel in good repair. He says the Sircar gave them notice to repair the channel and they spent about Rs. 2,000, but the repairs are not complete; but the Inam has not been resumed. He says the Dasabandham channel is in the river itself and the private channel starts from the bank of the river, and that is how it was not silted up at the time of the flood.

There is no other evidence on this subject. The plaintiffs claim madava right in No. 3 channel only for item No. 8. They assert that No. 3 channel is the same as Dasabandham channel. Exs. 1, 9, 10, and 11 show that in connexion with the irrigation of Vengamagari Madi, which is partly wet and partly dry cultivated wet, three channels are mentioned, i. e., No. 3 channel, river channel, and a Dasabandham channel. But considering the unsatisfactory nature of the evidence it is not possible to say if these are three separate channels or branches of the same channel or the same channel under different names. P. W. 1 swears that the Dasabandham channel is otherwise known as the "third channel." Defendant 1 tries to meet this by saying that the Dasabandham channel is out of repair, but I do not think he has proved it properly. The alleged notices issued by Government have not been produced. Under these circumstances, I find that plaintiffs are entitled to the madava right in No. 3 channel as claimed in the plaint for item No. 8 alone.

[This appeal coming on for final hearing after the return of the finding of the lower Court upon the issues referred by this Court for trial, the Court delivered the following.]

Judgment.—We accept the finding and allow mesne profits at Rs. 75 per annum, and declare that plaintiff is entitled to madava right as regards item 8 from channel 3. These provisions will be incorporated in our decree. Respondents will pay the costs through out.

S.N./R.K. *Appeal allowed.*

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* A. I. R. 1919 Madras 218

KUMARASWAMI SASTRI, J.

Kalliani Amma and *others* — Petitioners.

v.

Matathil Veetil Achuthan Nair and *others*—Opposite Parties.

Civil Revn. Petn. No. 83 of 1918, decided on 6th March 1919, against order of Sub-Judge., Palghat, in Misc. Petn. No. 2107 of 1917.

Civil P. C. (1908), O. 33, R. 1—Court is not to adjudicate complicated questions that must form separate issues—If evidence adduced or facts disclose in petition however show that no cause of action exists it may be dismissed.

The primary object of an inquiry under O. 33, is to determine the pauperism of the petitioner, and a Court is not justified in determining complicated question of law in the course of such inquiry. If in the course of the enquiry it appears to be clear from the facts brought out in the evidence or from the facts alleged in the petition that the petitioner has no good subsisting cause of action, the Court can dismiss the petition, but it cannot treat the petition as calling for an adjudication of various questions which ought to be subject of specific issues after all the pleadings have been filed. [P 219 C 2]

T. A. Anantha Aiyar—for Petitioners.

C. Madhavan Nair—for Opposite Parties.

Judgment.—The plaintiffs, who are the petitioners, sued for a declaration that the consent decree in Original Suit No. 422 of 1910 and the Karar dated 30th April 1912 are not valid and also for a declaration that the properties specified in the plaint are Tarwad properties. They paid a Court-fee stamp of Rs. 10 treating the suit as one for a mere declaration. The Subordinate Judge directed that an ad valorem fee should be paid on Rs. 18,000, the value of the properties as set out in the plaint. The fee payable would be Rs.715 and the petitioners, alleging that they had no property sufficient to pay the ad valorem fee directed to be paid, filed a petition to sue in forma pauperis.

When the petition came on for disposal, the Subordinate Judge held that the suit was barred by limitation and dismissed it. Hence this revision petition. The Subordinate Judge was of opinion that though all the plaintiffs were minors at the date of the transaction they seek to impeach, they are barred as there were two adult members who could have sued. It is contended by the petitioners' vakil (1) that the order directing payment of ad valorem fees was wrong, (2) that the Subordinate Judge was wrong in going beyond the scope of the inquiry directed in O. 33, Civil, P. C. (3) that on the facts found the suit will not necessarily be barred.

As regards the first point, it is argued by petitioners' vakil on authority of *Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon* (1) that the Subordinate Judge was wrong in having required ad valorem fees to be paid as the suit was for a mere declaration. It is unnecessary to consider this question on the present petition which relates to the pauperism of the petitioners. If the order directing ad valorem fees to be paid was wrong, the petitioners ought to have taken steps to have the order set aside. The application to sue in forma pauperis proceeded on the basis that ad valorem fees had to be paid and that petitioners were unable to pay it. As regards the other points raised, I am of opinion that the Subordinate Judge acted with material irregularity in dismissing the petition on the ground that it was barred. The scope of the inquiry under O. 33, Civil, P. C. is primarily to determine the pauperism of the petitioners and in *Govindaswami Pillai* v. *Municipal Council, Kumbakonam* (2) it was held that upon an application to sue in forma pauperis the Court was not justified in determining complicated questions of law.

In the present case the question of limitation is not so clear as the Subordinate Judge imagines. If the karar and the razinamah were fraudulent and collusive as the plaintiffs allege, the question as to when the persons who could set it aside had knowledge of a collusion or fraud becomes material. It is no answer to plaintiffs to say that there were members (defendants 11 and 12) who subsequently attained majority and who were inactive. Assuming that there were members who subsequently attained majority and could have sued, it must be shown that they were aware of the fraud and kept quiet for three years afterwards. Having regards to the decisions of the Privy Council in *Nobin Chandra Barua* v. *Chandra Madhap Barua* (3) the question whether there were persons who could by their dissent or inaction bind the minor plaintiffs or give a valid discharge is one not free from doubt or difficulty. The question of limitation is not one which could be decided offhand on the scanty evidence before the Subordinate Judge. It is no doubt that R. 5, Cl. (d), true O. 33, Civil P. C. gives the Court power to reject the application to sue in forma pauperis if the allegations do not show a cause of action. It seems to me to be clear from the whole scope of O. 33, that the primary question to which the Court's

(1) [1907] 30 Mad. 18=1 M. L. T. 412.

(2) [1918] 41 Mad. 620=45 I. C. 95.

(3) A. I. R. 1916 P. C. 148=44 Cal. 1=36 I. C. 1 (P. C.)

attention ought to be directed is the fact of the petitioner's pauperism. If in the course of the inquiry it appears to be clear from the facts alleged in the petition or brought out in the evidence that the petitioner has no good subsisting cause of action, the Court can dismiss the petition but the Court ought not to treat the application for permission to sue as a pauper as calling for an adjudication of various questions which ought to be the subject of specific issues after all the pleadings have been filed.

In *Koka Ranganayaka Ammal* v. *Koka Venkatachellapati Nayudu* (4) it was held that the Court should not in an application to sue in forma pauperis go into the merits of the claim. In *Rathnam Pillai* v. *Pappa Pillai* (5) a Full Bench of this Court held following *Koka Ranganayaka Ammal* v. *Koka Venkatachellapati Nayudu* (4) and overruling *Vijendra Tirtha Swami* v. *Sudhindra Tirtha Swami* (6), that in an inquiry under S. 409, of the old Code, corresponding to O. 33, R. 7, the Court ought not to go into the evidence as to the merits of the case. The Chief Justice was of opinion that:

"the Munsif acted illegally in allowing evidence to be put in on behalf of the defendant with reference to the merits of the claim of the party applying for leave to sue in forma pauperis and in dismissing the application on the ground that on the evidence on record the applicant had no subsisting cause of action."

A similar view was taken in *Sankararamier* v. *Subramania Aiyar* (7). In *Venkoba Row* v. *Thuniya Nataraja Chetty* (8) it was held by Benson and Sankaran Nair, JJ , that the inquiry under S. 409, Civil P. C. should be confined to the question of pauperism and should not be extended to matters touching the merits of the case. *Kamrakh Nath* v. *Sundar Nath* (9) and *Vijendra Tirtha Swami* v. *Sudhindra Tirtha Swami* (6) were dissented from and the Full Bench ruling in *Rathnam Pillai* v. *Pappa Pillai* (5) was followed. A similar view was taken in *Debo Das* v. *Ram Charn Dass* (10), which was followed in *Gopal Chandra Neogy* v. *Bigoo Mistry* (11). My attention has been called by Mr. Madhavan Nair to *Subramania Chetty* v. *Kulayappan* (12) where it was held by Hannay, J., that it was competent to the Court in an inquiry under O. 33, to go into the question as to whether the suit is barred by limitation. No reference is made by the learned Judge to the decisions of this Court referred to by me above. All that was held in *Nawab Bahadur of Murshidabad* v. *Harish Chandra* (13) was that it was competent to the Court:

"to interrogate the petitioner as regards the merits of the claim obviously with a view to determine whether or not his allegations show a cause of action."

It was held that in order to satisfy itself as to the existence of a subsisting cause of action the Court can refer not only to the petition but also to statements made by petitioner during the course of the inquiry. This decision is no authority for the proposition that the Court ought to frame an issue as to limitation, which is often a question dependent on facts and requires parties to go into the question which ought properly to be the subject-matter of an issue after the plaint is admitted. I am of opinion that the Subordinate Judge acted with material irregularity in dismissing the petition on the ground that the claim was barred by limitation, and set aside his order and direct him to dispose of the petition according to law. Costs will abide and follow the result.

S.N./R.K. *Petition allowed.*

(4) [1882] 4 Mad. 323.
(5) [1903] 13 M. L. J. 292 (F B.).
(6) [1896] 19 Mad. 197=5 M. L. J. 193.
(7) [1903] 13 M. L. J. 425.
(8) [1909] 3 I. C. 829.
(9) [1898] 20 All. 293=(1898) A. W. N. 36.
(10) [1898] 2 C. W. N. 474.
(11) [1904] 8 C. W. N. 70.
(12) A. I. R. 1915 Mad. 398=26 I. C. 90.
(13) [1911] 11 I. C. 55.

A. I. R. 1919 Madras 220

OLDFIELD AND SESHAGIRI AIYAR, JJ.

A. T. S. Balasubramania Pillai — Plaintiff—Appellant.

v.

T. A. B. Chit Company Yela Nidhi Ltd. and *others* — Defendants—Respondents.

Appeal No. 89 of 1918, Decided on 17th February 1919, against appellate order of Dist. Court, Tinnevelly, D/- 22nd March 1918, in Appeal Suit No. 84 of 1918.

(a) Limitation Act (1908), Art. 182 (5)—Application for execution re-presented after amendment—Time is to be counted from first presentation.

Where an application for execution of a decree or order is re-presented after required amendments have been made the amended application should, for purposes of limitation, be deemed to have been presented on the date on which it was first presented, and not on the date of re-presentation. [P 221 C 1]

(b) Limitation Act (1908), Art. 182 (5)—Execution application not in form—Application for time to amend is not step-in-aid—Nor does adjournment granted extend time.

An application for time to amend an execution application and to put it in the form prescribed is not a "step-in-aid" of execution within the meaning of Art 182 (5), nor is an adjournment granted to convert an irregular application not placed on the file into a regular one a "step-in-aid" of execution. [P 222 C 1]

(c) Limitation Act (9 of 1908), Art. 182 (5)—Act to become step-in-aid execution must be pending.

In order that a particular act may amount to a "step-in-aid" of execution, execution must be pending before the Court which it can aid: [P 222 C 1]

S. Subramanya Aiyar—for Appellant.

M. D. Devadoss—for Respondents.

Oldfield, J.—The execution application before us was so far from being in the proper form when it was presented, that after eight months the petitioner-appellant here crossed it out and amended it by re-writing it as a whole. The interval had been spent almost entirely in appellant's vakil asking for and the lower Court mechanically granting extension of time in instalments of two weeks. The case is not creditable either to the vakil or the Court. The first point taken is that for purposes of limitation the date on which the application was finally admitted, not that on which it was first presented, is the starting point, because appellant's interest is to put that starting point as late as possible. O. 21, R. 17 (2), Sch. 1, Civil P. C., however lays down that an amended application shall be deemed to have been presented on the date on which it was first presented. It is suggested that this provision does not abrogate the law, as it stood before its enactment, that the presentation should be treated as effected when the application was finally accepted, the decree-holder thus having his choice between two dates. It is sufficient that, even if the law before 1908, stood as is alleged, the wording of O. 21, R. 17, is clear and general and does not countenance this suggestion.

Next it is said that time should run from some one of the various applications for time inscribed on the application, which have been referred to above, as a step-in-aid of execution. But when the alleged step was taken there was no execution pending before the Court, which it could aid. This therefore also fails. Lastly, it is urged that the appellant should be regarded as having really presented two applications, one of which must be deemed to have been withdrawn when he made a fundamental and comprehensive amendment above mentioned. In fact he then put in the original petition with an endorsement "filed amended" and paid for no second stamp; and it is impossible to identify any withdrawal of the old petition or presentation of a new petition with what he did. The appeal against appellate order is dismissed with costs.

Seshagiri Aiyar, J.—I agree.

Mr. S. Subramania Ayyar for the appellant has raised some ingenious contentions. The first is that the application for execution must be taken to have been presented on the date of its re-presentation and not on the date of its original presentation. O. 21, R. 17, Cl. 2, Sch. 1, Civil P. C., is against this argument. Then it was suggested that this rule is only an enabling provision and that the legislature intended to provide alternative rights to the decree-holder and not to deprive him of the exisitng rights. This contention was based on the facts that before the Procedure Code of 1908 was passed, there was no provision corresponding to O. 21, R. 17 (2) and that it was held by some Courts that for purposes of computing the period of limitation under Art. 179, Lim. Act, it is the date of the re-presentation that should be regarded as the date of applying in accordance with law. The learned vakil from these facts advanced a bold argument that the legislature, notwithstanding O. 21, R. 17 (2), intended to perpetuate the old view of the law and provided an additional right to the decree-holder to enable him to count the original presentation date as also enuring for his benefit. I am unable to accept this contention. With knowledge of the old decisions the legislature has deliberately enacted that it is the date of the original presentation that starts limitation.

The next contention was that inasmuch as the Court granted a dozen times time to enable the applicant to comply with the requirements of the Code, each of those endorsements granting time was a step-in-aid of execution. Reliance was placed on *Abdul Kadur Rowther* v.

Krishna Malamal Nair (1) for this argument. In that case an execution application was on the file of the Court and the applicant was given time to furnish particulars to enable the Court to deal effectually with that application. The grant of time was held by the learned Judges as a step-in-aid of execution. Even in that view the present contention cannot be sustained. Here there was no application on the file and consequently there can be no step-in-aid of execution; what the applicant was asked to do was to make the application a valid one on which the Court's order can be passed; an adjournment granted to make an irregular application not placed on the file a regular one is not a step-in-pid of execution. I agree that the appeal should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1914 Mad. 381=38 Mad. 695=23 I.C. 533.

A. I. R. 1919 Madras 222 (1)

SPENCER AND KRISHNAN, JJ.

Puli Subba Reddi, In re—Appellant.

Criminal Appeal No 275 of 1919, Decided on 4th August 1919, against order of Sess. Judge, Vellore, in Case No. 12 of 1919.

(a) Criminal P. C. (1898), S. 298—Omission to ask jury not to mind statement which is not evidence is not misdirection.

The mere omission to direct a jury not to be influenced by a statement which they are told is not evidence, does not amount to a misdirection of any importance. [P 222 C 1]

(b) Criminal P. C. (1898), S. 300—Juror conversing with stranger during adjournment before charge is concluded is not sufficient for interference.

The fact that a juror has a conversation with a stranger during an adjournment of the Court before the Judge's charge is concluded, is not a sufficient ground for interference by the High Court. [P 222 C 2]

S. Swaminathan—for Appellant.

Public Prosecutor—for the Crown.

Judgment.—There was no doubt some misreception of evidence when prosecution 35th witness's statement in re-examination as to what was written in a case diary kept by the Circle Inspector, who was not a witness, was allowed to go on the record. The Judge however told the jury that this was not evidence and his mere omission to direct the jury not, to be influenced by the statement does not in our opinion, amount to a misdirection of any importance. The Judge further reminded the jury on the question of identification that the identification parade had been held after accused 24 had been taken to Kaligiri in the presence of the witnesses who afterwards identified him, and he observed that it was useless for the Sub-Inspector or deny it. It was for the jury after this to put what value they thought proper on the evidence of the identifying witnesses. As regards the finding of stolen property in the possession of this accused there was no misdirection as the Judge clearly explained to the jury the nature of the possession that there was in this case.

Dr. Swaminathan has asked us to find that the verdict of the jury was vitiated by the fact, asserted in an affidavit filed in this Court and sworn to by the pleader who defended accused 24 in the Sessions Court, that during an adjournment of the Court before the Judge's charge was finished one of the jurors was seen conversing with two strangers. In *Benimadhab Kundu* v. *Emperor* (1) a fresh trial was ordered in a case where one of the jury held some communication with a stranger in the Court compound after the Judge had finished his charge but before the jury had delivered their verdict. That was a case which fell within the scope of S. 300, Criminal P. C.

The present case does not do so, as the charge was not over at the time. The proper course for the pleader to have taken was to inform the Sessions Judge what he had seen as soon as the Judge resumed his seat on the Bench, but he did not do so and nothing was in fact done in the matter till accused was convicted and the case came up to this Court in appeal. In the circumstances we do not consider we should interfere. The appeal is dismissed.

S.N./R.K. *Appeal dismissed.*

(1) [1919] 46 Cal. 207=46 I. C. 513.

A. I. R. 1919 Madras 222 (2)

WALLIS, C. J. AND KUMARASWAMI SASTRI, J.

Rajah of Pittapuram—Appellant.

v.

The Revenue Divisional Officer, Cocanada, Godavari Dist.—Respondent.

Civil Appeal No. 171 of 1918, Decided on 12th February 1919, against award of Dist. Court, Godavari at Rajahmundry in Original Petn. No. 16 of 1916.

Land Acquisition Act (1 of 1894), Ss. 23 and 24 — Valuation of occupancy rights— Land including all interest should be valued and amount should be apportioned according to interests—How tenant's interest should be valued stated.

Where occupancy or other rights are claimed in land notified to be acquired under the Land Acquisition Act, the correct rule to be observed is to value the land in the first instance, including all interests in it, and to apportion the amount so ascertained among the parties interested according to their interests.

The difference between the market-value and the value of the tenant's interest represents the landlord's interest. [P 223 C 1]

A. Krishnaswami Aiyar — for Appellant.

V. Ramesam—for Respondent.

Judgment.—We think the correct rule in cases like this has been laid down by Sir Lawrence Jenkins, in *Collector of Belgaum* v. *Bhimarao* (1), viz , the land to be acquired has to be valued in the first instance including all interests in it, and that the amount so ascertained has then to be apportioned among the parties interested according to their interests. This was followed by Batchelor, J., in *Trustees for the Improvement of the City of Bombay* v. *Jalbhoy* (2). Similarly it was held in Calcutta in *Collector of Dacca* v. *Hari Das Bysak* (3) that the proper way of dealing with lands like this is, in the first instance, to leave out of consideration the value of the occupancy rights, and to ascertain what would be the market value of the land if it were put to the most lucrative use, having regard to its condition, etc., the value of the occupancy rights of the tenants settled on the land being left to be ascertained afterwards. The fact that neither the landlord nor the tenant can utilize the land for building purposes without the concurrence of the other makes no difference. The difference between the market value and the value of the tenant's interest represents the landlord's interest. These authorities are not referred to in the judgment in Appeals Nos. 371 and 372 of 1916, to which the District Judge has referred.

We must set aside the award in so far as it relates to the appellant and remand the case for disposal according to law. Costs will abide the result.

S.N./R.K. *Case remanded.*

(1) [1808] 10 Bom. L. R. 657.
(2) [1909] 33 Bom. 483=3 I. C. 757.
(3) [1912] 14 I. C. 163.

A. I. R. 1919 Madras 223

ABDUR RAHIM AND BAKEWELL, JJ.

Pilla Kakkadu and *others*—Plaintiffs—Appellants.

v.

Vedula Chendrayya Chandari and *others*—Defendants—Respondents.

Second Appeals Nos. 584 and 585 of 1917, Decided on 18th April 1918, against decrees of Dist. Judge, Ganjam, in Appeal Suits Nos. 428 and 429 of 1915.

(a) Practice—Jurisdiction—Suit for declaration that decree is not binding being obtained by fraud—Decree passed by superior Court—Inferior Court can take cognizance if subject-matter is otherwise within its jurisdiction.

A suit to obtain a declaration that a decree passed by a Court was obtained by fraud and is not binding on the plaintiff can be laid in a Court of inferior jurisdiction to the Court which passed the decree, provided the subject-matter is otherwise within the jurisdiction of the Court, in which the suit is instituted : 41 *I. C.* 937, *Foll.* [P 224 C 1]

(b) Court-fees Act (1870), S. 7 (4) (c)—Suit for declaration that decree having been obtained by fraud is not binding comes within S. 7 (4) (c).

A suit for a declaration that a decree is not binding as having been obtained by fraud comes within S. 7, sub-S. 4, Cl. (c), and the court-fee payable thereon is an ad valorem fee on the value at which the suit is valued in the plaint : 28 *I. C.* 79, *Foll.* [P 224 C 1]

P. Narayanamurthi—for Appellants.

K. V. L. Narasimmam—for Respondents.

Judgment. — The plaintiffs brought these suits for a declaration that the decrees in two other suits were not binding on them and for a permanent injunction restraining the decree-holders from executing those decrees. The decrees were passed by a Subordinate Judge and the present suits were filed in the District Munsif's Court. The plaintiffs valued the relief claimed by them under S. 7, sub-S. 4, Cl. (c), Court-fees Act and filed the suits, as stated, in the District Munsif's Court according to that valuation. It may be mentioned that they had originally filed the same suits in the Subordinate Judge's Court but on insufficiently stamped plaints, and afterwards withdrew the plaints. That does not however make any difference in the question we have to consider. It has been decided by a Bench of this Court, after a very elaborate discussion of the law, in *Arunachellam Chetty* v. *Sabapathy Chetty* (1) that a suit to obtain a declara-

(1) [1917] 41 Mad. 213=41 I. C. 937.

tion that a decree passed by a Court was obtained by fraud and was not binding on the plaintiff can be laid in a Court of inferior jurisdiction to the Court which passed the decree, provided the subject-matter is otherwise within the jurisdiction of the Court where the suit is instituted. The decision seems to be supported by authorities and nothing has been urged against the soundness of that view.

The real question argued is that the valuation for purposes of jurisdiction ought to be according to the amount of the decree and not at the option of the plaintiffs. This point however is covered by a recent Full Bench ruling of this Court in *Arunachalam Chetty* v. *Rangasamy Pillai* (2), where it is held that a suit for a declaration that a decree is not binding as having been obtained by fraud comes within S. 7, sub-S. 4, Cl. (c), Court-fees Act and that the court-fee payable thereon will be on the value at which the suit is valued in the plaint. That is a decision binding on us and it cannot make any difference in this respect that other High Courts, if the contention of the respondent is correct, have taken a different view. Then, if S. 7, sub-S. 4, Cl. (c), applies, as we hold that it does, following *Arunachalam Chetty* v. *Rangasamy Pillai* (2), to a suit of this nature, another Full Bench decision of this Court in *Ramiah* v. *Ramasawmi* (3) has laid down that Courts cannot reject for purposes of jurisdiction the valuation made by a party for purposes of court-fee of the relief sought by him in a suit for partition of properties of which he claims to be in joint possession along with his co-parceners, even if such valuation is proved to be not a bona fide but an arbitrary valuation. That was in a suit for partition, but the same principle applies to a suit like this, that is to say, where a party is allowed under S. 7, sub-S. 4, to value a suit as he chooses, that valuation is also good for the purpose of determining the jurisdiction of the Court in which the suit is to be filed.

The result will be that this appeal must be allowed and the decrees of the lower Courts set aside so far as defendants other than defendant 1 are concerned and the case will have to be disposed of on the remaining issues. We may mention that defendant 1 died while the appeal was pending in the lower appellate Court and his legal representatives were not made parties to the second appeal and the time has long since passed. We do not think that this was a case in which the delay which was clearly due to the negligence of the appellants should be excused. Costs will follow the result.

S.N./R.K. *Appeals allowed.*

(2) [1915] 38 Mad. 922=28 I. C. 79.
(3) [1913] 18 I. C. 363

A. I. R. 1919 Madras 224

WALLIS, C. J. AND SADASIVA AIYAR, J.

M. Guruswamy Pantulu—Plaintiff—Appellant.

v.

Budhkaran Lall Khajanchee and *others*—Defendants—Respondents.

Original Side Appeal No. 16 of 1918, Decided on 9th March 1919, from judgment of Bakewell, J.

Contract Act (9 of 1872), Ss. 11 and 65—Minor effecting mortgage by misrepresentation of age—He is not liable to refund consideration.

Where a mortgage turns out to be invalid because the mortgagor at the date of the mortgage was a minor, he cannot be held liable to refund the mortgage money even if he misrepresented his age. [P 225 C 2]

V. Viswanatha Sastri—for Appellant.

Mahomed Ibrahim Sahib—for Respondents.

FACTS will appear from the following judgment of:

Bakewell, J.—Defendants 3 to 8 represent purchasers at a sale under a mortgage decree obtained by the first mortgage. Plaintiff is the holder of a registered mortgage who should have been, but was not, made a party to the suit. Plaintiff now sues on his mortgage and is in the same position as if this were a suit against the prior mortgagee and the mortgagor, and defendants 3 to 8 represent both these parties.

The defendants have pleaded that the plaintiff's mortgage is invalid as having been executed by defendant 2, the mortgagor, during his minority. Defendant 2's mother Chellammal was appointed guardian of his person and property by an order, dated 20th February 1900, which also empowered her to raise a loan by a mortgage of his property. The petition Ex. 4, which is verified by defendant 2's mother, recites the members of his family and states that at the date of his father's death 16th October 1899,

he was of the age of seven years or thereabouts and that he was born in or about the beginning of the year 1885. The first witness for the defendants has married a sister of defendant 2, and he states that defendant 2 is the last born child of his father and was born in Madras about 1886, and he produces a copy from the Register of Births which he says relates to defendant 2 and gives the date of birth of the child therein mentioned as 13th January 1886. Persons in the position of defendant 2's mother are generally very inaccurate as to dates and the first witness for the defendants is also somewhat inaccurate, because he says that defendant 2's father died when he was about five years old but I see no reason to doubt that that witness was a truthful witness, and having special regard to the fact that he states that defendant 2 was the last born child of his father, I accept the Birth Register as giving the date of his birth. Defendant 2 was therefore aged about 18 years and 9 months at the date of the mortgage.

The plaintiff's case has been that he was deceived by the fraudulent representation of defendant 2 into the belief that he was of full age at the time of the mortgage. It is evident from the evidence of the plaintiff and his witnesses that the plaintiff had at the date of the mortgage suspicions as to the true age of defendant 2; he asked defendant 2 to produce his horoscope and he produced a copy; one of his witnesses says that the document was pinned on to the mortgage deed; he took a letter from him referring to this horoscope and stating that it shows that he was born in 1883 and he says that he made inquiries of the neighbours. He obtained certificates of encumbrances relating to the property which disclosed a mortgage executed by defendant 2's mother. He says that he made inquiries of the mortgagee and was told that the mortgage had been executed by defendant 2 and Chellammal, his mother. According to the plaintiff he was on the verge of discovering that the mortgage had been executed by the guardian of the minor, but he never actually made the discovery. I decline to believe him. If the plaintiff took all these precautions to investigate the title of defendant 2, it is impossible to believe that he did not take the further step of either inspecting the mortgage deed which would probably have shown that it was executed under a title conferred by the Court, or of obtaining further information as to defendant 2's age. The mortgage was executed for various sums advanced in the year 1904. Defendant 2 was a dissolute young man. The plaintiff seems to have slept upon his rights professes ignorance even of the sale of the property and made no attempt to obtain any interest on his money, and I think that the circumstances in the case show that he was aware that defendant 2 was a minor and took the documents which accompanied the mortgage for the purpose of throwing a favourable colour on the transaction.

The plaintiff's mortgage will therefore be declared to be invalid and his suit must be dismissed with costs of two sets of defendants 2, 3 and 6 to 8, and of defendant 5.

Judgment — We agree with the learned Judge that defendant 2 was a minor at the date of the mortgage. It was therefore invalid and even if he misrepresented his age, he cannot be held liable on principles of equity to refund the money: *R. Leslie Limited* v. *Sheill* (1), approved in *Mahomed Syedol Ariffin* v. *Yoh Joi Gark* (2), both of which have been referred to by this Court in *Raghavayya* v. *Subbayya* (3). The appeal is dismissed with costs one set.

S N./R.K. *Appeal dismissed.*

(1) [1914] 2 K. B. 607=83 L.J.K B. 1145=111 L. T. 106=58 S J. 454=30 T. L R. 460.
(2) A. I. R. 1916 P. C. 242=43 I. A. 256=39 I. C 4 1 (P. C).
(3) [1918] 43 I. C. 908.

A. I. R. 1919 Madras 225

WALLIS, C. J. AND AYLING, J.

Abdulla Sahib and *others*—Plaintiffs—Appellants.

v.

Hyder Beg Sahib and *others*—Defendants—Respondents.

Civil Appeal No. 108 of 1918, Decided on 12th February 1919, from decree of Temporary Sub-Judge, Vellore, in Original Suit No. 22 of 1917.

Trust—Creation—Grant of revenue to persons for their own use and also for expenses of lamps in mosque—Grantees also directed to pray for prosperity of Government—Public charitable trust held created.

A grant to certain specified persons, described as servants of a mosque, recited that the revenue of the lands granted were to be enjoyed by

the grantees for their own needs and for the expenses of lamp oil in the mosque, the grantees being required also to pray for the prosperity of Government:

Held: that the grant constituted a public charitable trust. [P 226 C 2]

K. Sreeniwasa Iyengar, *S. Doraswamy Aiyar* and *S. Aravamudu Aiyangar*—for Appellants.

K. V. Krishnaswamy Aiyar—for Respondents.

Wallis, C. J.—The question in this appeal is, whether the grant, Ex. L, created a public charitable trust. The petition, of which a precis is given at the close of the document, prays that a grant by the late Nawab Sadatullah of 18 cawnies of land for expenses of lamp oil in the mosque and in aid of the maintenance of the petitioners who were servants of the mosque should be confirmed. This was preceded by another summary of of the petition which says that the grant prayed for was of 16 cawnies of land and the rent of 12 shops for the same purposes. The grant itself which comes first, recites the earlier grant for subsistence of Abdul Kadir, etc., the servants of the mosque and for the expenses of lamp oil in the mosque and makes a grant of the lands and the rents "to the aforesaid persons so that the revenues may be enjoyed by them according to their own needs and that they should engage in prayers for the prosperity and duration of the Government."

In *Bibee Kuneez Fatima* v. *Bibi Saheba Jan* (1) and *Sayad Mahomed Ali* v. *Sayed Gobar Ali* (2) grants somewhat resembling this were held not to give rise to charitable trusts and the judgments of these cases show that the Court read the grants in those cases as grants to the grantees free from any trusts at all. It was not held in *Bibee Kuneez* v. *Bibi Saheba Jan* (1) that a grant of this nature for the maintenance of a monastery would not be charitable but that no such trust was intended to be created. On the other hand, in *Bishen Chand Basawat* v. *Nadir Hossain* (3) an express trust was clearly created by the terms of the instrument, and it affords no assistance at all in the present case. Here the lands and shops are given to the grantees to be enjoyed by them for their own necessities and they are to pray for the prosperity of the State. Nothing is said in terms of this grant itself about the future maintenance of the lamps and I cannot read it as a grant in favour of the petitioners subject to the burden of maintaining the lamps There is however one fact which is peculiar to this case. The grant is made to the petitioners, who are described as the servants of the mosque. It does not appear that they were all of one family and it can scarcely have been intended as a grant to them as tenants-in common. Having regard to this fact and to the fact that in the registers maintained since the establishment of the British Government the property has been treated with the assent of the heirs of the grantees as an endowment of the mosque, I think there is sufficient evidence to show that in this case the intention was to create a trust and I would accordingly reverse the decree and remand this case for disposal according to law. Costs to abide.

Ayling, J.—I agree.

S.N./R.K. *Case remanded.*

(1) [1867] 8 W. R. 313.
(2) [1881-82] 6 Bom. 88.
(3) [1888] 15 Cal. 329=15 I. A. 1=5 Sar. 113 (P. C.).

A. I. R. 1919 Madras 226

SESHAGIRI AIYAR AND PHILLIPS, JJ.

Asan Alliar Maraikayar and *another* —Plaintiffs—Appellants.

v.

T. B. Masilamani Nadar and *another* —Defendants—Respondents.

Second Appeal No. 2158 of 1917, Decided on 18th November 1918.

(a) Criminal P. C. (1898), S. 4 (p)—"Present at, station house"—Meaning explained.

The words 'present at the station' house in S. 4 (p) do not have the effect of depriving an officer of his functions if he happens to go out of the station house. [P 227 C 2]

(b) Criminal P. C. (1898), Ss. 4 (p) and 166—Search by person in charge of station during permanent incumbent's absence is valid.

A search by a person therefore who is appointed to do the duties of a station house officer but who happens to be out of the station at the time is not illegal. [P 227 C 2]

Under S. 4 (p) if a person is deputed to be in charge of a police station, the fact that he is doing duty elsewhere does not deprive him of his capacity of station house officer. [P 227 C 1, 2]

(c) Criminal P. C. (1898), S. 166—Person assisting police officer lawfully making search is not liable.

A person assisting a police officer lawfully engaged in making a search is not liable in damages for an illegal search. [P 228 C 1]

K. R. Gurusami Aiyar and *A. Subbarama Aiyar*—for Appellants.

C. Narasimhachariar and *S. Anantharama Aiyar*—for Respondents.

Seshagiri Aiyar, J.—This is a suit against two policemen for damages for illegal search of the plaintiff's house. On 29th January 1915, the two defendants undoubtedly conducted the search. The District Munsif held that the search was illegal and awarded Rs. 100 as damages against each of the defendants. In appeal the District Judge exonerated defendant 2 altogether and gave a rupee damage against defendant 1. The plaintiffs have preferred this second appeal and defendant 1 has filed a memorandum of objections. On the question whether defendant 2 should be held liable I have come to the conclusion that the District Judge is right. The main argument addressed to us by the learned vakil for the appellant was that defendant 2 was not an officer in charge of a police station and that consequently he had no power to make the search. Under S. 4, Cl (p), Criminal P. C., an officer in charge of a police station includes when a permanent incumbent is absent or unable to perform his duties;

"the police officer present at the station house who is next in rank to such officer and is above the rank of a constable."

In the present case the Sub-Inspector, as he is called, who is the officer in charge of the Police Station of Valliyoor left his jurisdiction for the purpose of pursuing a gang of thieves. This was on 26th January 1915. The only evidence we have in the case as to what happened when he left the station is the deposition of defendant 2 in which he says;

"I am the general charge officer and I look after the station work during the Sub-Inspector's absence as senior officer of the station.

Relying upon this evidence the District Judge has come to the conclusion that defendant 2 was put in charge of the station when the permanent incumbent went out of the jurisdiction. I see no reason to differ from this finding of fact. It is in evidence however that defendant 2 left the headquarters of the station on the 26th to inspect some of the outlying villages within his jurisdiction. There is some doubt whether he returned back on the 29th or not. I am of opinion, having regard to what he states in the earlier portion of his deposition, that he was not in the station house on the 29th. But that does not matter. If he was deputed to be in charge of the station, the fact that he was doing duty elsewhere does not deprive him of his capacity of station house officer. If Mr. Gurusami Aiyer's contention were upheld, every moment that the officer in charge of a police station leaves the station house, a new station house officer must be installed there. Take for example a case in which the permanent incumbent who left the jurisdiction returns to the jurisdiction under his charge but not to the station house. If the contention for the appellants were upheld, until he takes charge of the station house, he cannot exercise the functions of an officer in charge of the police station. I am unable to agree with this contention.

The object of the definition is to permit of the discharge of the duties which can only be done by an officer in charge of a police station by some person who is deputed to look after that work. The aim is to bring in more men so that the duties of the office may be performed without delay, and not to exclude persons who were either permanent incumbents or who have been appointed to act for the permanent incumbent. My opinion therefore is that as defendant 2 was within the jurisdiction of the police station, and as he was appointed to act for his superior when the latter went outside the jurisdiction, he was an officer in charge of a police station. It may be that Arunachalam Pillai, the station writer as he is called, was also an officer in charge of a police station, but it is not necessary to consider that matter. I am clear that defendant 2 was an officer in charge of the Police Station of Valliyoor. I do not think that the words "present at the station house" would necessarily have the effect of depriving an officer of his functions, if he happens to go out of the station house. That clause, as I said before, is intended to empower more men to discharge these duties and not to deprive others of their functions. In this view I am of opinion that defendant 2 in conducting the search acted within his powers. There is the finding by the District Judge that in exercising those powers he did not act harshly or oppressively. I am of opinion that the exoneration of defendant 2 was right. Therefore the appeal, so far as he is concerned, must be dismissed with costs.

The question of the liability of defendant 1 is somewhat different. He is not attached to the Valliyoor station. He

is the head of another station. Therefore prima facie he acted without jurisdiction in making the search. Under S. 166, Criminal P. C., if a theft is committed within the limits of a police station, and if the property is concealed within the limits of another station, the officer in charge of the station where the theft was committed can requisition the aid of the officer in charge of the station where the thief has secreted the property to cause a search to be made. That is not this case. The plaintiffs against whom the suspicion of having received stolen property was entertained had their house within the limits of Valliyoor station. Therefore defendant 1 had absolutely no right to make a search. I find no provision of law which would enable a police officer who did not belong to the constabulary of a particular police station to come within its limits and to help in the search of property. I must therefore hold defendant 1 acted without jurisdiction. It was suggested in the course of the hearing that as defendant 2 was acting within his powers in making the search, the association of defendant 1 did not matter. In *Morris* v. *Wise* (1) it was held that a person assisting a constable or that officer engaged in carrying out a lawful process of law would be justified, as it would not be unlawful to take part in a lawful act. Having regard to the rank of defendant 1, it is doubtful whether he can be said to have simply assisted defendant 2. But defendant 2 had jurisdiction to conduct the search and was doing a lawful act. Consequently, if the entry into the plaintiff's house for the purpose of a search was lawful, can it be said that the association of another in this act was an actionable wrong? After consideration I am inclined to agree with my learned brother that he too was not liable. It is unnecessary to consider the other questions argued before us. I agree therefore that the memorandum of objections should be allowed with costs.

Phillips, J.—Plaintiff's suit is for damages for wrongful trespass committed by defendants in searching their house. The District Judge has found that defendant 2 was the officer in charge of the Valliyoor Police Station within the limits of which the search was conducted. The evidence of defendants 1 and 2, supports this finding and I think it may be accepted. The contention put forward by Mr. Gurusami Aiyar that the Sub-Inspector, who had been put in charge of the station, could be the only officer in charge of the station, subject to the proviso in S. 4 (*p*), Criminal P. C., does not appear to be correct. The Sub-Inspector was absent from the station on special duty and during his absence it would be necessary to have some other officer in charge, and the evidence is that defendant 2 was that other officer. S. 4 (*p*), Criminal P. C., only provides that in the temporary absence of the officer in charge the next senior officer above the rank of constable shall also be deemed to be the officer in charge of the station. This does not take away the power of acting as such from the officer who is really in charge of the station, for it is only necessary to state the proposition to see its absurdity. It would mean that as soon as such officer left the station house, the next senior officer would be the only officer in charge and no search outside the station house could be conducted by the officer in charge. Accepting this finding the suit was rightly dismissed as against defendant 2.

The District Judge has however found that defendant 1 acted without jurisdiction in that he took part in a search which he had no jurisdiction to make. The search, being conducted by defendant 2 was made with jurisdiction and the fact that a person not authorized by the Code to conduct the search took part in it, does not invalidate the search. It is not necessary that a person who conducts a search should do all the acts connected with the search with his own hand, but it is sufficient if he is present and personally supervises the proceedings; vide *Satagopala Charlu* v. *Satrughna Behara* (2). In most searches one or more constables assist the officer conducting the search, and sometimes a cooly is employed to do manual labour, such as digging up the floor, etc., to facilitate the search. I do not for a moment think that such assistants could be held to be liable in damages for rendering such assistance. In the present case defendant 1 being defendant 2's superior officer, no doubt took a considerable part in effecting the search, but that is no reason for saying that he conducted the search, for he had been careful enough to send for defendant 2

(1) [1860] 2 F. & F. 51.

(2) [1912] 17 I. C. 75.

to conduct the search, knowing that he had no jurisdiction to conduct it himself. In doing what he did he cannot be said to have exceeded his jurisdiction, and he is not liable in damages to plaintiffs. In this view the second appeal must be dismissed with costs, and in allowance of the memorandum of objections plaintiff's suit must be dismissed with costs throughout.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 229 (1)

AYLING AND KRISHNAN, JJ.

In re *Rathinam Pillai* and *another*—Accused.

Criminal Revn. No. 507 of 1918, (Taken up No. 31 of 1918), Decided on 6th November 1918, from an order of Sess. Judge, Tanjore.

Criminal P. C (1898), S. 532—Defect from want of territorial jurisdiction is not covered.

Section 532 does not deal with cases in which the defect in the committal order arises from want of territorial jurisdiction. [P 229 C 1]

T. R. Venkatarama Sastri—for Accused.

Public Prosecutor—for the Crown.

Order.—The Sessions Judge of Tanjore has passed an order under S. 532, Criminal P. C., quashing the commitment of accused 3 and 4, on the ground that the committing Magistrate had no local jurisdiction to commit. This is not a ground giving a Sessions Juege jurisdiction to pass an order under S. 532, Criminal P. C. : vide *Queen Empress* v. *Abbi Reddi* (1) and *Queen-Empress* v. *James Ingle* (2). There is no question that the committing Magistrate in this case was empowered to commit under S. 206, Criminal P. C., and we agree with the rulings above quoted that S. 532 does not deal with cases in which the defect in the committal order arises from want of territorial jurisdiction.

We set aside the order of the Sessions Judge and direct him to accept the committal of these accused and dispose of the case according to law.

S.N./R.K. *Order set aside.*

(1) [1894] 17 Mad. 402.
(2) [1892] 16 Bom. 200.

A. I. R. 1919 Madras 229 (2)

AYLING AND NAPIER, JJ.

Periya Goundan — Plaintiff—Appellant.

v.

Kuppa Goundan -- Defendant — Respondent.

Second Appeal No. 832 of 1918, Decided on 2nd April 1919, against decree of Dist. Judge, Salem, in Appeal Suit No. 3 of 1919.

Malicious Prosecution — Liability—Informant is liable for damages for prosecution though by police.

Where, upon a report to a Village Munsif, the police after investigation, launch a prosecution against certain persons, and it turns out that the communication to the Munsif was false and the persons are acquitted, the person who made the report is liable, at the instance of the persons prosecuted, in an action for damages for malicious prosecution. It is no answer to such a suit, and would make no difference to the defendant's liability for damages that the prosecution was instituted and conducted by the police, as the person primarily responsible for the prosecution is the person who furnished the false information. [P 229 C 2]

S. S. Ramchandra Aiyar—for Appellant.

C. Sreenivasa Aiyangar—for Respondent.

Judgment.—Appellant sued respondent for damages for malicious prosecution. He got a decree for Rs. 100 in the Munsif's Court. The District Judge set it aside, on the ground that respondent could not be said to have prosecuted appellant, because he only made a report to the Village Munsif as a result of which the police, after investigation, launched and conducted a prosecution for theft against appellant and his father. The authority relied on is the ruling of this Court in *Narasinga Row* v. *Muthaya Pillai* (1)

Any person desirous of setting the criminal law in motion against another in respect of an act amounting to a cognizable offence can do so in three ways:

(1) He can present a complaint to a Magistrate having jurisdiction, who will thereupon take action under Ch. 17, Criminal P. C. (2) He may give information to an officer in charge of a police station, who will take action under Ch. 14, Criminal P. C. (3) He may (in the case of all nonbailable and certain other offences) give information to the headman of his village, who is bound under S. 45, Criminal P. C., to forth-

(1) [1903] 26 Mad. 362=12 M. L. J. 389.

with communicate the information to the nearest Magistrate, and to the officer in charge of the nearset police station. It then becomes the duty of the Polioe Officer to investigate the case as laid down in Ch. 14.

Method (3) in fact only differs from method (2) in that the Village Headman, baing the officer presumably most accessible to the person giving information, is made the channel of communication to the Police Officer. It was the method adopted in the present case, and, as the District Judge himself recognizes, the fact that this indirect method of communication with the police was resorted to makes no difference in the defendant's liability for damages. The contention is that whenever the prosecution in Court is instituted on the police report under S. 173, Criminal P. C., the person who furnished the original information to the police, whether directly or through the village headman, is not responsible for the act of the police and cannot be sued for damages for malicious prosecution.

This certainly seems to me to be the meaning of the learned Judges in *Narasinga Row* v. *Muthaya Pillai* (1), but with all respect, I am unable to agree. If it be conceded that a person is liable for damages in respect of a prosecution on the ground that it was instituted on maliciously false information communicated by him to the Court in the shape of a complaint under S. 200, Criminal P. C., why should he not be equally liable where he induces the police by maliciously false information to send the case to the Magistrate under S. 107, Criminal P. C.? No doubt it is the duty of the police to hold an investigation, as laid down in Ch. 14, before sending the case to the Magistrate with a view to verifying as far as possible the truth of the information furnished to them. But a similar duty is cast on the Magistrate receiving a complaint he must examine the complainant on oath (S. 200)and if not satisfied of the truth of the complaint, he may hold or direct a preliminary inquiry (S. 202), and he only takes action against the accused person by the issue of process under S. 204, Criminal P. C., if he is of opinion that there is sufficient ground for proceeding. The fact that some officer, whether policeman or Magistrate, has to form an opinion on the apparent truth of the informant's information before the prosecution proceeds is no more reason in the one case than in the other for exonerating the informant from liability for what follows. It is in each case his false information, out of which the prosecution arises, and it makes no difference whether the person led astray in the first instance is the police officer or the Magistrate. The police or, as the form usually runs, the King-Emperor may be the nominal prosecutor: but the person primarily responsible for the prosecution is the person who furnished the false information on which the Police act. "*Qui facit per alium facit per se.*" The true principles on which responsibility for the prosecution should be fixed are laid down by their Lordships of the Privy Council in *Gaya Prasad* v. *Bhagat Singh* (2). They are at pains to make it clear that it is not enough to say as the learned District Judge has in effect said here) that the prosecution was instituted and conducted by the police. The whole circumstances of the case must be looked to. It is true that their Lordships in their judgment referred to the judgment of this Court in *Narasinga Row* v. *Muthaya Pillai* (1), and add:

"The principle here laid down is sound enough, if properly understood, and its application to the particular case was no doubt justified; but in the opinion of their Lordships it is not of universal application."

I caannot understand this as meaning that their Lordships considered the facts of that case and endorsed this Court's decision on them as correct. To do so would, as it seems to me and if I understand this Court's decision aright, run counter to all the rest of their Lordships' judgment. The language suggests to me that they deemed it unnecessary to consider the correctness of the decision in that particular case: Rather they wished to point out that, while it might be correct, it was based on a principle which was not to be universally applied. If, as I presume, they had only the report in Indian Law Reports series before them, they may well have been misled. The latter is very incomplete, and contains nothing to suggest that any of the Courts which dealt with the case found the pro-

(2) [1908] 30 All. 525=35 I. A. 189=11 O. C. 371=5 A. L. J.665=10 Bom. L. R. 1080= 8 C. L. J. 337=12 C. W. N. 1017=18 M. L. J. 394 =4 M. L. T. 204 =14 Bur. L. J. 318 (P.C.).

secution to be, as a fact, malicious. It recites that the District Munsif found that it was not; but it fails to state (what we have ascertained from the original record) that the Sub-Judge who was the final Judge of fact, found

"that the prosecution of the plaintiff by defendant 1 was malicious and without reasonable and probable cause."

With all respect I do not think their Lordships realized that the Bench of this Court had in effect held that even if the information to the police was maliciously false, the plaintiff's suit for damages could not succeed, simply because the case having been taken up on a police report S. (1) (b), Criminal P. C. the police, and not defendant, must be regarded as the prosecutor. From such a proposition which is clearly contrary to the views expressed in the rest of their Lordships' judgment, I must respectfully dissent. It is not inappropriate in this connexion to draw attention to the view taken by this Court as to the applicability of S. 211, I. P. C., to cases such as the present one. The matter is fully discussed by a Full Bench in *Sessions Judge of Tinnevelly Division* v. *Sivan Chetty* (3) and according to the opinion of the majority the action of the defendant in this case, provided the information given by him to the village headman was maliciously false, would render him liable to prosecution for an offence under S. 211, I. P. C. It would be a curious anomaly if an action for damages against him could not be sustained on the same facts. I would set aside the decree of the District Judge, and direct him to restore the appeal to file and dispose of it in the light of the above remarks. Costs in this Court to be costs in the cause.

S.N./R.K *Case remanded.*

(3) [1909] 32 Mad. 258=1 I. C. 187 (F. B.).

*A. I. R. 1919 Madras 231

ABDUR RAHIM AND OLDFIELD, JJ.

S. M. Venkatachallapathi Aiyar and *another*—Plaintiffs—Appellants.

v.

Thavasi Servai and *others* — Defendants—Respondents.

Civil Appeal No. 409 of 1917, Decided on 27th November 1918, against decree of Sub-Judge, Madura, in Original Suit No. 11 of 1917, D/- 29th August 1917.

(a) Contract Act (1872), S. 74—Mortgage bond—Principal payable on certain date with interest at 9 per cent. per mensem and in default at 12 per cent. per mensem—Mortgage consideration applied to debts bearing higher interest—There is no penalty.

Where under the terms of a mortgage bond, the principal amount was payable on a certain day with interest at 9 per cent. per annum and in default with interest at 12 per cent. and it was found that the mortgage consideration was applied in satisfaction of debts bearing interest at 12 per cent. and more.

Held: that the provision for payment of enhanced interest was not a penalty. [P 231 C 2]

*** (b) Civil P. C. (1908), O. 34, Rr. 2 and 4—Mortgage decree—Interest subsequent to date fixed for redemption is payable on principal, interest and costs.**

Where by the preliminary decree in a mortgage suit a date is fixed for redemption and the property is ordered to be sold on default, subsequent interest is to be calculated on the principal, interest and costs found to be due on the date fixed and not on the principal sum alone, and such further interest is ordinarily to be calculated at 6 per cent, but the Court has a discretion in the matter: 34 *Cal.* 159 (*P. C.*) and 21 *Mad.* 364, *Foll* [P 232 C 2]

K. S. Jairama Aiyar—for Appellants.

M. O. Parthasarathy Aiyangar and *M. O. Thirumalachariar*—for Respondents.

Abdur Rahim, J.—I donot think the Subordinate Judge was right in treating the provision for payment of interest at 12 per cent. in default of payment on the date fixed in the mortgage bond as penal. The original rate fixed no doubt is 9 per cent. But it is to be borne in mind that the debts to discharge which this mortgage was executed carried interest at 12 per cent. and more. It could not therefore be said that the mortgagees were not justified in stipulating for payment of a higher rate, if the money was not paid as promised.

The second question raised by the appeal is one of some importance. It is whether in a mortgage decree for sale, interest should be computed on the aggregate amount found to be payable on the date fixed for redemption, that is, consisting of principal, interest and costs or only on the principal, if the ascertained amount is not paid and property has to be sold in consequence. The matter is now governed by O. 34, R. 4, Civil P. C., which read along with R. 2 provides that in case of default the sale proceeds of the property sold shall be applied in payment of what is declared due to the plaintiff for principal and interest on the mortgage and for costs of the suit until the date fixed for payment together with subsequent interest and subsequent costs. This prima facie suggest

that the subsequent interest is payable on the aggregate amount and not on the principal alone The form appended to this rule, form No. 4 Appendix D, Sch. 1 of the Code, clearly proceeds upon this above interpretation. But in forms Nos. 7, 8, 9, which are forms of decrees for sale in cases where there are more than one mortgage on this property, provision is made for payment of such subsequent interest and costs as may be allowed by the Court. These forms certainly suggest that the rate of such subsequent interest is left to the discretion of the Court and probably also that the Court may, in a proper case, refuse to allow any further interest.

Before the present Civil Procedure Code, the subject was dealt with in the Transfer of Property Act and the question arose as to whether the Court had the power to allow interest at all for any period subsequent to the date fixed for payment and as to the proper rate. The Privy Council held in *Sundar Koer* v. *Rai Sham Krishen* (1) that the Calcutta practice of allowing such interest at the Court rate, also adopted in this Court in *Subbaraya Ravathaminda Nainar* v. *Ponnusami Nadar* (2), was right, contrary to the view of the Allahabad High Court in *Amolak Ram* v. *Lachmi Narain* (3). Their Lordships at p. 161 (of *I.L.R.* 34 *Cal.*) also observed:

"They think that the scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree. It will be observed that according to the practice explained by the Registrar, (that is of the Calcutta High Court) which has been followed in this case, the interest is allowed on the aggregate sum, and not merely on the principal money, and this is right, if the mortgagee is treated as a decree-holder or judgment-creditor, but would be wrong if the right to the interest depended on the terms of the mortgage bond."

No doubt this reasoning is intended to prove that the contract rate was not to be given, but it contains all the same a clear dictum that the practice in Calcutta of allowing interest on the aggregate sum was right.

I have tried to ascertain the practice in the Courts of this Presidency with reference to this matter. It would seem that in the Moffussil Courts the practice cannot be said to be consistent or uniform. When the High Court in its appellate jurisdiction passes a mortgage decree for sale, the practice seems to be to allow interest at the Court rate of 6 per cent. on the aggregate amount. On the original side the practice is to provide in the final order for sale, for such subsequent interest and costs as may be allowed by the Court, and I understand that an application for the determination of such interest is generally made at the time of confirmation of the sale. The conclusion that I am led to is that in default of redemption by payment on the date fixed subsequent interest is to be calculated both on the principal and interest declared or found to be payable on that date, and such further interest is ordinarily to be calculated at 6 per cent. but the Court has a discretion in the matter.

The English law was also discussed at the Bar, and so far as I can gather the practice of the English Courts in a foreclosure action is to compute subsequent interest on the aggregate amount, but in other actions such as by way of administration subsequent interest is allowed only on the principal amount, apparently out of consideration for other creditors of the mortgagor. This is what is to be deduced from *Harris* v. *Harris* (4), *Whatton* v. *Cradock* (5), *Brewin* v. *Austin* (6) and *Elton* v. *Curties* (7). But in my opinion a question like this has to be determined with reference to the provisions of the Civil Procedure Code and the practice of the Courts in this Presidency, if there is a uniform and well-established practice. There seems to be no special reasons in this case why interest should not have been allowed on the amount found to be due on the date fixed, and I think that such interest should be allowed at the rate of 6 per cent. The decree of the Subordinate Judge will therefore be modified by allowing interest from the date of default

(1) [1907] 34 Cal. 150=34 I. A. 9 (P. C.).
(2) [1898] 21 Mad. 364.
(3) [1897] 19 All. 174.
(4) [1750] 3 Atk. 722=26 E. R. 1214.
(5) [1836] 1 Keen 267=6 L. J. Ch. 178.
(6) [1838] 2 Keen 211=48 E. R. 609.
(7) [1882] 19 Ch. D. 49.

at 12 per cent. instead of 14 annas per mensem decreed by the Subordinate Judge, and also by calculating interest at the rate of 6 per cent. on the aggregate amount, that is, principal and interest calculated as indicated above and on costs, and not merely on the amount of principal as decreed by the Subordinate Judge, from the date fixed for payment, that is, 28th February 1918, until realization. The respondents will pay the appellants the costs of this appeal.

Oldfield, J.—I agree.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 232

AYLING AND KRISHNAN, JJ.

Sivaramalinga Dikshitar—Plaintiff—Appellant.

v.

Sabharatna Dikshitar and *others*—Defendants—Respondents.

Second Apeal No. 438 of 1917, Decided on 28th August 1918, against the decree of Dist. Judge., South Arcot, in Appeal Suit No. 184 of 1915.

(a) Specific Relief Act (1 of 1877), S. 42—Suit for declaration—Suit should not be dismissed unless prayer for consequential relief is necessary.

A suit for a declaratory decree ought not to be dismissed on the ground that it is barred by the proviso to S. 42, Specific Relief Act, unless it is quite clear that the plaintiff ought to seek further relief which he has failed to claim. 18 *I. C.* 633, *Foll.* [P 234 C 1]

(b) Specific Relief Act (1 of 1877), S. 42—S. 42 contemplates relief flowing directly from declaration sought for.

The further relief which the section speaks of is such relief as flows directly from the declaration sought for and such as the plaintiffs would be able to claim in an ordinary suit by virtue of the title sought to be declared. 15 *Mad* 15, *Foll.* [P 234 C 1]

(c) Specific Relief Act (1 of 1877), S. 42—Conditional suspension of temple trustee—Trustees holding properties in rotation—Suit to declare suspension invalid, for injunction and emoluments—Suspended trustee not entitled to possession at date of suit—Relief of either joint or symbolical possession held unnecessary—Suit held competent.

The plaintiff, one of twenty trustees of a temple was suspended conditionally from the trusteeship until he paid a certain fine and delivered a plot of land to the remaining trustees. Plaintiff sued for a declaration that the order of suspension was invalid, for an injunction restraining future interference with his performance of the duties of the office and for damages for loss of enoluments caused by the defendant's obstruction. According to the usage of the temple, the trustees held possession of its properties by rotation and plaintiff was not entitled to possession at the date of suit. The District Judge directed the plaint to be amended by adding a prayer for joint possession of the properties with the other trustees and ordered additional court-fees to be paid on their value. As plaintiff failed to comply with the order the suit was dismissed:

Held: (1) that the only consequential relief incidental to and flowing out of the declaration had been asked for by the plaintiff, viz., injunction and damages, and that no further relief was necessary (2) that as the plaintiff was not entitled to possession of the properties at the date of suit, and the setting aside of the suspension order would in no way affect the possession of the temple and its properties, the plaintiff was not bound to ask for either joint or symbolical possession.

14 *M. L. J.* 290; 15 *Mad.* 15; and 5 *I. C.* 630; *Dist* 16 *I. C* 630, *Expl*, 12 *I. C* 449, *Cons.* [P 234 C 2]

T. R. Venkatarama Sastri for *T. Rangachariar* and *S. Muthiah Pillai*—for Appellant.

K. Bashyam Aiyangar and *N. Kunjithapatham Aiyar*—for Respondents.

Judgment.—The lower Courts have dismissed the plaintiff's suit without any trial, holding that it was not maintainable under the Specific Relief Act without a prayer for the possession of the temple and its properties jointly with the defendants. Though a preliminary issue was framed on the point, no evidence was given or taken and the question was disposed of solely on the pleadings; we have therefore to decide the question on the same materials.

In his plaint the plaintiff states that he is one of the Dikshidars, who are holders of the combined offices of Archaka and Dharmakarta in the plaint temple, and that as such he is entitled, according to the usage of the temple, to the right of performing puja for 5 days once in every 9 months and along with 19 others to the custody of the idols, jewels and other valuables of the temple for 6 months by rotation (apparently once in 6 or 7 years). He states that in 1909 on account of a dispute as to the ownership of a certain plot of land, the body of Dikshidars passed a resolution directing him to deliver it up to the temple and inflicted a fine of Rs. 300 on him and suspended him from his office till he obeyed their orders. He complains that as a result of this resolution, he has been obstructed in the exercise of the rights and duties of his office and prevented from enjoying the emoluments and privileges attached to it. He claims that the resolution is illegal and inoperative and prays for a declaration to that effect and also for an injunction restraining the defendants from interfering

with him in the exercise of his office. He further claims damages for the loss of emoluments caused by the wrongful obstruction of the defendants and for the loss of his reputation, in all Rs. 1,600. The only objection the defendants took to the frame of the plaint in their written statement was that plaintiff should have asked for the possession of his office as well. The plaintiff was thereupon amended to add a prayer for the joint possession of the office. The above is a brief summary of the material allegations and prayers in the plaint with reference to the point we have to consider.

On this point the lower Court have told that as plaintiff was excluded by the defendants from the office of Dharmakarta, he ought to sue not only for a declaration that the defendants' act was wrongful but also for the possession of the temple and its properties as consequential relief flowing from the declaration; and relying mainly on the observations of Subramaia Aiyar, J., in *Vengan Poosari* v. *Patchumuthu* (1) and on the ruling in *Abdulkadar* v. *Mahomed* (2) and *Rathnasabapathi Pillai* v. *Ramasami Aiyar* (3), and distinguishing the case in *Rama Das* v. *Hanumantha Row* (4), they have held the suit to be not maintainable under S. 42, Specific Relief Act without such a prayer. On the facts of this case we are unable to support that view. We agree with Mookerjee, J., in thinking that a Court should not throw out a suit on the ground that it is barred by the proviso to S. 42, unless it is quite clear that the plaintiff ought to seek further relief which he has failed to claim: see *Aisa Siddika* v. *Bidhu Sekar* (5). The further relief the section speaks of is such relief as flows directly from the declaration sought for and such as a plaintiff will be able to claim in an ordinary suit by virtue of the title sought to be declared. This is the view taken in *Abdulkadar* v. *Mahomed* (2), and we accept it. Such further relief will necessarily depend on the facts of each case.

Is it clear then that in the preseut case on the declaration asked for being granted the plaintiff will become thereby entitled to the joint possession of the temple and its properties and that he should be compelled to ask that relief and pay court fees on their value which is said to be about Rs. 35 lakhs? We do not think so. Plaintiff's right to the trusteeship is not denied and he is not seeking to establish it in the present case. He sues to declare the invalidity of a conditional order of suspension against him, under which he had been excluded from the performance of the duties of his office and from the enjoyment of its perquisites till he paid a fine of Rs. 300 and delivered over a plot of land to the temple. The direct result of the declaration will be that plaintiff will be entitled to recover the office and the emoluments that he has lost in consequence of the wrong order and to prevent interference with him in the future in the discharge of his duties. He has prayed for all these consequential reliefs. It is not at all clear that the setting aside of the order of suspension will in any way affect the possession of the temple and its properties.

There is no allegation in the plaint or in the written statement about the lands belonging to the temple; they are said to be in the possession of the .persons who look after the lighting of the temple, in turn. The temple building and the jewels and valuables were, on the date of suit, according to the usage of the temple in the custody of a body of 20 persons of whom plaintiff was not one. The declaration therefore will not give plaintiff any right to the present possession of the temple or its properties. As to plaintiffs' right to possession when his turn comes, the declaration by itself will be sufficient relief as the persons in possession must be taken to be holding the properties on behalf of all the rightful trustees.

In considering this question the District Judge says that this view ignores plaintiff's right to the subsidiary offerings when he is not doing his morali or turn of worship and does not take account of his right to vote on the question whether the bids for the leases of the offerings should be accepted or not. These are clearly irrelevant considerations on the question of possession of the temple and its properties. The injunction and damages plaintiff asks for are the proper reliefs to secure such rights. We must therefore hold that in the circumstances

(1) [1904] 14 M. L. J. 290.
(2) [1892] 15 Mad. 15.
(3) [1910] 33 Mad. 452=5 I. C. 630.
(4) [1911] 36 Mad. 364=12 I. C. 449.
(5) [1913] 18 I. C. 633.

of this case plaintiff is not bound to ask for joint possession; indeed he is not entitled to it and the dismissal of his suit for not asking for such relief is erroneous. The case chiefly relied on by the lower Court and by the learned vakil for the respondents are all clearly distinguishable. None of them dealt with a case of suspension of a dharmakarta or with circumstances, such as we have here, of the possession of the temple and its properties being held not by all the trustees but by a few of them at a time in rotation, plaintiff not being entitled to it at the time of the suit. In the case of *Vengan Poosari* v. *Patchamuthu* (1) it appears that the plaintiff was entitled to the joint possession of the temple but the defendant prevented him from having access to it by keeping it under lock and key. In *Abdulkadar* v. *Mohamed* (2) defendant was in possession of the properties which possession, if plaintiff's case was established, would be that of a trespasser. The case most relied on by the respondents is the one in *Rathnasabapathi Pillai* v. *Ramasami Aiyar* (3), but that was a case of a trustee who had been dismissed from his office and had actually been custed from possession of the temple properties by the defendants; that ruling also is thus distinguishable from the present case.

The case which seems to us to be nearest to the present case is the one in *Rama Das* v. *Hanumantha Row* (4). The District Judge distinguished it on the ground that the tenants in possession there were willing to recognize whomsoever was holding the office of dharmakarta, whereas he says we have here the determined opposition of the whole body of dikshadars. That opposition however was only to the order of suspension being cancelled as invalid and not to the giving of the custody of the properties to the plaintiff in his proper turn if the Court set it aside as illegal or the plaintiff complied with the condition. The distinction drawn is therefore not valid, as here also the persons in actual possession were holding on behalf of all the rightful trustees. In this case as in that, a substantial value has been put on the injunction. If, as the defendants contend, the prayer for the recovery of the office has not been properly valued it will be for the trial Court to consider it but it does not affect the question before us. That case therefore supports the view that the present suit is maintainable without a prayer for possession.

The learned vakil for the respondents also cited to us the case of *Appu Pillay* v. *Perumal Pillay* (6) and contended that it was an authority for holding that the fact that the Court was not in a position to place the plaintiff in possession of the property at the date of the hearing, on account of an arrangement as to management under which the defendant was to remain in possession, was not material in considering the applicability of the proviso to S. 42. We do not think that any such general proposition has been laid down by that case. As a matter of fact the question there was whether a declaration alone could be asked for in second appeal because the right to possession had ceased by then, whereas both in the suit and in the appeal possession had been asked for. It was held that it could not be, but there is no discussion of the reasons. The prayer in second appeal must ordinarily have reference to the prayer in the suit and the circumstances that existed then. It is probably for this reason the bare declaration was disallowed in second appeal. The case certainly cannot be treated as an authority for the respondents' contention before us. If, on the declaration being given, a plaintiff is not entitled to possession he is not bound to ask for symbolical possession under S. 42.

The appellant's vakil relied on the ruling in *Kunj Behari* v. *Keshavlal Hiralal* (7), in which it was held that a person suing to get himself declared the proper trustee of a religious institution need not ask for the possession of the trust properties but it was sufficient for him to ask for an injunction against the defendant. This view has been dissented from in *Rathnasabapathi Pillai* v. *Ramasami Aiyar* (3), but we observe that the late Chief Justice has, in his judgment in *Rama Das* v. *Hanumantha Row* (4), accepted the view that the ownership of the trust property is in the idol as a juridical person and not in the trustee and it may therefore be a question whether, when the person in possession of the property holds it on behalf of the idol and the plaintiff does not dispute his right to do so a prayer for joint possession should be insisted upon. But in this case we need not express any opinion on that question. The lower

(6) [1912] 16 I. C. 630.
(7) [1904] 28 Bom. 567.

Court's decree must be set aside and the suit remanded to the first Court for disposal according to law. Defendants will pay plaintiff's costs here and in the lower appellate Court; costs in the first Court to abide and follow the result.

S.N./R.K. *Case remanded.*

A. I. R. 1919 Madras 236

PHILLIPS AND KUMARASWAMI SASTRI, JJ.

Venkatachellam Chetty and *others*—Plaintiffs—Appellants.

v.

Ayyamperumal Tevan and *others*—Defendants—Respondents.

Second Appeals Nos. 1956 to 1973 of 1916 and 1327 to 1361 of 1917, Decided on 22nd April 1919, against decrees of Dist. Judge, Ramnad, at Madura.

(a) Civil P. C. (1908), S. 11—Opposite decision of similar questions in other litigation does not make decision of certain questions less res judicata

Questions that have been once settled between the parties are not the less res judicata on the ground that similar questions between the same parties have been decided otherwise in, other litigation. [P 237 C 1]

(b) Civil P. C (1908), S. 11—Competency of Court is to be seen at time when first suit was instituted — Subsequent deprivation of jurisdiction to try subsequent suit does not affect.

A Court which had jurisdiction at the time of the institution of the first suit to try the subsequent suit, but was deprived of such jurisdiction by legislative enactment before judgment was pronounced in the first suit, is a Court competent to try such subsequent suit within the meaning of S. 11, Civil P. C. [P 237 C 1, 2]

(c) Landlord and Tenant—Rent—Enhancement—Excess charge for watering dry land is not enhancement.

A charge in excess of the prior dry rent for water taken by the tenant is not an enhancement of rent. [P 237 C 2]

(d) Landlord and Tenant—Rent—Contract to pay excess will be inferred when water is taken from landlord to irrigate with his permission.

Where water is taken by the tenant with the permission of the landlord to irrigate his dry lands, it is only reasonable to infer a contract between the parties that the landlord shall be entitled to a reasonable compensation for the water. [P 238 C 1]

(e) Landlord and Tenant—Rent—Levy of saresari if recovered usually for use of water for less remunerative purpose is not illegal.

Where the tenant utilizes the water for less remunerative crops as cotton, chillies, etc., and sarasari has usually been levied in the past, the levy is not illegal. [P 238 C 1]

(f) Landlord and Tenant—Cess voluntary and illegal—Long payment will not make it binding but only raise presumption o its being legal in origin if contract to pay can be inferred from its nature.

While mere length of payment will not make a cess, which is purely voluntary or which, on its face, is illegal, acquire a binding character, payment during a long course of years will be presumptive evidence that the payment of a cess had a legal origin, if the cess is of such a nature that a contract to pay it may be reasonably inferred. [P 239 C 1]

(g) Landlord and Tenant—Cess—Landlord not entitled to levy of Easwaran koil mahamai — Meaning of varapathu and varisaipathu lands explained.

Cesses in connexion with temples are purely voluntary and the landlord is not entitled to the levy of Easwaran koil mahamai. [P 239 C 1]

Meaning of varapattu and varisaipattu lands explained. The levy of kanganam, tayermutti, pakkilai and amanji disallowed as regards varisaipattu lands. [P 239 C 2]

K. Srinivasa Aiyangar and *K. V. Krishnaswami Aiyar*—for Appellants.

B. Sitarama Rao and *S. R. Muthuswami Aiyar*—for Respondents.

Judgment.—These second appeals are filed against two batches of appeals of the Ramnad District Court, which were decided by two District Judges who have not taken altogether identical views on all point. In second appeals, there are two main points for consideration: (1) whether the plaintiff is entitled to charge sarasari or average paddy varam for dry lands irrigated by plaintiff's water; (2) what cesses the plaintiff is entitled to charge.

On both these points there have in the past been a number of suits between some of the same parties, one batch of suits in the Manamadura Munsif's Court, a second batch before the Special Deputy Collector of Ramnad and the third before the Deputy Collector of Devakottah. It is contended for the appellants that the decisions in all these suits constitute res judicata so far as the parties and property concerned are the same. In the Manamadura suit, there was no appeal beyond the District Court except in two cases which came to the High Court and in those two cases, the High Court reversed the decision of the lower Courts. Mr. Moore accordingly holds that the question is not res judicata as regards the defendants in the Manamadura suits who did not appeal, because to hold otherwise would lead to certain startling results, and Mr. Venkataramayya also appears not to consider the decisions as res judicata and regards them as of small evidentiary value in view of the contrary opinion of the High Court. It is difficult

to see why questions that have once been settled between the parties should not be deemed to be res judicata merely on the ground that similar questions between the same parties have been decided otherwise in other litigation, and the learned vakil for the respondent does not support the finding of the District Judges on the grounds given by them, but so far as the case decided by the Manamadura Munsif is concerned, he relies on the language of S. 11, Civil P. C., for holding that they are not res judicata. His contention is that under S. 11, the Court which decided the first suit must have become competent at the time of such decision to try the subsequent suit, and relies on a ruling in *Kunji Amma* v. *Raman Menon* (1). We do not think that this case really supports his plea. No doubt the Judges said that they were of opinion that the only reasonable construction to be put upon the words "Court of jurisdiction competent to try such subsequent suit" must be held to refer to the jurisdiction of the Court at the time when the suit was heard and determined, but that the Judges did not really mean to decide that the Court must be competent on the date of judgment and not on the date of the institution of the suits appears to be clear from the fact that they approved the view of the Calcutta High Court in *Gopi Nath Chobey* v. *Bhugwat Pershad* (2) and *Raghunath Panjah* v. *Issur Chunder Chowdhry* (3). In the former of these cases it was clearly held at p. 707 as follows:

"The reasonable construction of the words in a Court of jurisdiction competent to try such subsequent suit' seems to us to be that it must refer to the jurisdiction of the Court at the time when the first suit was brought; that is to say, if the Court which tried the first suit was competent to try the subsequent suit if then brought, the decision of such Court would be conclusive under S. 13, although on a subsequent date by a rise in the value of such property or from any other cause, the said Court ceased to be the proper Court, so far as pecuniary jurisdiction is concerned, to take cognizance of a suit relating to that property."

This view is followed in *Raghunath Punjah* v. *Issur Chunder Chowdhry* (3) and also *Rai Charan Ghose* v. *Kumud Mohan Dutt Chowdhry* (4). At the date of institution of the first suit in the Manamadura Court, that Court had jurisdiction to try the subsequent suit and the fact that that jurisdiction was taken away by the passing of the Estates Land Act shortly before the judgment was pronounced, would not make it a Court not competent to try the subsequent suit within the meaning of S. 11. We therefore think that the decision of the Manamadura Munsif which was not appealed against constituted res judicata as well as the two decisions of this Court. So far as the cases decided by the Special Deputy Collector are concerned, there was no appeal and his decision is undoubtedly res judicata. In the third class of cases before the Deputy Collector of Devakottah no appeal was preferred in some of the suit and his decision would therefore be final in those cases. So far therefore as the previous litigations related to the same land or between the some parties, we think that the questions therein raised and decided must be held to be res judicata. There are, however other cases before us to which the principle of res judicata will not apply and these will have to be decided on the merits. The contention of the respondent on the first of the two questions before us which was upheld by the District Judge is that the charge of Sarasari is illegal because it is an enhancement of rent. Rent was originally charged for dry crops on the suit dry lands, and the right to levy Sarasari now claimed is claimed on the ground that these lands have been irrigated by water taken from the landlord's tank and for this water, he is entitled to a reasonable compensation. It has been held in *Thayammal* v. *Muttia* (5), *Venkata Rao* v. *Vaithilinga Udayan* (6) and *Battina Appanna* v. *Yarlagadda Venkataramalinganna* (7) that a charge for water taken by the tenant is not enhancement of rent. No doubt, under S. 3 (11), Estates Land Act, such charge, even if not consolidated with the rent, will come within the definition of rent. But for that reason alone, it is not necessary to hold that the charge for water in excess of the prior dry rent is an enhancement of rent.

It is suggested that the landlord's remedy would be to sue for compensation for the use of water taken, but that, with-

(1) [1892] 15 Mad. 494=2 M. L. J. 262.
(2) [1884] 10 Cal. 697.
(3) [1885] 11 Cal. 153.
(4) [1898] 25 Cal. 571=2 C. W. N. 297.
(5) [1887] 10 Mad. 282.
(6) [1902] 12 M. L. J. 22.
(7) [1917] 42 I. C. 464.

in the meaning of the Estates Land Act, would be in effect a suit for rent and would be governed by the provisions of that Act. Nor can he sue for damages for loss of water when, as a matter of fact, he has consented to the tenant taking that water. It is not disputed that any water taken was taken with the permission of the landlord, and we think it is only reasonable to infer from such taking by consent a contract between the parties that the landlord shall be entitled to a reasonable compensation for the water. The question, therefore would be whether the charge of Sarasari, which is the average Varam collected on paddy lands in the village, is a reasonable charge. It is very difficult to fix exactly the proper charge for the water, for the quantity of water, taken must vary according to the season of the year and also the nature of the crop raised on the land. So far as the landlord is concerned, the most profitable use of the water would be to facilitate the cultivation of a paddy crop as it would result in his obtaining his share of the produce in paddy, and the landlord might well say that all the water taken from his tank should be utilized for such purpose. If the tenant utilized it for less remunerative crops, such as chillies and cotton, as in the present case, can he be heard to say that he should pay less? It is a somewhat difficult question, but we find that Sarasari has been levied in the past. Sarasari being a curious method of levying compensation, which would hardly suggest itself to a landlord in modern days, it is evident that it must be levied according to old existing custom, and this would also appear from the technical meaning which is attached to the word itself. By its levy the landlord gets no more for his water than he would get by supplying water to wet lands, and there seems to be no ground for depriving him of what he can ordinarily expect to get for his water.

The tenant is not bound to take water to dry lands, and consequently he suffers no hardship by being asked to pay the full price for water taken by him. He has his remedy in his own hands, i. e., he can cease to take water. The landlord on the other hand has not a similar remedy, for the application of the water to paddy crops or to Vanpayier crops lies in the tenant's hands. In these circumstances it seems to us that the levy of Sarasari by the landlord is only a reasonable and equitable compensation for water supplied by him, and must be allowed. As there is no finding as to whether water was taken for the suit years, appellant's vakil says he will be satisfied with a mere declaration. The decree will therefore, be modified accordingly. As regards the cesses claimed, Mr. Moore allowed all the cesses of Varapattu and Varisaipattu lands. Mr. Venkataramiah disallowed the cesses in the case of Varisaipattu lands and as regards Varapattu lands disallowed Amanji, Pakkilai and Tayermutti. The appellant's vakil stated that he does not press Pakkilai and Tayermutti. Varapattu lands are the ordinary wet lands in respect of which the landlord and tenant divided the actual produce, while varisaipattu lands are lands paying a fixed paddy rent. The Special Deputy Collector disallowed pakkilai, tayermutti and amanji and allowed the other cesses claimed, on the ground that

"these cesses have been customarily paid by the raiyats and collected by the landlords in kind as part of their rent."

There can be little doubt that the cesses have been paid for a long series of years by the tenants without objection. The karnam (P. W. 1) deposes that on varapattu lands kanganam, eswaran koil Mahamai, kulavettu, kadiraruppu (cooly karnam swatantram' kudivaram, kaipichai are deducted as common charges and the balance divided befween the landlord and tenant. Out of these common charges some go to the landlord and some to the raiyat. He states that out of the kadiraruppu 3 measures are taken out of every 14 markkals and added to the landlord's share as amanji. As regards varisaipattu lands he states that kanganam, kulavetu, tayermutti, amanji, Eswaran koil mahimai, pakkilai swatantram, vamadai, vikalkattu are the cesses levied. The plaintiff appeals against the decision of Mr. Venkataramiah disallowing the cesses claimed and the defendants have filed a memorandum of objections against the decision of Mr. Moore as regards the cesses allowed. In our judgment in *Vadamali Thiruvanatha Sevuga Pandia Thevar Avergal* v. *Sankara Moorthi Naidu* (8) we have given what in our opinion are the tests to be applied

(8) [1919] 42 Mad. 197=49 I. C. 688.

and the considerations which should weigh with the Court in allowing or disallowing cesses which have been paid for a long time without dispute and to the difference between cesses which are deducted out of the gross produce and those deducted out of the tenant's share. We observed as follows:

"In considering whether any particular cess claimed and which has been paid for a series of years is enforceable or not, the first thing to be considered is whether the cess claimed has any direct or proximate bearing on the purpose for which the land is let. If the cess is payable in respect of such purpose, it will prima facie be one which is binding on the parties and the onus will be on the tenant to show that owing to some special circumstances it is not binding on him. When the cesses are in their nature unconnected with the object for which the land is let, they can only be claimed by the landlord under contract between him and the raiyat, supported by consideration or usage for which a legal origin is either proved or presumed from the nature of the cess and long course of payment."

While on the one hand mere length of payment will not, as pointed out in *Sundaram Iyer* v. *Theetharappa* (9), give to a cess, which is purely voluntary or which is on its face illegal, a binding character, payment during a 'long course of years will be presumptive evidence that the payment of a cess had a legal origin, if the cess is of such a nature that a contract to pay it may be reasonably inferred. As regards cesses deducted out of the gross produce before division of the Varam, there is nothing to prevent the parties from agreeing that certain expenses, which they consider to be beneficial to both of them, should be met by them in common and in such cases, so long as the levying of the cess is not a device by the landlord to give himself a purely personal benefit, the purpose for which the cess is levied is immaterial. It will, of course, be open to the tenant to show that the purpose for which the cess is levied has failed or that the landlord has not been appropriating the cess to the purpose for which it is claimed and levied. So far as cesses in connexion with temples are concerned, they have been held to be purely voluntary in *Siriprapu Ramanna* v. *Mullikarjuna Prasada Nayudu* (10), *Ramalingam Chettiar* v. *Ramasami Aiyar* (11) and *Devanai* v. *Raghunatha Row* (12). Eswaran koil mahamai will therefore be disallowed.

(9) [1917] 40 I. C. 159.
(10) [1894] 17 Mad. 43.
(11) [1903] 13 M. L. J. 379.
(12) [1913] 18 I. C. 298.

As regards varisaipattu land, there is obviously no necessity for kanganam which is a cess for superintending harvest, as the landlord gets a fixed paddy rent irrespective of the produce and no supervision is necessary. Tayermutti and pakkilai have been given up. Eswaran koil mahamai is for the reasons above given not enforceable. The Deputy Collector has disallowed amanji, and it has not been shown that the cess is one that can be enforced. We do not see sufficient grounds to disallow the other cesses. They have been paid for several years without objection and have been found by the Deputy Collector to have been paid for a long series of years as part of the rent. The decrees of the lower Courts as regards cesses will be modified accordingly.

Appellant will get costs in Second Appeals Nos. 1327—1353 and 1356--1361, will pay costs in 1956—1973, and on the memoranda of objections, each party will bear his own costs as also in Second Appeals Nos. 1354—1355.

[These second appeals and the memoranda of objections having been set down to be spoken to this day, the Court delivered the following.]

Judgment.—The statement submitted by the parties will be forwarded to the District Judge for report as to the correct amount to be awarded in each decree after hearing the parties. The report will be submitted within two months from the date of receipt of records in his Court and seven days will be allowed for filing objections.

[These Second appeals and the memoranda of objections coming on for hearing after the return of the report submitted by the District Judge, Ramnad at Madura, in compliance with the order of this Court, dated 18th December 1918, the Court delivered the following]

Judgment.—We have already held that the decision in certain previous suits constitutes res judicata between the parties, but the District Judge thinks that the question of cesses must be treated on a different footing. The right to levy cesses could and should have been raised in the prior litigation and the question must now be deemed to be res judicata. In other respects the District Judge's report is accepted, but it must be noted that vamadai vaikalkattu is not claimed

for varapathu land and it is admitted that vasi was given up at the last hearing. No argument was addressed to us as regards fishing rent, and in this respect we express no opinion but confirm the findings of the District Judge. Decree will be drawn up in accordance with the above.

S.N./R.K. *Order accordingly.*

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OLDFIELD AND SESHAGIRI AIYAR, JJ.

Damodaran Namboodri—Defendant—Appellant.

v.

Govindan Nair and *another*—Plaintiffs—Respondents.

Second Appeal No. 1673 of 1918, Decided on 11th April 1919, against decree of Temporary Sub-Judge, Palghat, in Appeal Suit No 8 of 1918.

Specific Relief Act (1877), Ss. 52 and 54—Injunction to restrain doing official acts cannot be granted—Suit to restrain samudayi from interfering in management is untenable without proof of his dismissal.

An injunction cannot be asked for against a person whose employment, whatever its exact nature, so long as it continues, entitles him to the exercise of the rights proposed to be restrained. Where the Uralans of a Malabar Deveswom sued for an injunction to restrain a Samudayi appointed by them from interfering with the management of the Devaswom and its properties without any allegation or proof of his dismissal :

Held : that as the dismissal of the defendant was a condition essential to grant of relief by way of injunction and as this was not alleged to have been fulfilled, the suit was incompetent : 33 *Mad.* 162 *Dist.* [P 240 C 2]

C. Madhavan Nair and *K. P. Ramakrishna Iyer*—for Appeallant.

T. Eroman Unni—for Respondents.

Judgment.—The plaintiffs Uralans, sued defendant 1 alleging that they had admitted him to the management of their Devaswom as Samudayi and given him a Samudayam deed. The prayer was for an injunction prohibiting him from interfering with the Devaswom in future, for an account, and for possession of various properties bolonging to the Devaswom and for the setting aside, meaning presumably a declaration, in respect of the Samudayam deed.

In the plaint there was no reference to any dismissal of defendant 1 except a statement that on 1st April 1916 plaintiffs required him to vacate the office of Samudayi. Defendant 1 therefore pleaded inter alia,

" the statement in the plaint that plaintiffs wanted this defendant to vacate the Samudayiship on 1st April 1916 is false. They have not so requested nor sent any registered letter. Therefore defendant is still Samudayi. "

Unfortunately the significance of this plea was not appreciated at the trial. It was not noticed that an injunction could not be asked for against a person, whose employment, whatever its exact nature, so long as it continued entitled him to the exercise of the rights proposed to be restrained. *Kunchunni Nair* v. *Subramania Patter* (1) was no doubt a suit for what was described as the removal of an agent. But the facts, as reference to the printed papers shows, were peculiar and it would have been useless for the defendant to lay stress on this aspect of them, because the plaintiff had in fact once dismissed him that dismissal having been the basis of previous proceedings. In the present case there seems to be no reason for departure from the principle recognized in *Srinivasa Swami* v. *Ramanuja Chariar* (2) and *Sundaram Iyer* v. *Venkateswar Iyer* (3) that the plaintiffs cannot throw on the Court the duty which lay upon them and ask it to grant them relief, which can only be granted after that duty has been done, on the assumption that the Court will do it. The present suit, as the cause of action was set out in the plaint, was in the circumstances incompetent, since a condition essential to the grant of relief by way of injunction was not alleged to have been fulfilled. If the proper course had been taken and an issue as to whether defendant 1 had been dismissed had been framed, a finding that he had not been, would have been fatal to plaintiffs and might have resulted in their withdrawing, with or without leave to sue again, after taking action to dismiss defendant 1. And this point is not merely formal. For if a dismissal had been alleged or proved, defendant 1 might, as he has done here, have gone on to contend that it was of no effect, because the forms of natural justice were not observed in the holding of any inquiry preceding it.

Unfortunately all this was overlooked until the hearing in this Court and even here, although the absence of any inquiry preliminary to the dismissial was alleged in a supplementry ground of ap-

(1) [1910] 33 Mad. 162= 5 I. C. 758.
(2) [1900] 23 Mad. 117=8 M. L. J. 190.
(3) [1910] 7 I. C. 391.

peal, nothing was said as to the absence of any dismissal until the argument. As we have said however we think the point fundamental, and we therefore do not feel at liberty even at this stage to disregard it. We therefore set aside the decisions of the lower Courts and remand the suit to that of the District Munsif for restoration to file and rehearing in the light of the foregoing, after both parties have been given reasonable opportunities to amend their pleading on the points above referred to.

In view of the course of the proceedings, defendant 1 must pay the costs incurred by plaintiff 1 to date, excluding stamp value. Stamp value of appeal to this Court will be refunded on application.

S.N./R.K. *Appeal allowed.*

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OLDFIELD AND SESHAGIRI AIYAR, JJ.

(*Kalavoor Chembazhi*) *Govindan Nair* —Plaintiff—Appellant.

v.

Kunja Nayar and *others*—Defendants —Respondents.

Second Appeal No. 1036 of 1918, Decided on 14th February 1919, against decree of Dist. Judge, South Malabar, in Appeal Suit No. 154 of 1917.

(a) Malabar Law—Maintenance — Member of tarwad leaving family house to live with wife is entitled to separate maintenance— (Per *Seshagiri Aiyar, J.*) **— Onus of proving good cause for leaving family house is on person leaving it.**

A male member of a Malabar tarwad leaving the tarwad house solely for the purpose of living with his wife is entitled to separate maintenance and menchilavu: 36 *Mad.* 203; 16 *I. C.* 178 and 36 *Mad.* 593, *Appl.* [P 241 C 2]

Per *Seshagiri Aiyar, J.*—The Customary law of Malabar, as enunciated in the decisions of the High Court, is that ordinarily every member of a tarwad house should be maintained by the karnavan. The onus of proving that his departure from the tarwad is for proper cause is on the member leaving the tarwad house and it is not for the karnavan to show that it was improper: 36 *Mad.* 591, *Foll.*; 49 *I. C.* 471, *Diss. from.* [P 242 C 1]

(b) Malabar Law—Menchilavu is part of maintenance.

Menchilavu is part of maintenance and does not stand on a higher footing. [P 242 C 2]

C. Madhavan Nair and *K. Kuttikrishna Menon*—for Appellant.

C. V. Anantakrishna Aiyar—for Respondents.

Oldfield, J. — I agree unreservedly with the conclusion of my learned brother in the judgment, which he is about to deliver, that a person claiming, like the plaintiff, the appellant, separate maintenance must show some good cause for doing so and that a claim to menchilavu is on the same footing as a claim to maintenance. The more difficult question is whether the plaintiff's desire to live with his wife (for that is all the real justification which he can allege for his claim) is such good cause; and I have felt great doubt whether the reasoning by which corresponding claims by female members have been countenanced in *Maravadi* v. *Pamakkar* (1), *Kunhi Amma* v. *Ammu Amma* (2) and *Muthu Amma* v. *Vellathumkara Gopalan* (3) should be extended. For those decisions involve, with all due deference, a radical departure from the view taken by earlier authorities. They have however been acquiesced in, so far as we have been shown, for over five years; they proceeded from learned Judges, whose competence in West Coast law commands respect; and their departure from or extension of recognized principles was deliberate. In these circumstances it seems to me that the principle as regards females must be treated as established; and if it is so, there is no reason against applying it for the benefit also of male members, since it has not been shown how any special consideration such as the right of the tarwad to any services at their hands or otherwise to their presence in it, as a condition of their right to maintenance, can be sustained against them. I concur in allowing the appeal, reversing the decree of the District Judge and restoring that of the District Munsif. Each party will bear their own costs throughout.

Seshagiri Aiyar, J.—This is a suit by a male member of a Malabar tarwad for arrears of menchilavu from the tarwad.. The case, as it finally developed itself in the Courts below, is that the plaintiff left the tarwad house to help his wife to manage her tarwad affairs and also because he did find it inconvenient to live in the tarwad house. I do not think the fact that the plaintiff wanted to assist his wife to manage her affairs is a good ground for leaving the tarwad house; nor the allegation that the plaintiff found it more comfortable to live in

(1) [1913] 36 Mad. 203=14 I. C. 383.
(2) [1913] 36 Mad. 591=16 I. C. 178.
(3) [1913] 36 Mad. 593=16 I. C. 895.

his wife's house a sufficient ground for claiming separate maintenance. The cases discussed in *Maravadi* v. *Pamakkar* (1), *Kunhi Amma* v. *Ammu Amma* (2) and *Muthu Amma* v. *Vellathumkara Gopalan* (3) support the above proposition. I may say at once that I do not agree with Sadasiva Aiyar, J., in *Kozhipunath Kunnikrishna Menon Karnavan* v. *Kozhipurath Kunhikavamma* (4) that the burden of proving proper cause or the want of it is on the karnavan The Customary law of Malabar, as enunciated in the decisions of this Court, is that ordinarily every member of a tarwad should live in the tarwad house and should be maintained there by the karnavan. He may go out of the house for good and proper cause. The onus of proving that his departrue is for such a cause is on the member leaving the tarwad house. This was laid down in *Kunhi Amma* v. *Ammu Amma* (2) to which Sadasiva Aiyar, J., was a party. *Maravadi* v. *Pamakkar* (1) is also to the same effect. In *Muthu Amma* v. *Vellathumkara Gopalan* (3). Sadasiva Aiyar, J., did not start his present theory of burden of proof. I am therefore unable to agree with the learned Judge that everything would be regarded as a proper cause which the karnavan cannot show to be improper.

Now comes the important question whether a male member of a tarwad leaving the tarwad house solely for the purpose of living with his wife is entitled to separate maintenance. Mr. Ananthakrishna Aiyar did not question the correctness of the rulings which laid down that a female member leaving the tarwad house for the purpose of living with her husband would be entitled to separate maintenance. see the three cases reported in 36 Madras Series. Nor did he take exception to the principle that maintenance is given to a member of a Malabar tarwad by reason of the proprietary interest possessed by the member in the tarwad property: see *Ammini Ammal* v. *Padmanabha Menon* (5). It is not denied that a male member of a tarwad has a proprietary interest in the tarwad property. Further in the case of a female member, the Customary law is that she should ordinarily reside in the tarwad house and that the husband should visit her there. That being the normal state of affairs in a tarwad, the permanent residence of a husband in the wife's tarwad cannot be regarded as an improper act on his part. The law as we have construed it, has made an inroad upon custom to this effect, namely, that a female member leaving the tarwad house solely for the purpose of living with her husband in his tarwad is entitled to separate maintenance. I fail to see why the same reasoning is not applicable to the converse case. I am almost inclined to regard the latter as an a fortiori case. But it is not necessary to go that length. There are expressions in the judgments of this Court which deduce the propriety of the cause from the ground that it is conducive to morality that the wife should be encouraged to live with her husband. It would serve the cause of morality no less that the husband should be encouraged to make his permanent home with his wife in her tarwad. Therefore I am of opinion that the present case is within the rule relating to the right of a female member making her home in her husband's tarwad.

Mr. Ananthakrishna Aiyar s complaint, that we shall be disrupting the tarwad if the plaintiff succeed, comes too late in the day. Disintegration commenced long ago. On one point I agree with him. Melchilavu is part of the maintenance. I do not think that there is any reason, as suggested by Mr. Madhavan Nair, for placing it on a higher footing. I agree with the reasoning in *Valia Konikkal Edom Kelu Achen* v. *Lakshmi Nethyer Ammal* (6) on this point. I would therefore reverse the decree of the District Judge and restore that of the District Munsif and I agree with the order as to costs made by my learned brother.

S.N./R.K. *Appeal allowed.*

(4) [1919] 49 I C. 471.
(5) [1918] 41 Mad. 1075=48 I. C. 104,
(6) [1864-65] 2 M H. C. R. 12.

A. I. R. 1919 Madras 242

BAKEWELL AND PHILLIPS, JJ.

Annammal—Defendant—Appellant.

v.

M. V. Sambasiva Aiyar—Plaintiff—Respondent.

Second Appeal No. 992 of 1918, Decided on 10th April 1919, against decree of Dist. Judge, Tanjore, in Appeal Suit No 281 of 1915.

Civil P. C. (1908), S. 21—Party residing outside but raising no objection—Ex parte de-

cree cannot be set aside on that ground if summons is served and no objection raised.

A party residing outside the territorial limits of the jurisdiction of a Court, who receives a summons fr m that Court and raises no objection to its jurisdiction, must be deemed to have submitted to jurisdiction and once a party so submits, he cannot subsequently raise the question again in another Court. An ex parte decree passed against such a person cannot be vacated on the ground of want of jurisdiction. [P 244 C 1, 2]

T. R. Ramachandra Aiyar—for Appellant.

K. S. Jayarama Aiyar—for Respondent.

Judgment.—The defendant in this case obtained a decree of the High Court, made in the exercise of its ordinary original civil jurisdiction, against the plaintiff for the return of certain jewels or payment of their value, and the present plaintiff has brought a suit in the Court of the Subordinate Judge of Tanjore for a declaration that this decree is null and void and of no effect on the grounds of fraud and want of jurisdiction. The lower appellate Court has found that there was no fraud on the part of the defendant, and the question to be decided in this appeal is whether the decree is void for want of jurisdiction.

The plaint filed in the High Court by the defendant alleged that the present plaintiff resided with his wife at No. 25, Venkataramaier Street, George town, Madras, that is within the local limits of the jurisdiction of the Court; that the defendant's mother entrusted some jewels to her mother, the defendant's wife, and subsequently died at Vizagapatam, where the plaintiff was then employed; and that the plaintiff and his wife had failed to return the jewels to the defendant after demand. The plaint alleged that the jewels continued in the custody of the plaintiff's wife until the death of the defendant's mother, and there was no averment of a conversion of the jewels within the jurisdiction by the plaintiff or his wife. The plaint therefore contained no averment to support the contention that the cause of action or part thereof arose within the local limits of the jurisdiction of the High Court. The High Court was competent to entertain a suit of this nature and of the value stated, and its jurisdiction depended upon the residence of the persons sued within the prescribed area.

The plaintiff and his wife did not appear in answer to the summons issued in the suit, and an ex parte decree was passed against the plaintiff upon evidence that he had been served at the house mentioned in the plaint and that this was his residence. The present plaintiff applied to the High Court to set aside the ex parte decree on the ground that he had not been served with summons. In his affidavit in support of this application he admitted that a bailiff of the Court told him that he had a summons against him, and that he wrote to the Assistant Registrar of the High Court requesting him to send the summons through his superior officer, and stated that he was permanently residing at Kumbakonam. The order dismissing the application was confirmed on appeal. Many authorities have been cited before us with reference to judgments of foreign Courts, but we are of opinion that they are not relevant to the question to be decided. The Courts of this country will not recognize the judgment of a foreign Court, unless it complies with the prescribed conditions (S 13, Civil P. C.), and one of the conditions is that the Court had jurisdiction in the particular case. In the present case the plaintiff is a subject of British India and resides within the Presidency of Madras and is therefore subject to the process of its Courts.

For the convenience of parties and for the better despatch of the business of the Courts the legislature has prescribed the subject with which the several Courts shall deal, and the areas within which they shall respectively exercise their powers, and has determined what persons shall be subject to their process; and it has provided that no objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and unless there has been a consequent failure of justice (S. 21, Civil P C.) Upon the averments contained in the plaint presented to the High Court that Court had power to inquire into their truth, and if it found that the defendant was in fact resident within the local limits of its jurisdiction, it had power to pass the decree prayed for. Such decree could not be set aside by the appellate Court, unless objection had been taken by the defendant in the prescribed manner. If its jurisdiction depends upon the existence of certain facts, the

Court must decide upon the evidence whether they exist or not, and if upon the facts so found a subordinate Court has assumed jurisdiction, the superior Court will not interfere with its decision except by way of appeal: see *Monisha Eradi* v. *Siyali Koya* (1), *Revell* v. *Blake* (2) and *Gomathan Almelu* v. *Komandur Krishnamacharlu* (3):

"Where an inferior Court has no jurisdiction from the beginning, a party by taking a step in a cause before it, does not waive his right to object to the want of jurisdiction. But jurisdiction is some times contingent; in such case, if the defendant does not, by objecting at the proper time, exercise his right of destroying the jurisdiction, he cannot do so afterwards:" *Jones* v. *James* (4) per Erle, J., cited in *Moore* v. *Gamyee* (5).

The plaintiff received a summons from the High Court while he was in Madras, and at the time took no objection to the jurisdiction of this Court, but merely asked that another summons should be sent to him. This Court had therefore to determine whether it had jurisdiction. Acting on the averments in the plaint, the return of the summons, and the failure of defendants to raise any objection, if decided that it had jurisdiction and disposed of the suit. Although S. 21, Civil P. C., is not applicable to the facts of this case, there is no reason why the principle underlying it should not be applied. This principle is that no objection to the place of suing shall be entertained unless it is taken at the earliest opportunity. All Courts in this Presidency, so far as original jurisdiction is concerned, are local Courts, and there is no Court exercising original jurisdiction over the whole Presidency. If therefore a Court has jurisdiction to try a suit of a particular nature, the fact that it has no territorial jurisdiction over the suit is a matter of minor importance and will not be deemed to be a matter destroying jurisdiction, unless the objection to jurisdiction is taken at the earliest opportunity. In this case plaintiff, by receiving summons and raising no objection, must be deemed to have submitted to jurisdiction. Although such submission would not be effectual, if the Court, apart from the question of territorial jurisdiction, had otherwise no jurisdiction, it is held to be effectual on a question of territorial .jurisdiction : vide the provisions of S. 21, Civil P. C. In the present case therefore plaintiff must be deemed to have submitted to jurisdiction, and cannot subsquently raise the question again in another Court. The cases in *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan* (6) and *Alderson* v. *Palliser* (7) are no authority to the contrary, for there the jurisdiction depended on questions other than territorial.

We are of opinion that the remedy open to the plaintiff was that provided by S. 21 of the Code and that he has no other remedy. The decrees of the lower Courts are set aside and the plaintiff's suit is dismissed with costs throughout. The memorandum of objection is also dismissed with costs.

S.N./R.K. *Appeal allowed.*

(1) [1888] 11 Mad. 220.
(2) [1873] 8 C. P. 533=42 L. J. C. P. 165=29 L. T. 67=22 W. R. 96.
(3) [1904] 27 Mad. 118.
(4) [1850] 19 L. J. Q. B. 257=1 L. M. & P. 65 =87 R. R. 518.
(5) [1890] 20 Q. B. D. 244=59 L. J. Q. B. 505 =38 W. R. 669.
(6) [1854-57] 6 M. I. A. 134=19 E. R. 50.
(7) [1901] 2 K. B. 833=70 L. J. K. B. 935= 49 W.R. 706=85 L.T. 210=17 T.L.R. 742.

A. I. R. 1919 Madras 244

OLDFIELD AND SESHAGIRI AIYAR, JJ.

Anantharaju Shetty—Petitioner.

v.

Appu Hegade—Opposite Party.

Civil Revn. Petn. No. 1102 of 1918, Decided on 14th March 1919, against order of Dist. Judge, South Canara, D/- 29th July 1918, in I. A. No. 32 of 1918.

(a) Religious Endowments Act (20 of 1863), S. 10—Order under Act cannot be reviewed either under S. 10 or Civil P. C. (5 of 1908), S. 141.

Inasmuch as there is no explicit provision in the Religious Endowments Act for a review, a District Judge has no power, under that Act, to review an order passed by him under S. 10 of the Act, nor has he any such power under S. 141, Civil P. C. [P 246 C 1, 2]

(b) Civil P. C. (1908), Ss. 141 and 151—Power to review is not inherent but must be given by statute.

The power to review is not inherent in a Court, and can only be exercised if it is permitted by Statute. [P 246 C 1]

A. Narayanaswami Aiyar for *K. N. Aiya Aiyar*—for Petitioner.

B. Sitaram Row—for Opposite Party.

Oldfield, J.—The only question we have to decide is whether a District Judge can, at the instance of a party, review an order passed by him under S. 10, Act 20 of 1863. The Act contains no explicit provision for a review and petitioner has accordingly supported his

claim to one with reference to (1) the Code of Civil Procedure, (2) the inherent power of the Court. As regards the Code there is nothing in the Act to apply its provisions and they can be applicable, if at all, only with reference to S 141 of the Code itself. That section however does no more than provide for the procedure to be adopted by Courts of civil jurisdiction in dealing with matters before them. It does not authorize an appeal, since that would not be a mere matter of procedure but the recognition of a substantive right, which must be conferred in explicit terms. *Damodara Menon* v. *Kittappa Menon* (1). And similarly it confers no right to a review. For we have not been shown how the one right stands on a different footing from the other.

To turn to the alternative ground for petitioner's claim, that the power or duty to review an erroneous decision is inherent in the Court, he has supported it mainly with reference to *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad* (2). I referred to the material dicta in that case in my judgment in *Muthiah Chettiar* v. *Bawa Sahib* (3) and I am still of opinion that the Court's action, which the Judicial Committee then approved, consisted merely in the recognition that previous proceedings authorized by it were void. I may now add that the case can be regarded on the widest construction only as authorizing the Court to repudiate its previous proceedings on the ground that they were without jurisdiction, *Debi Bakhsh Singh* v. *Habib Shah* (4) being similarly decided in very similar circumstances, or alternatively on the ground referred to in the judgment that a mistake had been made through inadvertence. Again in *Mahomad Kala Mea* v. *Harperink* (5) the right to review was recognised, because the proceedings were vitiated by the fraud or misrepresentation of an officer of the Court.

These cases however merely constitute exceptions to a rule which is otherwise well established, and the facts in none of them in any degree resemble those alleged before us. For the rule that a Court cannot review its own decision except so far as it is permitted to do so by statute, is of general authority, since it is recognized alike in England, for instance in *Drew* v. *Willis* (6) and in India in *Damodara Nadar* v. *Manicka Vachaka Dasika Pandara Sannadhi* (7), *Lala Pryag Lal* v. *Jai Narayan Singh* (8) and *Baij Nath Ram Goenka* v. *Nand Kumar Singh* (9). And here the petitioner has alleged only that, if he had had a better opportunity of laying his case before the lower Court, he would have been able to adduce evidence, which would have resulted in a different decision. In these circumstances there was no ground on which the lower Court could be asked to review its order. The civil revision petition must therefore be dismissed with costs.

Seshagiri Aiyar, J.—I am of the same opinion. The question raised in the order of the learned District Judge is a very important one and I shall therefore say a few words. The ground has been cleared considerably after hearing the very able arguments of Mr. Sitaram Rao who appeared for the counter-petitioner. It was argued by the learned vakil for the petitioner that, as under the ruling of the Judicial Committee in *Balakrishna Udayar* v. *Vasudeva Aiyar* (10) the District Judge in filling up a vacancy under S. 10, Act 10 of 1863 is acting judicially, his orders are clothed with all the rights and are subject to all the disabilities which attach to his judgments in an ordinary civil action. I do not think this result follows from the judgment of the Privy Council. District Judges in this Presidency have jurisdiction to hear and determine cases under special Acts. In some of them, the procedure to be followed is prescribed. In others the Civil Procedure Code is referred to as regulating procedure. Where neither of these provisions exist, the District Judge if he is asked to deal with the subject

(1) [1913] 36 Mad. 16=10 I. C. 879.
(2) [1870-72] 14 M. I. A. 40=7 B. L. R. 186=2 Suth 434=2 Sar. 656=20 E. R. 701 (P. C.).
(3) A. I. R. 1915 Mad. 392=26 I. C. 46.
(4) [1913] 35 All. 331=16 O. C. 194=40 I. A. 150=19 I. C. 516 (P. C.).
(5) [1909] 36 Cal. 323=36 I. A. 32=1 I. C. 122 (P. C.).
(6) [1891] 1 Q. B. 450=60 L. J. Q. B. 264=64 L. T. 760=39 W. R. 310=55 J. P. 373
(7) [1910] 33 Mad. 65=3 I. C. 463.
(8) [1895] 22 Cal. 419.
(9) [1913] 40 Cal. 552=40 I. A. 54=18 I. C. 956 (P. C.).
(10) A. I. R. 1917 P. C. 71=40 Mad. 793=44 I. A. 261=40 I. C. 650 (P. C.).

judicially, should act on the principles of audi alteram partem, take such evidence as may be tendered and decide the matter according to well-recognized principles of jurisprudence. Such a disposal does not necessitate the application of all the provisions of the Code of Civil Procedure to his procedure and conclusions.

It was next argued that S. 141, Civil P. C. ,is indicative of a general enunciation of principle by the legislature that to all the judicial proceedings, the Civil Procedure Code is applicable. The section only empowers the Judge to regulate judicial trials by rules as to summoning of witnesses, etc., which are to be found in the Code, and not that the Code is to be applied in its entirety to such proceedings, including power of appeal and of review. The last argument related to the inherent power of a judicial officer to review his own judgment. It is settled law that a case is not open to appeal unless the statute gives such a right. The power to review must also be given by the statute. Prima facie a party who has obtained a decision is entitled to keep it unassailed, unless the legislature has indicated the mode by which it can be set aside. A review is practically the hearing of an appeal by the same officer who decided the case. There is at least as good reason for saying that such power should not be exercised unless the statute gives it, as for saying that another tribunal should not hear an appeal from the trial Court unless such a power is given to it by statute. This was the view taken by Lord Esher in *Drew* v. *Willis* (6). In *Charles Bright & Co. Ltd.* v. *Sellar* (11) and in *Hession* v. *Jones* (12) the same principle was enunciated. The decision in *The Bolivar* (13), as pointed out by Mr. B. Sitaram Rao, proceeds on the ground that no party should be condemned unheard and when such a procedure has been adopted, the Court has inherent power to reconsider its decision.

The course of decisions in this country has followed the same line. In *Damodara Nadar* v. *Manicka Vachaka Desika Pandara Sannadhi* (7), in which the question was whether a Collector can review his order under the Revenue Recovery Act, this Court following *Drew* v. *Willis* (6) held that the right to review is not an inherent power. *Lala Priyag Lal* v. *Jai Narayan Singh* (8) is to the same effect. In *Baij Nath Ram Goenka* v. *Nand Kumar Singh* (14) a similar view was taken. When that case was taken before the Privy Council, Lord Atkinson, in the course of the argument and in the short judgment that he delivered on behalf of the Board, declared in explicit terms that the power to review is not inherent in a Court. Mr. Sitaram Rao with characteristic frankness drew our attention to *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad* (2) as sounding the other way. After reading that judgment I am convinced the Judicial Committee did not intend to lay down that a Court has power to review its own judgment even though there is no law empowering it to do so. It was pointed out in that case that the order was an invalid one; that is to say, it was an order which the Court had no jurisdiction to pass. That decision is of the same class to which *The Bolivar* (13) belongs. Another Privy Council case in *Debi Bakhsh Singh* v. *Habib Shah* (4) proceeds on the ground that a Court has power to correct mistakes into which it has been led by inadvertence. In *Mahomed Kala Mea* v. *Harperink* (5) the auction-purchaser was misled by the misrepresentation of the Court officers. The Judicial Committee held that a Court should be careful to see that it does not contribute to the inflicting of injuries on persons who come before it, believing that the Court and its officers would act honestly. These cases do not affect the present question.

In a review, in short, a party generally claims a reconsideration of the decision on the ground either there is some fresh evidence or a new pronouncement of law or some new matter which, if taken into account, would have affected the attitude of the Court regarding the matter in dispute. Such a consideration is analogous to what happens on the hearing of an appeal and is not analogous to proceedings in which for fraud or inadvertence the Court is permitted to set aside its order. I am therefore of opinion that a District Judge has no power to review his own decision passed under S. 10, Religious

(11) [1904] 1 K. B. 6=72 L. J. K. B 921=89 L. T. 431=52 W R 148=20 T. L. R 12.
(12) [1914] 2 K. B. 421=83 L. J. K. B 810=110 L. T. 773=30 T. L. R. 320.
(13) [1916] 2 A. C. 203=85 L. J. P. 193=2 P. Cas. 175=114 L. T. 1005.
(14) [1907] 34 Cal. 677=6 C. L. J. 84=11 C. W. N. 803.

Endowments Act. It is unnecessary to consider the further argument of Mr. Sitaram Rao whether S. 9, Act 20 of 1863 is applicable to orders passed by the District Judge under S. 10 of the same Act. I agree that the petition should be dismissed with costs.

S.N./R.K. *Petition dismissed.*

A I. R. 1919 Madras 247 (1)

PHILLIPS AND NAPIER, JJ.

Ravunni Achan—Plaintiff—Appellant.

v.

Kizhakke Naduvath Karnavan and *another*—Defendants—Respondents.

Second Appeal No. 1287 of 1918, Decided on 4th April 1919, against decree of District Judge, South Malabar, in A. S. No. 501 of 1917.

(a) Malabar Law—Maintenance—Wife not belonging to husband's tarwad is not entitled to maintenance or menchilavu.

According to Malabar law a wife who belongs to a tarwad different from that of her husband is not entitled to maintenance from her husband's tarwad, and, having no legal right to maintenance, she is not entitled to menchilavu, i. e., a luxurious form of maintenance

[P 247 C 1,2]

(b) Malabar Law—Maintenance—Claim for menchilavu is similar to arrears of maintenance and can be decreed.

A claim for compensation for menchilavu is on the same footing as a claim for past maintenance for which the Courts may give a decree.

[P 247 C 2]

C. Madhavan Nair—for Appellant.

C. V. Ananthakrishnan Aiyar—for Respondents.

Judgment.—Appellant's counsel contends, that an anandravan of a Malabar tarwad is entitled to menchilavu not only for himself, but also for his wife, who belongs to another tarwad. Prima facie, a junior member of a Malabar tarwad, whether male or female, must look to the karnavan of his or her own tarwad for maintenance. If therefore a woman who can claim maintenance from her own karnavan, is entitled also to claim maintenance from her husband's tarwad, it gives her a right apparently opposed to the principles of Marumakathayam law and we have not been referred to any authority which recognizes such a right except *Parvathi* v. *Kamaran* (1). That case is however no authority for any such proposition of law. This Court merely accepted a finding that such a custom existed in North Malabar, and this finding, based on the evidence of two witnesses, was not objected to. We are not therefore prepared to accept without authority this new proposition of law that a wife is entitled to maintenance from her husband's tarwad, a proposition which even in *Parvathi* v. *Kamaran* (1) was described as inconsistent with the principles of Marumakathayam law. If the wife has not a legal right to bare maintenance a fortiori her claim to menchilavu, which may be termed a luxurious form of maintenance, must be negatived.

A memorandum of objections is filed for respondent, and it is contended that plaintiff is not entitled to any money allowance from the karnavan, and reliance is placed on *Kunhammatha* v. *Kunhi Kutti* (2). In this case however no money allowance is decreed, but only compensation for menchilavu not received in the past, to which plaintiff has been held to be entitled. This claim to menchilavu must be treated as on the same footing as a claim to past maintenance for which undoubtedly a decree could be given: *Vide Kelu Achen* v. *Lakshmi Nethyar Ammal* (3) and *Kalavoor Chembazhi Govindan Nair* v. *Kunja Nayar* (4).

The second appeal and memorandum of objections are both dismissed with costs.

S N./R.K. *Appeal dismissed.*

(1) [1883] 6 Mad. 341.

(2) [1884] 7 Mad. 233.

(3) [1913] 18 I. C. 234.

(4) [1919] 51 I C. 326.

A. I. R. 1919 Madras 247 (2)

SESHAGIRI AIYAR AND PHILLIPS, JJ.

S. N. Palanivelappa Goundan—Defendant—Appellant.

v.

Nachappa Goundan—Plaintiff—Respondent.

Second Appeals Nos. 345 and 401 of 1918, Decided on 23rd April 1919, against decree of Sub-Judge, Coimbatore, in Appeal Suit No 86 of 1917.

(a) Specific Relief Act (1 of 1877), S. 31—Property transferred wrongly described—Both rectification or mere declaration of title can be claimed—In suit for recovery purchaser can prove real intention under Evidence Act (1 of 1872), Ss. 95 to 97.

Section 31 Specific Relief Act is only an enabling section. It is open to a transferee to seek relief by rectification under this section, but that is not his only remedy. He can protect his title as defendant without rectification. He can sue for a declaration that the property be-

longs to him without seeking rectification, in which case he can avail himself of the provisions of Ss. 95 to 97, Evidence Act.

Where property is transferred to a person and the deed of transfer gives a wrong number or description of the property conveyed which does not belong to the transferor, the transferee is entitled to treat his title to the property that was really intended to be conveyed as complete at the time of the execution and registration of the document, and to plead misdescription as a defence in an action against him for the recovery of the property, invoking in aid the provisions of Ss. 95 to 97, Evidence Act. [P 248 C 2]

(b) Transfer of Property Act (1882), S. 41—Property wrongly described—Purchaser allowing vendor to deal with property—Bonafide purchaser for value of same property will get preference.

A subsequent bona fide purchaser for value without notice of the property that was intended to be conveyed by the prior deed of transfer, will have preference as against the first transferee if the latter, by his act or omission, made it possible for the transferor to deal with the property, the principle being that of two innocent transferees the one who has rendered it possible for the owner to deal with the property a second time must suffer for his negligence. [P 249 C 1]

C. V. Ananthakrishna Aiyar—for Appellant.

A. Viswanatha Aiyar—for Respondent.

Judgment.—As the lower appellate Court has not properly understood the pleadings and has not applied the law correctly, it is necessary to state the facts. One Kuttianna Goundan was the absolute owner of the properties in suit. By two contemporaneous deeds, Ex. B and C, he disposed of the whole of his property in April 1906. By Ex. B, he gave some property to his concubine with remainder over after her death to the plaintiff. By Ex. C he gave all the remaining properties to the plaintiff, who was his nephew. The uncle and nephew subsequently fell out and there was another document in 1908. This is Exhibit D. By it, the plaintiff gave back a portion of the properties covered by Ex. C to Kuttianna. By Exs. B and C the donor purports to the donees Survey No. 553 consisting of 6 acres 52 cents. It is the common case of all the parties that Kuttianna was not possessed of Survey No. 553. Further the extent of Survey No. 553 which belongs to a third party is not acres 6·52 in extent. The donor was the owner of Survey No. 560, which is 6 acres and 52 cents in extent. There can be no doubt that it was this property that was referred to as Survey No. 553, and this is found by both the lower Courts.

After these transactions Kuttianna sold to the defendant Survey No. 560 in 1911. The concubine died a month before the suit. The case for the plaintiff is that he became the owner of Survey No. 560 under Ex. C and that there was no title left in Kuttianna to sell that property to the defendant. The District Munsif gave a decree to the plaintiff as prayed for. In appeal, the Subordinate Judge has taken the view that Ex. D was the only basis of the plaintiff's title. There is no warrant for this conclusion. It is not pleaded that Ex. D superseded Ex. C. There is no issue about it, and even in the grounds of appeal to the lower appellate Court, there is no complaint that Ex. D should be regarded as the only title under which plaintiff should claim.

Both the Courts below have dealt with the case as if plaintiff's case was one for rectification of Ex. C. In this Court also, the authorities quoted by the learned vakil for the defendant referred to this aspect of the case. In our opinion the Courts below were wrong. S. 31, Specific Relief Act, is only an enabling section. It is open to the transferee to seek relief by rectification under it. If he gets a decree for rectification, the plea of a possible innocent purchaser that he got it bona fide for value without notice might be avoided. But the transferee is not bound to seek this remedy. He can protect his title as defendant without rectification : see *Rangasawmi Aiyangar* v. *Sowri Aiyangar* (1). He can have a declaration as plaintiff that the property belongs to him without seeking rectification. In such cases the provisions of Ss. 95 to 97, Evidence Act, can be availed of by him. This was the course pointed out in *Karuppa Goundan* v. *Periathambi Goundan* (2). The learned vakil for the defendant suggested that even in such cases there must be a prayer for rectification. We do not think that it was held in *Karuppa Goundan* v. *Periathambi Goundan* (2), that without rectification, the title would not be complete. What was said was that if the plaintiff asked for this relief, it may be granted by amending the plaint. As was pointed

(1) [1916] 39 Mad. 792=29 I. C. 538.
(2) [1907] 30 Mad. 397=2 M. L. T. 336.

out in *White* v. *White* (3), the decree declaring that Survey No. 560 was covered by Ex. C would give to the plaintiff all that he wants. We are therefore, of opinion that the plaintiff's claim to the property was complete by the execution and registration of Ex. C.

There is the further question whether this title can prevail against that of a bona fide purchaser for value without notice. If the plaintiff by his act or omission made it possible to the grantor to deal with the property and if the purchaser, without knowledge that Survey No. 560 was really conveyed by Ex. C, bona fide paid consideration, it may be that he would be entitled to the property in preference to the plaintiff. The principle is well setted that of two innocent transferees, the one who has rendered it possible to the owner to deal with the property a second time must suffer for his negligence. It is not necessary to cite authorities for this proposition. Before finally disposing of this case, we must ask the Subordinate Judge to return a finding on the question, in the light of the above observations, "Whether the defendant is a bona fide purchaser for value without notice." No fresh evidence should be adduced. The finding should be submitted within six weeks and seven days will be allowed for filing objections.

[In compliance with the order contained in the above judgment, the Subordinate Judge of Coimbatore submitted the following.]

Finding—A finding has been called for by the High Court on the following issue: Whether the defendant is a bona fide purchaser for value without notice?"

It is urged by the appellant that as Kuttianna, the vendor of the land under Ex. 2, put the defendant in possession of the sale deed Ex. I under which Kuttianna's father acquired the land and as Ex. 2, made no mention of a partition deed, it was unnecessary for the defendant to have ascertained anything more about the title of Kuttianna to the land.

No doubt the partition deed Ex. E under which the land fell to the share of Kuttianna at a division between himself and his brothers, the deed of gift Ex. C under which the land was given to plaintiff along with some other lands by Kuttianna, Ex K which is a mortgage bond executed by plaintiff in respect of the suit land among others and attested by defendant, and Ex. D which is a settlement deed executed between plaintiff and Kuttianna and attested by defendant, refer to the suit land by a wrong Survey No. 553 while it is really 560. Ex. D does not mention the suit land as having been allotted to plaintiff, but only refers to the northern moiety of it as having been given to one Ammani Ammal for life for her maintenance. The title of plaintiff under Ex. C in respect of the suit land remains unaffected as observed by their Lordships in appeal.

Defendant is a merchant of Erode living at Selambagoundenpalayam, which is two or three miles from the village at which the plaintiff is living and the suit land is situate. He was aware of the disputes between the uncle and the nephew and of the arrangement come to as regards the enjoyment of lands. He also knew that a moiety of a land was given to Kuttianna's concubine for maintenance. If defendant knew that only one nanja land was reserved for Kuttianna's enjoyment, it was but reasonable defendant should have ascertained how Kuttianna Gounden got the suit land. Kuttianna Gounden had brothers. If there was partition, defendant was bound to ascertain whether Kuttianna Gounden got it under the partition deed. If this had been done it would have revealed the fact that the land was referred to by a wrong number. Then it would have also brought to light the fact that subject to one moiety of it being enjoyed for life by Ammani Ammal, the whole of it was given to the plaintiff under the deed of gift.

There seems to be no doubt whatever that Ammani Ammal was in possession and enjoyment of the northern moiety until her death a few months before the institution of the suit, and the cist of the land has been paid by plaintiff from 1907. It is more likely that, as stated by P. Ws. 1 to 8, the land was in the possession of plaintiff than it was in the possession of Kuttianna Gounden as stated by P. W. 9. Defendant exercised no reasonable diligence to ascertain and find out how Kuttianna was entitled to the property, whether Kuttianna was in pos-

(3) [1873] 15 Eq. 247=42 L. J. Ch. 288=27 L. T. 752.

session and enjoyment of theland and who paid the assessment of the land.

The mere payment of the consideration spoken to by defendant and borne out by an entry in his account book and the inferential evidence given by D. W. 1 that as there is a recital in Ex. 2 as to payment, the conside ration would have been paid, do not impress me as sufficient in this case to find that there was actual payment of consideration in spite of defendant's position as a man paying a large kandayam and income-tax as a trader.

I find that defendant is not a purchaser for value without notice.

[These second appeals coming on for final hearing after the return of the finding of the lower appellate Court upon the issue referred by the Court for trial, the Court delivered the following]

Judgment.—We accept the finding and dismiss Second Appeal No. 345 of 1918 with costs. As a result of this conclusion, the decree in Seocnd Appeal No. 401 of 1918 will be reversed and the decree of the District Munsif will be restored. As was held by the Subordinate Judge in the appeal we have confirmed, there must be an inquiry as to mesne profits in respect of the property covered by Second Appeal No. 401 of 1918 as well and a final decree embodying the result must be passed. There will be no costs in this Court in Second Appeal No. 401 of 1918. Plaintiff will have his costs in the lower appellate Court.

S.N./R.K. *Order accordingly.*

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ABDUR RAHIM AND SESHAGIRI AIYAR, JJ.

Vatavatta Raman Nair—Defendant—Appellant.

v.

Kenath Puthen Vittal Kuppassan Menon and *another*—Plaintiffs and Defendants—Respondents.

Civil Appeal No. 239 of 1917, Decided on 8th April 1918, from decree of Sub-Judge, South Malabar, D/- 26th March 1917, in Original Suit No. 33 of 1915.

(a) Malabar Law—Kanom—Grant of melcharth is not valid unless for necessity or benefit to tarwad.

The granting of a melcharth before the expiry of the term of the kanom is invalid, save where the melcharth-holder proves necessity or benefit to the tarwad: *A. I. R.* 1915 *Mad.* 307; 16 *I.C.* 391 and 21 *I. C.* 1007, *Foll.* [P 251 C 2]

The surrender of a term of a kanom and its renewal as from the date of the surrender does not affect the principle [P 254 C 2]

(b) Malabar Law—Kanom—Grant of melcharth—Proof of necessity—Reasonable inquiry as to its existence—Extent of inquiry explained.

The melcharth-holder should show that there was necessity for the melcharth and that he satisfied himself by reasonable inquiries as to the existence of such a necessity. Ordinarily, it is enough if he satisfies himself that there is a pre existing debt and he is not bound to pursue his inquiries and find out if there was a necessity for that debt. It is not enough however that he inquired of the karnavan granting the melcharth and rested content with the statement made by him. Where a member of the tarwad has already notified that the impending alienation is improper it is his duty to make inquiries of such member. [P 255 C 1]

C. V. Ananthakrishna Aiyar—for Appellant.

T. R. Ramachandra Aiyar—for Respondents.

Abdur Rahim, J.—The plaintiff in the suit from which this appeal has been preferred is a senior Anandravan of the tarwad of which defendant 2 is the karnavan. Defendant 1 holds a kanom, Ex. 2 in the case, executed on 24th August 1914. The object of the suit is to have that kanom set aside on the ground that it was an imprudent transaction and was injurious to the interests of the tarwad. Defendant 1, who is the karnavan of a rich tarwad, has had dealings with defendant 2's tarwad for a long time prior to the suit. He holds kanoms and melcharths on large properties belonging to defendant 2's tarwad including the property in dispute.

In order to understand the questions arising in the case, it is necessary only to go back to Ex. 20 which is a melcharth in favour of defendant 1 in respect of the property comprised in Ex. 2 executed in May 1916. The melcharth therefore which is a sort of second charge, would expire in 1908. In 1902 defendant 2's predecessor executed in favour of defendant 1's predecessor a puramkadam—that is a second charge—on receiving a fee of about Rs. 1,350. That document contains a stipulation for renewal of the melcharth, Ex. 20. Then, disputes arose between the parties not merely with respect to this property but also with respect to properties belonging to defendant 2's tarwad in possession of defendant 1. A notice was given by defendant 2 in

1914 to defendant 1 asking the latter to surrender the property comprised in Ex. 20. There had been two suits instituted with respect to other properties of defendant 2's tarwad in possession of defendant 1. All these disputes it appears were arranged to be settled by the mediation of certain pleaders practising at the Palghat Bar, and in the result, Exs. 2 and 3 were executed. It appears that altogether Rs. 3,000 was paid by defendant 1 to defendant 2, out of which Rs. 1,000 was the fee for renewal. The case of the plaintiff is that Ex. 2 is a renewal of Ex 21 which was to expire only some time in 1920. It was strongly contended by Mr. Ananthakrishna Aiyar for the appellant that we must ignore Ex. 21, altogether, as that was disputed by the parties and as Ex. 2 was executed under an arrangement arrived at by way of compromise. But the whole case tried before the Court was that Ex. 2 was executed before the expiry of the term mentioned in Ex. 21 and therefore it was invalid unless defendant 1 was able to show that the transaction was for the benefit of the family or was entered into for a necessary purpose. The document Ex. 2, itself states that

"though a period of five years and eight Months has yet to expire of the former puramkadom demise for 12 years (meaning thereby Ex. 21), yet we have to-day given you this demise for 12 years as we are pressed for payment of the amount on the pronote with interest thereon executed to M. K. Krishna menon."

The written statement of defendant 1, para. 1, also proceeds on the same basis and the evidence of defendant 1 himself is to that effect. And the question raised by issu 1, the issue bearing on the point is:

"whether the demise, Ex. 2, was valid and binding on the tarwad in view of the fact that defendant 1 has surrendered his prior demise before he took this demise."

By the prior demise here is meant the puramkadam Ex 21. I think it would be altering the entire case if we were now to accede to Mr. Ananthakrishna Aiyar's contention that Ex. 21 must be ignored altogether and that we must hold that since the term in Ex. 20 expired in 1908, Ex. 2 should not be treated as a transaction entered into before the expiry of an existing demise.

Mr. Ananthakrishna Aiyar has next argued that since there were disputes between the parties as to the validity of Ex. 21 and also about other transactions and as Ex. II was executed in settlement of those disputes, no question of necessity or benefit to the tarwad arises in connexion with Ex. 2 at all. But the suit raises the question, not whether Ex. 2 is binding on defendant 2, but whether it binds the tarwad of which defendant 2 is the karnavan. Ex. 2 was executed long before the expiry of the term of Ex. 21. The contention on behalf of the plaintiff is that defendant 1 must prove either necessity or benefit to the tarwad. I do not think that the fact that defendant 2 executed Ex. 2 under the mediation of some persons would by itself relieve defendant 1 in the circumstances of the case from making out that this is a transaction which is binding on the tarwad. The defendant did not attempt to make a case before the trial Court that the transaction should be upheld on the ground that it was part of the terms of a bona fide settlement of disputes. If he had set up such a defence, the nature of the entire dispute, would have to be looked into. All facts which will show that it was a bona fide settlement should have been placed before the Court. It has been ruled in more than one case that if a melcharth is granted before the expiry of the term of the kanom, the melcharth-holder must prove necessity or benefit to the tarwad: see *Raman Nambiar* v. *Raman Nambiar* (1), *Cheria Chirikandan* v. *Krishnan Nambiar* (2), and *Moidin Kuti* v. *Kunhi Koyan* (3). In the first two cases Sundara Aiyar, J and Sadasiva Aiyar, J. who had considerable experience of Malabar law and litigation, took part. In fact Mr. Ananthakrishna Aiyar has not seriously contended that these rulings are wrong.

But his argument upon which he has insisted a great deal is that the rule regarding the grant of a melcharth has no application to the renewal of a kanom. A melcharth is what is granted to a person other than the kanomdar or tenant, while if a kanon is renewed to the holder of the kanom himself that is a case of renewal. The ground upon which the rule relating to melcharth has been based is two-fold:—firstly, if a kanomdar grants a melcharth before the expiry of the term of the kanom, he is practically fettering the discretion of the person who

(1) A. I. R. 1915 Mad. 307=25 I. C. 578.
(2) [1912] 16 I. C. 391.
(3) A. I. R. 1915 Mad. 650=27 I. C. 1007.

may hold the office at the time of the expiry of the kanom. Secondly, it is not possible always to ascertain beforehand what would be fair and reasonable terms for the melcharth before the kanom has expired. Both these considerations seem to apply with equal force in the case of renewals, i. e., where a kanom is renewed before the expiry of its term. Mr. Ananthakrishna Aiyar argues that there is no rule prohibiting the surrender of a portion of the term of a kanom and that in fact such a surrender would be beneficial to the tarwad. I am not prepared to say that the surrender of a portion of the term must necessarily be beneficial to the tarwad; but even supposing it to be so, the grant of another kanom which would expire after the date of the expiry of the term of the original kanom would come within the purview of the ruling relating to melcharth and the same considerations would apply. The question shortly put is, why should a karnavan be in a hurry to renew a kanom before its term expires. If he can show that there was necessity to renew the kanom at that stage or that it was for the benefit of the tarwad that he should do so, that would be sufficient justification. I think therefore that the principle of the rulings above cited applies to this case, and this is also the view of the Subordinate Judge who is presumably familiar with the Malabar law. Then remains the question whether Ex. 2 is a valid transaction. Defendant 1 has not been able to prove actual necessity, but his real case has been that he made bona fide inquiries before obtaining Ex. 2 and that he was satisfied after such inquiry that necessity existed for the transaction in question.

What are the exact limits of the enquiry which a person obtaining a transfer or advancing money to a person in the position of a karnavan, whose position is very much analogous to that of a manager of an ordinary Hindu family is required by law to make are not capable of being defined for all cases. But I think it is amply clear from the authorities that it is not only enough for the alienee to show that he made inquiries of the karnavan himself and that he was satisfied with the statements made by him. If that was all that was wanted, there would be hardly any case in wich it would not be possible for the alienee to satisfy the letter of the law. In *Kameswar Prashad* v. *Run Bahadur Singh* (4) Sir James Colvile, delivering the judgment of the Judicial Committee, says that

"their Lordships in no degree depart from the principles laid down in the case of *Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonweree* (5) which has been so often cited. They have applied those principles in recent cases not only to the case of a manager for an infant, which was the case there, but to transactions on all fours with the present, namely, alienations by a widow, and to transactions in which a father, in derogation of the rights of his son under the Mitakshara law has made an alienation of ancestral family estate. The principle broadly laid down is, that although the lender is not bound to see to the application of the money, and does not lose his rights if, upon a bona fide inquiry, he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, he still is under an obligation to do certain things."

The words of the judgment in that case are :

"Their Lordships think that the lender is bound to inquire into the necessities for the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate; but they think that if he does so inquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money . . . ."

Their Lordships do not think that a bona fide creditor should suffer when he has acted honestly and with due caution, but is himself deceived. The same principle was applied in *Ravaneshwar Prasad Singh* v. *Chandi Prasad Singh* (6), which was confirmed by the Privy Council on appeal. At page 751 (of *I. L. R.* 38 *Cal.*) it is pointed out that the inquiry was wholly insufficient and could not be said to be bona fide on the ground, among others, that the Maharajah of Durbhanga, who was the alienee there, merely satisfied himself with the enquiries made of his servants and did not make enquiries of the creditors and the heirs, and that it was not sufficient merely to ask the debtor if he was borrowing for necessity and to be satisfied with his answers. In this case it is alleged that there was a debt of Rs. 3,000 outstanding on a promissory note executed by defendant 2 to one Kutti Krishna Menon. The evidence is that defendant 1 and his

(4) [1881] 6 Cal. 843=8 I. A. 8 (P. C.).
(5) [1854-57] 6 M. I. A. 393=18 W. R. 81 note; (P. C.).
(6) [1911] 38 Cal. 721=12 I. C. 931.

pleader made enquiries of defendant 2 as well as of Kutti Krishna Menon. The promissory note was for Rs. 3,000 and part of the amount, at any rate, is alleged to have been borrowed for the purpose of repairing a temple belonging to the defendant 2's tarwad and for the performance of the purification ceremony after the repairs. This Kutti Krishna Menon is a close relation of defendant 2, being his son's first cousin. The note was executed shortly before Ex. 2. Defendant 1 is a neighbour of defendant 2 and as he has had money dealings with him he may well be presumed to have some knowledge of his affairs. Now, the real point as regards this is that the plaintiff, the senior anandravan of the tarwad, a few days before the transaction had given a notice (Ex. C) to defendant 1 that defendant 2 was trying to execute documents to the injury of the tarwad and to raise money for the purposes of his own extravagance. He also sent him a notice which he had published in a vernacular paper, and there it was stated that defendant 2 wanted to execute a renewal which was not for the benefit of the tarwad nor was there any necessity for it. In spite of these notices, defendant 1, who is a pleader of considerable experience and standing in the profession, does not think it worth his while to refer to the plaintiff and ascertain from him how far the allegations made by him were well founded or not. The repairs of the temple were alleged to have been met by subscription from the tenants and there was no necessity therefore for borrowing any money. It ought to have also struck defendant 1 that Kutti Krishna Menon being a near relation of defendant 2, it would be safer to require some independent proof of the bona fides of the promissory note. It is difficult to understand why defendant 1 should have refrained from taking what would appear to anybody, and especially to a pleader, obvious steps for securing his position. He ought to have gone to the plaintiff and ascertained what was the true state of affairs.

The tarwad of defendant 2 consists of a large number of adult male persons and he ought to have asked some of them whether there was any necessity for defendant 2 to raise any money. I think if he had made proper inquiries, he would have learnt that the repairs of the temple were met by subscriptions from the tenants and I must hold that he should not have placed implicit reliance on the statement of defendant 2 or of Kutti Krishna Menon. I think there is great force in the argument of Mr. Ramachandra Aiyar that this payment of Rs 3,000 or of Rs. 1,000 as renewal fee for Ex. 2 could not have been for purposes of necessity, and it was more or less an afterthought that struck defendant 1 to get hold of a promissory note in favour of Kutti Krishna Menon. Kutti Krishna Menon is a wealthy man and his evidence is that he obtained Rs. 60 out of this Rs. 3,000 as consideration for an agreement not to press for the loan. There is absolutely nothing to show any sort of necessity why only a few days afterwards money had to be raised by Ex. 2 in order to pay off this loan. It is pointed out by the learned Subordinate Judge that the money alleged to have been repaid to Kutti Krishna Menon was not invested in any better security or to any greater advantage, but in fact it was lent to a bank at a lower rate of interest than under Ex. 1. I think the conclusion of the Subordinate Judge was amply justified that necessity is not proved or that any benefit accrued to the tarwad from Ex. 2. It appears that defendant 2 is an old man and it is not at all unlikely, having regard to the fact that there are several tavazhis in this tarwad, that he wanted to enrich his own family at the expense of the tarwad of which he was the karnavan. It seems to me that if defendant 1 had made proper inquiries, he would have found out that there was no necessity whatever for executing Ex. 2. On the other hand, it seems to me extremely probable, as suggested by Mr. Ramachandra Aiyar, that this transaction was really a term of the settlement of certain disputes with respect to other properties in respect of which suits were pending and that it was not a transaction entered into for purposes of tarwad necessity. As already pointed out, it was not sought to be proved that, apart from the question of benefit or necessity, the settlement was binding on the tarwad.

There has been much discussion before us as to a recital in Ex. 2 in respect of the value of certain improvements amounting to Rs. 400 to Rs. 800, which

is made payable along with the mortgage money secured by Ex. 2. Those improvements, it is abundantly clear, had already been paid for by defendant 2's tarwad, and therefore nothing was due on that account. Defendant 1, when in the witness box, gave up his claim saying at the same time that he was not satisfied that the improvements had been paid for. I think there can be no doubt whatever that the case of the plaintiff on this point is perfectly true and is borne out by Ex. D, the draft of which Ex. E was corrected by defendant 1 himself. It is however possible that at the time of ths execution of Ex. 2 defendant 1 had forgotten what was stated in Ex. D and therefore it is unnecessary for me to hold that the recital regarding the improvements in Ex. 2 was deliberately false. However, in view of my finding that there was no necessity for the execution of Ex. 2 at all, I do not think it necessary to discuss this part of the case any further. I agree with the finding of the Subordinate Judge that Ex. 2 is not valid and binding on defendant 2's tarwad and the appeal must be dismissed with costs.

Seshagiri Aiyar, J.—I would have simply expressed my concurrence with my learned brother's judgment, had it not been for the fact that I am unable to agree unreservedly with what he says regarding the conduct of defendant 1. Therefore I shall say a few words on the two questions of law argued by Mr. Ananthakrishna Aiyar with special reference to the conduct of defendant 1. I entirely agree in thinking that the document should not be regarded solely as the result of a compromise. There is no issue upon that question. If that question had been raised, there would have been a necessity to go into the evidence as to whether defendant 1 was acting honestly in putting forward the claim that Ex. 21 is not binding upon the tarwad. Therefore it is not open to the defendauts now to set up that case. Upon the further question argued by Mr. Ananthakrishna Aiyar that there was a surrender of the previously existing kanom and that the renewed kanom which dates from the date of the surrender is not affected by the same mischief which affects a melcharth or renewal which is to take effect on the expiry of the existing kanom, I fail to see how on principle the two questions are different. The reason why the melcharths are discountenanced under the Malabar law is this: there is an existing contract which the karnavan has made which is binding on the tarwad. It has a particular term to run. It is not therefore open to a karnavan to anticipate the term and to get a new contract executed without showing that there was necessity for making a new contract.

When the old kanom expires, there may be a new man who will be able to apply his mind to the circumstances arising at the end of the period. He may probably think that the old tenant should not be given the kanom again; or he may also think that it would be necessary in the interests of the tarwad that fresh terms should be imposed upon the old tenant. Therefore it is not ordinarily open to a karnavan to anticipate what is going to happen some years after. It is a well-known fact in Malabar that melcharths and renewals are given mostly in the personal interest of the karnavan for the time being who is anxious to enrich himself at the expense of the tarwad. Those are the grounds on which these transactions have been discountenanced by Courts, and I fail to see how the fact that there is a surrender of the existing period and the kanom is made to date from the date of the surrender could make any difference in the principles to be applied. Therefore I agree with my learned brother in thinking that as in this case there was some time still to run for Ex. 21, the fact that the period was surrendered and a new kanom was taken on that date, should not make any difference in considering the question.

Upon the second question I do not go the whole length which my learned brother has gone. I see nothing in the conduct of defendant 1 to show that he has not been acting honestly and bona fide. In my opinion he bas been mistaken in judging of his rights and duties. There were two suits, one in which he was himself the plaintiff and the other in which he was the defendant. A notice had been given by defendant 2, impeaching the validity of the kanom by his predecessors; in these circumstances defendant asked his own vakil and the vakil for defendant 2 to settle the dispute between the parties. He apparently relied upon their mediation and entered

into this arrangement. Now it may be that he felt himself very sure of his position and did not make any further inquiries. But I do not think it can be said that he shirked any inquiry or acted otherwise than honestly in this matter. In my opinion the evidence which has been given is entirely to his credit, and there is nothing suggested in the cross examination to show that he was acting fraudulently or was not behaving properly towards defendant 2, who is said to be an old man. After all it must be remembered that defendant 1, although a vakil, was acting in the interests of his own tarwad which he was bound to protect. In these circumstances I am not prepared to say that he was acting otherwise than honestly and bona fide in conducting the negotiations. At the same time I am prepared to agree with my learned brother that the inquiry which he instituted was not sufficient in the eye of the law to justify the transaction. As has been pointed out by my learned brother, at the time of the transaction two notices were sent to defendant 1, Ex. C and Ex. L. Ordinarily it would be enough for a lender to be satisfied that there is a pre-existing debt, for, if a lender is to be compelled to find out that that debt also was one contracted for necessity and if that is to be insisted upon in the case of each loan, the result would be that the lender would have to go back a number of years and to investigate the affairs of the family from the outset.

I do not think that is what the law requires of him to do. Nonetheless when defendant 1 had the notices from plaintiff 2 that the money he was going to lend to defendant was for the latter's personal use and would not bind the tarwad, it was his duty to have gone to that person and made inquiries as to whether the representations made in the notices were true or not. His failure to make further inquiries was certainly wrong and certainly not legally justifiable. I think *Ravaneshwar Prasad Singh* v. *Chandi Prasad Singh* (6) lays down the principles applicable to the present case. I do not understand the decision to rule that in all cases where a man is lending to pay off a pre existing debt, the lender must not only satisfy himself that there is a debt but that the debt is also one binding on the family. As I said before, in my opinion, defendant 1 apparently believed that the mediation of the two vakils was sufficient to enable him to lend the money; I do not think that he can be said to have acted dishonestly or not to have acted bona fide in having taken the renewal. As regards the question about the insertion of the further charge in the document for improvement, the same remarks would apply here also. I am unable to agree with Mr. Ramachandra Aiyar that there was anything sinister in the conduct of defendant 1 in getting this provision for a further charge inserted in Ex. 2. The first document which he attested, Ex D, was in 1898 and 16 years later he took this document, Ex. 2, from defendant 2 after the mediation of the two vakils. He may say that he was under the impression that the money was not paid and he has sworn to the fact that his karnavan, Thoppan Nayar, did not receive the money. I see no reason for not believing the evidence given by him in the witness-box. It is unnecessary to pursue this subject further because, in my opinion, if the matter rested only with Ex. 2, I would have come to the conclusion that the two transactions were entirely separable. But as I have come to the conclusion that no necessity or benefit to the tarwad is proved by defendant 1 in respect of Ex. 2, it is unnecessary to say whether the second clause should be regarded as a clog on the equity of redemption and whether it would be valid and binding on the tarwad.

I agree in the conclusion come to by my learned brother that the appeal should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

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OLDFIELD AND SADASIVA AIYAR, JJ.

Nataraja Pillai—Petitioner—Appellant.

v.

Subbaraya Pillai and *others*—Respondents.

Letters Patent Appeals Nos. 133 and 134 of 1917, and Civil Revn. Petn. No. 587 of 1917, Decided on 14th February 1918, against judgment of Krishnan, J., D/- 30th August 1917, in Civil Revn. Petn. Nos. 534 and 535 of 1917.

(a) Guardians and Wards Act (1890), S. 41 (3)—Death of Ward — Court can pass

order directing guardian to hand over properties to minor's heir.

Where the powers of a guardian for the property of a minor cease, owing to the minor's death, the Court has jurisdiction, under S. 41 (3) to pass an order directing the guardian to deliver the property of the minor to the latter's heir. [P 256 C 1]

(b) Guardians and Wards Act (1890), S. 41 (3)—Words "for any cause" include death of minor."

"The words "for any cause" in S. 41 (3) are not confined to the causes mentioned in Cls. (1) and (2) of the section and the death of the minor is also a "cause" which puts an end to the powers of the guardian within the meaning of the expression "any cause." [P 256 C 1, 2]

(c) Guardians and Wards Act (1890), S. 41 (3)—"Property belonging to ward" explained.

The expression "property belonging to the ward" in the same clause includes property which belonged to the person who was a ward though, by the cessation of his minority or by his death, he has ceased to be a ward. [P 256 C 2]

S. Muthiah Mudaliar—for Appellant.

T. Narasimha Aiyangar—for Respondents.

Oldfield, J.—The lower Court's order was passed ou the death of a minor to whose property it had appointed a guardian, and directed the handing over of the property by that guardian to one of those, who claimed as the deceased minor's heir. It is urged, first, that it had no power to pass such an order and should have directed the guardian to institute an interpleader suit. But it is not shown how it had the right to give him any such direction. S. 41 (3), Guardians and Wards Act (8 of 1890) appears wide enough to cover the Court's action; and the Court in *Murlidhar Natha* v. *Vallabhdas Murlidhar* (1) appears to have acted similarly without objection being taken by the appellate Court or the parties. In these circumstances I hold that the lower Court's action was within its powers. It is then contended that the lower Court used its discretion wrongly. It had materials before it which it apparently considered, and we are not prepared to say that its discretion was not rightly exercised. The Letters Patent Appeals and the Civil Revision Petition fail and are dismissed with costs, except in Letters Patent Appeal No. 134 of 1917 in which there is no appearance.

Sadasiva Aiyar, J.—I feel clear in my own mind that the words in S. 41, Cl. (3), Guardians and Wards Act (8 of 1890) "for any cause" are not confined to the causes mentioned in Cls. (1) and (2) and that when the death of the minor ward occurs that also is a "cause" which puts an end to the powers of the property guardian within the meaning of the expression "any cause." I am also clear that the expression "property belonging to the ward" in the same clause includes property which belonged to the person who was a ward though by the cessation of his minority or by his death, he ceased to be a ward. That under S. 41, Cl. (3), Guardian and Wards Act, the Court has jurisdiction to pass orders where the powers of the guardian cease through the minors' death seems to have been assumed as a matter of course in the case of *Murlidhar Natha* v. *Vallabhdas Murlidhar* (1). I agree therefore that these appeals and the Civil Revision Petition should be dismissed with costs as regards Letters Patent Appeal No. 133 of 1917 and Civil Revision Petition No. 587 of 1917.

S.N./R.K. *Both Appeals and Petition dismissed.*

(1) [1909] 33 Bom. 419=3 I. C. 172.

A. I. R. 1919 Madras 256

OLDFIELD AND SESHAGIRI AIYAR, JJ.

Marimuthu Naicken—Petitioner—Appellant.

v.

Ramasami Padayachi and *others*—Respondents.

Appeal No. 129 of 1918, Decided on 20th February 1919, against order of Dist. Judge, South Arcot.

Limitation Act (1908), Art. 182 (5)—Payment out of Court not mentioned—Still execution application extends period—Civil P. C. (1908), O. 21. Rr. 1 (2) and 2 (3).

An execution application which omits to mention an uncertified payment towards the decree out of Court is, notwithstanding such omission, an application "in accordance with law within the meaning of Art. 182, Sch. 1, Lim. Act. [P 256 C 2]

E. Venayaka Row—for Appellant.

N. S. Rangasawmi Iyengar—for Respondents.

Judgment.—The case lies in a small compass. The petitioner appellant did not mention in a previous execution application an alleged payment towards the decree, which had not been certified to the Court. The question is whether in this respect the application was in accordance with law with reference to Art. 182, Sch. 1, Lim. Act. Reading O. 21, R. 1 (1), Civil P. C. with order 21, R. 2 (3), we must answer the question in the affirmative. The result is that the appeal against

order is allowed and the application remanded to the lower Court for disposal according to law. Costs to date will follow the result and be provided for in the order to be passed.

S.N./R.K. *Appeal allowed.*

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* A. I. R. 1919 Madras 257

AYLING AND KRISHNAN, JJ.

Kottarathil Puthiyapurayil Pokker—Defendant—Appellant.

v.

Balathil Parkum Chandrankandi Kunhamad and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1558 of 1917, Decided on 27th September 1918. from decree of Temporary Sub-Judge, Tellicherry, in Appeal Suit No. 715 of 1916.

*** (a) Civil P. C. (1908), O. 21, R. 63—Suit by attaching creditor to set aside fraudulent alienation by judgment-debtor is maintainable—Suit need not be representative—Transfer of Property Act (1882), S. 53.**

A suit by an attaching decree-holder to set aside an alienation by the judgment-debtor as infringing S. 53, T.P. Act, is not liable to be dismissed merely on the ground that it is not a representative suit on behalf of the general body of creditors: 34 *I. C.* 778; 27 *Bom.* 146; 43 *I. C.* 651 (*F. B.*); 16 *Bom.* 1 and 32 *Cal.* 198 (*P. C.*), *Expl.* and *Dist*;. 34 *Cal.* 999, *not Appr.*; *Mouatt, In re Kingston Cotton Mill Co* v. *Mouatt*, (1899) 1 *Ch.* 831; *Cornish* v. *Clark*, (1872) 14 *Eq.* 184; *Ideal Bedding Co.* v. *Holland*, (1907) 2 *Ch.* 157; *Reese River Silver Mining Co.* v. *Atwell*, (1869) 7 *Eq.* 347 and *Maddever, In re, Three Towns Banking Co.* v. *Maddever*, (1884) 27 *Ch. D.* 523, *Dist.*

(b) Transfer of Property Act (1882), S. 53—Suit need not be of representative character. (*Obiter*).

Obiter. — Even an ordinary creditor suing to set aside an alienation under S. 53 is under no obligation to sue in a representative character. [P 259 C 2]

(c) Civil P. C. (1908), O. 21, R. 63—Suit by attaching creditor—Mere declaration asked is immaterial.

Per *Ayling, J.*—There are no restrictions as to the nature of the suit to be brought by the attaching creditor under O. 21, R. 63. That the plaint only asks in terms for a declaration that the property is liable to sale in execution of the decree is immaterial. [P 258 C 1]

(d) Transfer of Property Act (1882), S. 53—Suit to set aside fraudulent alienation—Representative character is not necessary—Suit in individual capacity—Amendment of plaint—Decree setting aside transfer—Form No. 13, App. D, should be adopted—Civil P. C. (1908), O. 21, R. 63, App. D, Form 13.

Per *Krishnan, J.*—There is no rule either in the English or in the Indian law justifying the dismissal of a suit under S. 53, T.P, Act, because it is not brought in a representative capacity. To avoid the difficulty of a multiplicity of suits the trial Court may, of its own motion, and should, if moved by the transferee-defendant, direct that a suit by a single creditor under the section should be amended so as to make it a suit on behalf of all the creditors. The Court should also take care, when passing a decree setting aside a transfer even in a single creditor's suit, to adopt Form No. 13 in App. D, Civil P. C. [P 259 C 2]

K. Ramanatha Shenai—for Appellant.

C. Madhavan Nair and *B. Pocker*—for Respondents.

Ayling, J.—In this case the lower appellate Court seems to me to have erred in supposing that unless the contested sale deed, Ex. 5, is merely a sham transaction, the present suit is not maintainable. The ruling quoted [*Palaniandi Chetty* v. *Appavu Chettiar* (1)], if examined, does not support such a view; nor does the later Full Bench ruling [*Subramani Ayyar* v. *Muthia Chettiar* (2)] which considered the same question, and to which I was a party.

What was decided in these cases was this; that, where the validity of an alienation is impugned on the ground that it offends against S. 53, T. P. Act, that alienation must be uphold until it is set aside in proceedings properly instituted for the purpose. The exact nature of the proceedings which should be instituted was not determined. In *Palaniandi Chetty* v. *Appavu Chettiar* (1) Coutts-Trotter, J., expressed the opinion that a creditor suing to set aside an alienation on this ground must do so on behalf of all creditors, unless (as in the case before us) he was a judgment-creditor who had taken attachment in execution of his decree. This view was dissented from by the other learned Judge, Seshagiri Aiyar, J. and the Full Bench expressly left the point undecided. No other light is thrown on the nature of the proceedings by either judgment.

What we have therefore to consider is whether the present suit should be treated as one properly instituted for the purpose of setting aside the assignment deed Ex. 5. It was brought by plaintiff under O. 21, R. 63, Civil P. C. Defendant 1 had preferred a claim to the property attached by plaintiff, based on Ex. 5, which had been allowed under O. 21, R. 60. Plaintiff therefore brought this suit, as he was bound to do by O. 21, R. 63, to establish the right which he

(1) [1916] 34 I. C. 778.
(2) [1918] 41 Mad. 612=43 I. C. 651 (F. B.).

claimed of bringing the property to sale, as that of his judgment-debtors. Whether it was the judgment-debtor's property or not depends solely on whether Ex. 5 be upheld or set aside. The suit directly raises, and actually turns upon, the validity of the assignment by Ex. 5, and in my opinion, it must be regarded as one properly instituted to set aside that transaction. That the plaint only asks in terms for a declaration that the property is liable to sale in execution of the decree is immaterial. The form the suit has taken is determined by the peculiar position held by plaintiff. The law declares that an attaching decree-holder against whom the claim of a third party is allowed must sue within a year of the date of the order to establish his right; failing which the latter is extinguished. It puts him in a specially unfavourable position as regards limitation as compared with an ordinary creditor; but on the other hand, in prescribing the exact nature of his remedy it frees him from any other restrictions as to the nature of the suit to be brought which the latter may labour under.

It seems to me impossible to hold that as appellant's counsel contends, he is bound to bring two suits, one in his individual capacity under O. 21, R. 63, to save himself from limitation, and another as a representative of the whole body of creditors impugning the validity of the alienation. Quite apart from the provisions of O. 21, R. 63, the exceptional position of a judgment-creditor is generally recognized even in English law; vide 15 Halsbury 89. In *Palaniandi Chetty* v. *Appavu Chettiar* (1) Coutts-Trotter, J. points out the distinction; and although it was ignored by the learned Judges in *Hakim Lal* v. *Mooshahar Sahu* (3), this may have been because the point was not raised and the decision of the case proceeded on altogether different grounds. Our attention has been drawn to no case in which a suit by an attaching judgment-creditor was dismissed simply because it was not brought in a representative capacity. Whether an ordinary creditor who seeks to set aside an alienation as infringing S. 53, T. P. Act, must sue in a representative capacity we are not called upon to say. I must not be understood to hold that he is under any such obligation. The present suit is, in my opinion, certainly not liable to dismissal on account of any defect of form; and on the concurrent findings of fact arrived at by both the lower Courts plaintiff is entitled to a decree. I can see no ground for questioning these findings or for holding that defendants should have been allowed further opportunity of adducing evidence. I would therefore dismiss the second appeal with costs.

Krishnan, J.—I agree with my learned brother that this second appeal fails. But as the point raised by the appellant's advocate Mr. Shenai, as to the necessity of bringing a representative suit under S. 53, T. P. Act, is an important one and has been argued at some length before us, I shall add a few words. Both the lower Courts found on the evidence in the case that Ex. 5, the sale deed in favour of the appellant, was intended to defeat the vendor's creditors of which plaintiff was one and that the appellant was not a transferee in good faith. The Subordinate Judge went further and found that the sale was a sham or colourable transaction which was void and did not require to be avoided. This last finding has been attacked before us and it is difficult to support it on the facts of the case. But, in my view, it is an unnecessary finding and may be ignored, as the sale deed was properly treated as unenforceable against the plaintiff on the other two findings. It was however argued by Mr. Shenai that a creditor was not entitled to avoid a transfer under S. 53, Transfer of Property Act, unless he had brought a representative suit on behalf of all the creditors and got a decree setting aside the deed. He contended that as this was not such a suit, we must ignore the findings as to the fraudulent character of Ex. 5 and treat it as in force and dismiss the plaintiff's suit. The result of his contention, if adopted, will be that we should be driven to uphold a sale deed which has been proved to be fraudulent and voidable at plaintiff's option, and enforce it against him simply because he has not brought what is called a representative suit. Such a result seems somewhat startling, but Mr. Shenai contended that his proposition was supported by decided cases both in this country and in England; we must therefore examine the authorities relied on.

(3) [1907] 34 Cal. 999.

It is conceded that there is no statutory rule on the point.

Mr. Shenai relied in the first instance on the English rule regarding cases under the Statute of Elizabeth, 13, Elizabeth Ch. 5; the provisions of that Statute are practically the same as that of S. 53, T. P. Act on this point. The English rule,as stated in Halsbury's Laws of England, Vol. 15, p. 89, is as follows:

"In an action to set aside an alienation under the Statute a creditor should sue on behalf of himself and all other the creditors of the grantor, except where he has recovered judgment for his debt, in which case he can obtain an order declaring the alienation as void against him and containing consequential directions for the satisfaction of his debt alone, without mention of any other creditors or their debts."

As pointed out by Coutts-Trotter, J., in *Palaniandi Chetty* v. *Appavu Chettiar* (1), the equity Courts used to insist that after getting a judgment in his favour the creditor should sue out a writ of fifa or elegit before seeking their help to set aside a deed of transfer in equitable execution of his decree. If we adopt the rule in the restricted manner with the execution as above stated, the present suit will be a validly constituted one as it is by a judgment-creditor who has attached immoveable property, which corresponds in a general way to suing out the writ of elegit. Apart from that, it has not been shown that the rule itself was ever used for the purpose of dismissing a suit by a single creditor. No authority has been cited where such a procedure was followed in England. The cases cited in support of the rule, viz., *Bott* v. *Smith* (4), *Mouatt, In re*; *Kingston Cotton Mill Co.* v. *Mouatt* (5), *Cornish* v. *Clark* (6), *Ideal Bedding Co.* v. *Holland* (7) and *Reese River Silver Mining Co.* v. *Atwell* (8), when examined, show either that the suit was brought by the plaintiff himself on behalf of all the creditors or, as happened in the last case cited, the suit was allowed to be amended for the purpose in the trial Court. On the contrary in the case of *Maddever, In re*; *Three Towns Banking Co.* v. *Maddever* (9), though the suit was by a single creditor, no objection was apparently taken as to its form, but the decree gave, as a matter of form, a declaration that the conveyance in question was void against the plaintiff and all other if any, creditors of the debtor. It seems to me therefore that even in cases of ordinary creditors where the rule applied and not the exception, suits were not dismissed for not being brought on behalf of all the creditors, but were allowed to be amended in the trial Court or where the transfer was to be set aside, a decree was passed setting it aside on behalf of all the creditors.

As the provisions in the Statute of Elizabeth and S. 53, T. P. Act, are practically the same, we may well adopt the English rule as a whole, but without giving any further scope to it either by allowing objections to the form of the suit being taken in appeal for the first time or by dismissing the suit because it is not in a representative character. As pointed out by Coutts-Trotter, J., in the case in *Palaniandi Chetty* v. *Appavu Chettiar* (1), already cited, the rule has already been, to some extent, adopted in India. There are indications in the Indian law to show that a creditor may bring a suit under S. 53, T. P. Act, in his individual character without joining the other creditors or suing on their behalf. The wording of S. 53 itself gives to each individual creditor who has been defeated or delayed a right to treat as voidable at his option a transfer that falls within it. He has not got to exercise his option in conjunction with the co-creditors. He thus gets a cause of action for himself and there is nothing in the Code of Civil Procedure to prevent him from seeking relief by himself.

Again, it would seem from the wording of the form of the decree under the Civil Procedure Code in a suit to set aside a transfer in fraud of creditors, see Form No. 13, Sch. 1, App. D, a suit to which all the creditors are not parties either personally or otherwise is contemplated; for the form of the decree in *Re Maddever's* case (9) above cited is adopted. The use of the words "if any" shows that all the creditors are not before the Court.

I am therefore of opinion that there is no rule either in the English or in the Indian law justifying the dismissal of a suit brought under S. 53, T. P. Act, because it is not brought in a representa-

(4) [1856] 52 E. R. 957.
(5) [1899] 1 Ch. 831.
(6) [1872] 14 Eq. 184.
(7) [1907] 2 Ch. 157.
(8) [1869] 7 Eq. 347.
(9) [1884] 27 Ch. D. 523.

tive capacity. To avoid the difficulty of multiplicity of suits pointed out by Coutts Trotrer, J., in *Palaniandi Chetty* v. *Appavu Chettiar* (1), I think the trial Court may, of its own motion, and should, if moved by the transferee-defendant, direct that a suit by a single creditor under S. 53, T. P. Act, should be amended so as to make it a suit on behalf of all the creditors, as was directed to be done in *Ishvar Timappa Hegde* v. *Devar Venkappa Shanbog* (10). The Court should also take care, when passing a decree setting aside a transfer even in a a single creditor's suit, to adopt the Form No. 13 in Appn. D above referred to. But if a suit had been proceeded with, without any objection being taken to its form on the ground of its not being on behalf of all the creditors and a decree had been passed setting aside a transfer as fraudulent, it seems to me that there is no justification for allowing such an objection to be raised for the first time in appeal or for ignoring the findings arrived at by the lower Court and dismissing the suit as not being of a representative character. Such a course will make the Court really an instrument for the support of a proved fraud.

I shall now refer to the Indian cases relied on by Mr. Shenai. To start with, he relied on the Madras cases reported as *Palaniandi Chetty* v. *Appavu Chettiar* (1) and in *Subramania Ayyar* v. *Muthia Chettiar* (2). The latter case is a Full Bench decision. The point decided in both these cases was that a defendant to an action cannot plead in defence his right to avoid a transfer under S. 53, T. P. Act; and that if he wishes to exercise his option under that section, he can do so only as a plaintiff and not as a defendant. If this question were res integra, I should find some difficulty in adopting this view. But it is not necessary to discuss it as the question before us now is quite different. The creditor here is not seeking to set up his right as a plea in defence but he has come to Court as a plaintiff and the question raised is, whether he should do so in a representative suit only. On that question I consider that neither case is an authority. In the judgment in the Full Bench case, this question has been expressly excluded from consideration. No doubt, there is an observation in it that the sale should be set aside "in proceedings properly instituted for the purpose." There is however no indication in the judgment what these proceedings are and as my learned brother who made the observation considers that the present suit is such a proceeding, it cannot be relied on as an authority against the respondent.

If *Palaniandi Chetty's* case (1) is examined, it will be found that Seshagiri Aiyar. J., definitely ruled that no representative suit was necessary. The view of Coutts Trotter, J., on the point is not quite clear; but it seems to be that a representative suit is necessary except in the case of attaching decree-holders. The difficulty in understanding his view arises from the fact that he apparently overlooked that the case before him was that of a decree-holder who had not only attached property but had obtained an order in his favour in the claim petition. From his judgment it would appear that he would have supported the decree in the case if he had not treated it as one of a mere decree-holder. However that may be, if the learned Judge is to be taken as holding that a creditor's suit should be dismissed in second appeal if it is not brought in a representative capacity, with all respect, I am unable to follow him. I am inclined to agree with the view of Seshagiri Aiyar, J., on this point, though I am doubtful about his wiew as to the applicability of S. 11, Expl. 6, Civil P. C., for in a case which ends in favour of the transferees it may be difficult to hold that the creditors who were no parties to the suit are also barred from disputing the validity of the transfer. The other cases relied on by Mr. Shenai are *Burjorji Dorabji Patel* v. *Dhunbai* (11), *Ishvar Timappa Hegde* v. *Devar Venkappa Shanbog* (10), *Hakim Lal* v. *Mooshahar Sahu* (3) and *Chatterput Singh* v. *Maharaj Bahadur* (12). The last one is a Privy Council ruling and the observation relied on is on p. 217:

"such an issue could be raised and such a decree could be made only in a suit properly constituted for that purpose and this suit was not so constituted either as to parties or otherwise."

There is nothing to show that their Lordships meant by a properly constituted suit a representative suit; they do not say so. The facts of the case show

(10) [1903] 27 Bom. 146.

(11) [1892] 16 Bom. 1.

(12) [1905] 32 Cal. 198 (P. C.).

that proper allegations had not been made and proper parties, viz., the transferors, had not been joined to enable the Court to set aside Chatturput's private purchase as fraudulent. The observation referred to is apparently connected with these circumstances. I am therefore not able to treat it as an authority on the point before us. The observation in the next Calcutta case on p. 1106 (of *I. L. R.* 34 *Cal*). is no doubt in point in appellant's favour; but as the decision in the case was that the conveyance was a valid one and not liable to be set aside under S. 53 T. P. Act, they are in the nature of obiter dicta. It was also pointed out to us that the learned Judges had not noticed the exception recognized in the English Law to the general rule in favour of the attaching decree-holder, though the case before them was one of such a decree-holder. With every respect I am unable to follow their view that a suit under S. 53, T. P. Act, is liable to be dismissed if not brought in a representative capacity. They have also not expressed a definite opinion whether the objection should be allowed to be raised for the first time in appeal, though they were apparently inclined to hold that it should not. As I have already stated, I am also of the same opinion that it should not be allowed.

I have already referred to the case in *Ishvar Timappa Hegde* v. *Devar Venkappa Shanbog* (10) and I am in agreement with the learned Judges there that suitable amendments may be directed by the trial Court to make a suit brought by a single creditor under S. 53, T. P. Act, a representative suit. The actual decision in that case was that a creditor who has not obtained a decree in his favour is nevertheless entitled to sue under that section. In the case in *Barjorji Dorabji Patel* v. *Dhunbai* (11) the suit was not dismissed on the ground of its not being a representative suit, though no doubt the learned Judge was of opinion that the suit was liable to be dismissed on that ground. This opinion however was really only an obiter dictum, for it was found by him that plaintiffs were claiming under the transferor himself and could not therefore impeach his transfer. It was not a case of creditors at all and was not under S. 53, T. P. Act, as the Act did not then apply to Bombay. As already pointed out, the English authorities the learned Judge follows do not show that the suit should be dismissed if not brought in a representative character. I do not therefore consider that this case which, it will be noted, is the decision of a single Judge, is an authority against the view I am taking and which I should follow.

I have thus, for the reasons above stated, come to the conclusion that even looking upon plaintiff as no more than an ordinary creditor of the vendor, the appellant's contention that we should now dismiss his suit should be overruled. In my view the Subordinate Judge was wrong in allowing the point to be raised for the first time in appeal. In this case however the decree of the lower Court can be supported on a much narrower ground as well; for the plaintiff here is not merely a creditor but an attaching decree-holder who was the defeated party in a claim petition filed by the transferee-defendant under O. 21, R. 60, Civil P. C. I have already pointed out that adopting the English rule he will have, as attaching decree-holder, a personal right to sue by himself to avoid the transfer. Again as the defeated party in a claim petition he has a statutory right of suit given to him under R. 63 and that suit must necessarily be one brought by himself alone and is not a representative suit.

Under that rule he can sue to establish the right which he claims to the property in dispute, and that right is that it can be attached and sold for his decree. The present suit is exactly that suit and it cannot therefore be defeated by any rule of practice which has no statutory basis. As it is necessary to find whether Ex. 5 is valid against him to give him the relief claimed, the Court, I think, was bound to decide that question and he could not be referred to another suit for the purpose. In fact the suggestion of the appellant's counsel that after bringing this suit plaintiff should have at once launched another suit of a representative character to set aside Ex. 5 and get a stay of this suit pending that suit, if he wanted to save it from dismissal, does not seem to me to be at all reasonable nor the course proposed necessary; it is perhaps even impracticable; I do not see why plaintiff should be driven to bring two suits for the same purpose. To hold that plaintiff cannot get the deed set aside except in a representative suit will

be a practical denial of his statutory right of suit, a suit which he has to bring, as pointed out by my learned brother, within one year at the risk of losing his right to attach his property if he does not do so.

The only case cited to us which was a case of an attaching decree holder defeated in a claim petition suing, is the one in *Hakim Lal* v. *Mooshahar Sahu* (3) already referred to. But in that case the learned Judges did not consider his special and peculiar right to sue in his own name under R. 63. I have already stated that I am unable to follow their view as to the character of the suit to be brought under S. 53. It is therefore no authority against the respondent. I agree with my learned brother that the appellant's contention that the present suit should be dismissed because it was not a representative suit on behalf of all the creditors fails and that the lower Courts were right on their findings in holding that Ex. 5 was not valid against the plaintiff and in giving relief on that footing. I agree the second appeal should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 262

SESHAGIRI AIYAR AND PHILLIPS, JJ.

Muthu Ayer St. Arunachalam Chettiar and *another*—Plaintiffs—Appellants.

v.

St. N. Narayana Chettiar and *others*—Defendants—Respondents.

Second Appeal No. 1849 of 1917, Decided on 27th November 1918, against decree of Dist. Judge, Ramnad, in Appeal Suit No. 404 of 1916.

(a) Paper Currency Act (1910), S. 26, Proviso—Hundi payable on demand to bearer can be made to be drawn on bank against intended deposit— Negotiable Instruments Act (1881), Ss 120 and 122.

Where a hundi is drawn on a banker, an intended deposit before the presentation would save the hundi under the proviso to S. 26, Paper Currency Act:

Defendant 1 drew a hundi on a Rangoon firm in which at the top he was described as the debtor and defendant 3 as the creditor. The material portion of the hundi was as follows: "The money which Rangoon current rate of interest should be paid on demand to the person who brings this by the Rangoon firm." Defendant 1 had no money with the firm when he drew the hundi, but intended to make a deposit before presentation:

Held: that the hundi was covered by the proviso to S. 26 and that the plaintiff was entitled to recover on the basis of it: 36 *I. C.* 741, *Expl.* and *Dist.* [P 262 C 2]

Per *Seshagiri Aiyar, J.*— The policy of the proviso to S. 26, Paper Currency Act is to enable bona fide customers to operate on actual or intended deposits. There is nothing against public policy in so doing and a hundi can be drawn on a bank against an intended deposit. [P 263 C 1]

(b) Evidence Act (1872), S. 115—Negotiable instrument.

The endorser of a negotiable instrument is estopped as against the endorsee from disputing the validity of the instrument. [P 632 C 2]

C. S. Venkatachariar—for Appellants.

A. Krishnaswami Aiyar and *Patanjali Sastri*—for Respondents.

Seshagiri Aiyar, J.—This is a suit by an endorsee of a Hundi. On 9th April 1914 defendant 1 drew the Hundi, Ex. A, on a Rangoon firm. At the top of the Hundi defendant 3 is described as the creditor and defendant 1 as the debtor. The exact rendering of the Hundi omitting unnecessary portions is

"the money with Rangoon current rate of interest should be paid on demand to the person who brings this, by the Rangoon firm."

This was signed by defendant 1. Subsequently defendant 3 put his signature by way of endorsement. Plaintiffs lent to defendant 1 on the strength of the endorsement. Hence the suit. The defence was that the debt was discharged, and that as the Hundi offended against the provisions of the Paper Currency Act the suit is not maintainable. The Courts below held that the Hundi was not discharged. They came to the conclusion, relying upon *Chidambaram Chettiar* v. *Ayyasami Thevan* (1) that the suit should be dismissed. Mr. Venkatachariar in the second appeal tried to distinguish *Chidambaram Chettiar* v. *Ayyasami Thevan* (1) from the present case on the ground that the Hundi must be regarded as not being made payable to the payee or bearer. I am unable to agree with him. The fact that the name of the payee is entered at the top of the Hundi does not matter. In effect the Hundi is drawn in favour of defendant 1 and is made payable to bearer. I think that even without the endorsement of defendant 3 the Hundi could have been presented for payment. Consequently it is obnoxious to S. 26, Paper Currency Act.

This case however is distinguishable from *Chidambaram Chettiar* v. *Ayyasami Thevan* (1) on another ground. In the first place, I think that the document in question is covered by the proviso to

(1) [1916] 40 Mad. 585=36 I. C. 741.

the section. Under it a draft can be made payable

" to bearer on demand in respect of deposits of money in the hands of bankers and held at the credit and disposal of person drawing such drafts."

Mr. Patanjali Sastri contended that in the present instance the Hundi should not be regarded as being drawn against a deposit of money, because on the date of the Hundi there was no money in the Rangoon firm due to defendant 1. If we turn to the admissions of defendant 1 contained in his deposition, it is clear that this contention must be overruled. He says:

" When the Hundi was drawn on it I had no money in that firm, but I had written to Saigon where I had money to send it on to the said Rangoon firm, and so I drew the Hundi on it." " My account with that firm as regards that money is not yet closed No money is due to me from that firm. The money I wanted to be sent to the Rangoon firm from Saigon was not sent. After the suit Hundi my money has gone to that firm and I have drawn it."

Notwithstanding the evident intention of defendant 1 to sell as many lies as would save him from liability, the net import of this evidence is that he drew the Hundi on money which he directed to be sent to the Rangoon firm and that after drawing the Hundi and before presentation for payment at Rangoon, he drew that money out. It is clear from this statement that the case comes within the proviso, because the draft was drawn in respect of an intended deposit of money which was expected to be held by the bankers at the credit and disposal of defendant 1. The money that apparently reached the Rangoon firm would but for the dishonest conduct of defendant 1 have been available to the plaintiffs. To hold otherwise would be to decide that when a customer draws a cheque or Hundi on a bank to which he has directed a payment to be made which would cover the draft, is guilty of an offence. The object of the proviso is to enable bona fide customers to operate on actual or intended deposits. There is nothing against public policy in so doing and I am of opinion that the Hundi was validly drawn on the bank. The subsequent misconduct of defendant 1 in drawing out the money would not invalidate it. There is another possible ground. It was not disputed that the plaintiff was a holder in due course. He had paid consideration for the Hundi before it had become payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. Prima facie therefore defendant 1 is estopped from saying that the Hundi which he endorsed is not a valid document. Under the English Bills of Exchange Act the position of the plaintiffs would have been unassailable. S. 55, Cl. (2) (c), runs thus:

" The endorser of a bill by endorsing it is precluded from denying to his immediate or subsequent endorsee that the bill was at the time of his endorsement a valid and subsisting bill and that he had then a good title thereto."

This rule is an illustration of the principle of estoppel contained in S. 115, Evidence Act. The Indian enactment, though passed a year previous to the passing of the English Bills of Exchange Act, was apparently modelled on its provisions. In the chapter headed Special Rules of Evidence, Ss. 120 and 122 refer respectively to estoppel against makers and endorsers. S. 120 says that:

" the maker or drawer of a bill of exchange shall not be permitted in a suit thereon by a holder in due course to deny the validity of the instrument as originally made or drawn."

This would undoubtedly make defendant 1 liable. As regards the endorser S. 122 says:

" No endorser of a negotiable instrument shall in a suit thereon by a subsequent holder, be permitted to deny the signature or capacty to contract of any prior party to the instrument."

There are two noticeable differences between the two sections. One is that under the latter section, the liability incurred is not only to the holder in due course but to any holder. In the second place, the estoppel is only against denying the signature or capacity of a prior party and not against the validity of the instrument as originally made or drawn. There is no reason why there should be this distinction between the position of a drawer of a bill of exchange or the maker of a promissory note and the endorser. The English Law does not recognize such a distinction, and I am inclined to think that it is a case of inadvertent omission rather than of deliberate departure from the English rule. If we turn to S. 36 of the Act, we find that:

" every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied.

Section 38 says:

"Each prior party is, in the absence of a contract to the contrary, liable thereon as a principal debtor in respect of each subsequent party."

The illustration to the section shows that the drawer will be the principal debtor and the endorser will be the surety. Ordinarily an estoppel which would apply against the principal party would also be available against the surety, unless there are circumstances such as those mentioned in S. 40, etc. Byles in his book on Bills of Exchange (16th Edn.) says at p. 180:

"The endorser makes a similar contract, and promises in the same way to compensate the holder or any subsequent endorser; he is estopped from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature, and all previous endorsements; he is estopped from denying to his immediate and any subsequent endorsee, that the bill was at the time of his endorsement a valid and subsisting bill and that he had a good title thereto."

I fail to see why this salutary principle of estoppel should not be applied in India. However, having regard to the language of S. 122, I shall not base my decision on the rule of estoppel enunciated in S. 55, Cl. (2) (c), English Act. The legislature should make this point clear. As I have held that the Hundi is covered by the proviso to S. 26, Paper Currency Act, this appeal should be allowed and the decrees of the Courts below reversed; plaintiff is entitled to a decree as prayed for and to costs in all the Courts.

Phillips, J.—I agree that the suit document comes with in the proviso to S. 26, Paper Currency Act. The finding that defendant 1 had no money with his bankers at the time he signed the Hundi is not by itself sufficient to show that he was not operating on money deposited by him with his bankers. In fact he admits that he was so operating and had given instructions for a remittance to be made to his bankers to meet the suit Hundi. The Subordinate Judge's conclusion from the mere fact no money was actually in the banker's hands when the Hundi was signed is not warranted, for it would involve the proposition that a cheque drawn payable to bearer at a time when as a matter of fact the drawer had no balance at the bank is an offence against the Paper Currency Act, although the drawer believed he had sufficient funds in the bank or intended to put the bank in funds before the cheque could be presented. The words of the proviso to S. 26 "in respect of deposits of money in the hands of the bankers" do not seem to me to warrant such a broad proposition. I therefore agree in the order proposed, and think it unnecessary to discuss the further question of estoppel.

S.N./R.K. *Appeal allowed.*

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* A. I. R. 1919 Madras 264

OLDFIELD AND SESHAGIRI AIYAR, JJ.

Dattada Bhimaraju—Appellant.

v.

Kasibotla Sreerama Sastrulu — Respondent.

Appeal No. 210 of 1918, and Civil Revn. Petn. No. 634 of 1918, Decided on 25th February 1919, against order of Sub-Judge, Kistna, D/- 5th August 1918, in Appeal Suit No. 683 of 1917.

*** Civil P. C. (5 of 1908), Ss. 42 and 108—Small Cause Court decree transferred to Court of regular jurisdiction—Order in such execution is appealable but no second appeal will lie.**

Where a decree made by a Court exercising Small Cause Court jurisdiction is transferred for execution to a Court exercising ordinary original jurisdiction, the decree by force of its transmission acquires, for the purposes of execution, all the rights which a decree passed by a Court of ordinary original jurisdiction would have. An order made in execution of such a decree is appealable, but there is no second appeal.

[P 265 C 1, 2]

P Somasundaram—for Appellant.

V. Suryanarayana—for Respondent.

Seshagiri Aiyar, J.— This matter arises in execution. The Subordinate Judge of Coconada exercising Small Cause Court jurisdiction passed a decree on 14th July 1905. It was transferred for execution to the District Munsif of Ellore on the regular side. This was on 20th October 1908. The last application was on 24th April 1917 On it an order to attach immovable property was made on 16th August 1917 ex parte by the District Munsif. It was set aside on the application of the judgment-debtor on 26th September 1917. On the very same day, an oral application was made to arrest the judgment-debtor. The District Munsif was asked to allow the decree-holder to amend the execution application by inserting the prayer for arrest. He declined to accede to the request and dismissed the petition altogether. An appeal was made to the Sub-Court against that order. The Subordinate Judge considered that the amendment should have

been allowed. He therefore set aside the order and remanded the petition for disposal on the merits. The judgment-debtor has preferred this second appeal. A preliminary objection is taken on behalf of the respondent that no second appeal lies. I think the contention is well founded. I felt some doubts during the course of the hearing whether any appeal lay to the Sub-Court from the order of the District Munsif refusing to issue the warrant of arrest. On further consideration I have come to the conclusion that the first appeal was properly presented and that no second appeal lies. It is clear that under S. 7 (a) (iii), Civil P. C., a Court of Small Causes can have no power to execute decrees against immovable property. Its power to issue a warrant of arrest or to attach moveable properties is not affected by this subclause. The decree holder in this case, as he was desirous of getting the immovable property of the judgment-debtor attached, had the decree transferred to the Court of the District Munsif of Ellore.

By S. 42, Civil P. C, in consequence of the transfer, the decree, though passed by a Judge exercising Small Cause Court jurisdiction, becomes impressed with rights incident to a decree passed by the District Munsif. The words "as if it had been passed by itself" in the first sentence of the section show that the decree by force of its transmission acquires all the rights which a decree passed by the District Munsif exercising original jurisdiction would have for purposes of execution. The third sentence of S. 42 makes it clear that the orders in execution are subject to the same right of appeal as orders passed by the District Munsif exercising original jurisdiction. Mr. Somasundaram for the appellant suggested that the clause "shall be subject to the same rules in respect of appeal" only refers to the procedure to be adopted and does not confer a right of appeal.

This construction would make the sentence meaningless. I am clear that by virtue of the fact that the Munsif passed orders in execution in respect of a decree passed by the Small Cause Court, his orders became subject to appeal. The only difficulty which I find in giving full effect to this view relates to S. 104, Cl. (h), Civil P. C. That section enumerates the various orders which are appealable under the Code. Cl. (1) (h) says:

"An order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree".

Reading it literally this clause would mean that no appeal is provided against an order in execution directing arrest or detention of a judgment-debtor. But I do not think that is the true construction of the clause. The exemption of order of arrest or detention in execution of a decree is due to the fact that such orders are covered by S. 47, Civil P. C. Under S. 2, Cl. (2) the expression "decree" includes the determination of any question within S. 47. Therefore inasmuch as the order exempted by Cl. (h) acquires the superior force of a decree, it was thought desirable by the legislature to exempt it in S. 104. Moreover Cl. (2), S. 104 provides that there shall not be a second appeal against the orders made appealable under Cl. (1). If the exemption in favour of arrest or detention in execution of a decree were not in Cl. (1) (h), it would follow that even where such orders are passed in execution of a decree of a regular Court for more than Rs. 500, no second appeal would lie from such an order. This would make S. 104 inconsistent with S. 47 and S. 2 (2). Therefore the object of exemption in S. 104, Cl. (1) (h), is not to make such orders unappealable, but only to point attention to the fact that they are not orders of the same class mentioned in the other subclauses. I am therefore of opinion that an appeal lies to the Sub-Court against the order of the District Munsif. This view is supported by a decision of this Court in *Perumal* v. *Venkataraman* (1). Although that case was decided with reference to the old Small Cause Courts Act, it seems to me that the conclusion is equally applicable to proceedings under Act 9 of 1887. In *Peary Lal Singh* v. *Radha Nath Singh* (2) the same view was taken.

If an appeal lies, then the question is whether a second appeal is competent. That must be answered in the negative, having regard to S. 102, Civil P. C. Under the old Code it was held in *Lala Khandha Pershad* v. *Lala Lal Behary*

(1) [1888] 11 Mad. 130.
(2) [1907] 11 C. W. N. 861.

Lal (3), *Harakh* v. *Ram Surup* (4) and *cary Lal Singh* v. *Radha Nath Singh* (2) that no second appeal lies in execution proceedings relating to Small Cause Court decrees. The language of S. 102 is an exact reproduction of S. 586 of the old Code: see also *Mavula Ammal* v. *Mavula Maracair* (5). For these reasons I am of opinion that the preliminary objection must be allowed and the appeal should be dismissed with costs. I agree as to the order passed by my learned brother in the civil revision petition.

Oldfield, J.—I agree with my learned brother's judgment; but I desire to add that the argument based on S. 42, Civil P. C., depends on the interpretation of the word "rules" therein as not conferring any substantive right of appeal, but referring only to the rules mentioned in Ss. 121—128. It is a sufficient answer to this that S. 42 merely reproduces S. 228 of the former Code, in which no such rules could have been in question. The appeal against order must be dismissed with costs. The civil revision petition, which is also before us, must be dismissed, because no question under S. 115, Civil P. C., is shown to arise. No order as to costs in the civil revision petition.

S.N./R.K. *Appeal dismissed.*

(3) [1898] 25 Cal. 872.
(4) [1890] 12 All. 579=(1890) A. W. N. 206.
(5) [1907] 30 Mad. 212=17 M. L. J. 376.

A. I. R. 1919 Madras 266

SADASIVA AIYAR AND SPENCER, JJ.

C. Venkatachariar— Plaintiff—Appellant.

v.

C. Rangaswami Ayyangar and *another* —Defendants—Respondents.

Second Appeal No. 979 of 1917, Decided on 2nd October 1918, against decree of Temporary Sub-Judge, Salem, in Appeal Suit No. 216 of 1915, D/- 27th September 1916.

(a) Landlord and Tenant — Forfeiture—Kayam saswatham lease—Denial of title can forfeit lease—Denial of derivative title has same effect.

A kayam saswatham, or permanent tenancy, can be forfeited by denial of the landlord's title: 46 *I. C.* 62 and 24 *Cal.* 440, *Foll.* [P 268 C 1]

A denial of a derivative title will work a forfeiture as much as the denial of the original landlord's title: 46 *I. C.* 62, *Foll.* 18 *W. R.* 465, *Diss from.* [P 268 C 1]

If a tenant, honestly doubtful and not intending to identify himself with a third party who sets up a title in himself against the real landlord, merely puts his alleged derivative landlord to the proof of the latter's title before recognizing him as such, such conduct may not work a forfeiture of the tenancy and may not constitute such disclaimer of the title of the landlord as would work a forfeiture.

[P 268 C 1]

(b) Transfer of Property Act (1882), S. 111 (g)—Lease executed before Act—Separate act indicating intention to act on forfeiture is not pre-requisite to maintain ejectment suit.

In cases of leases executed before the Transfer of Property Act came into force or of agricultural leases, a separate act by the landlord indicating his intention to act upon a forfeiture that has been incurred is not a necessary pre-requisite for the maintainability of a suit in ejectment.

[P 268 C 2]

V. C. Seshachariar, *A. Krishnaswami Aiyar* and *K. V. Sesha Aiyangar*—for Appellant.

K. Srinivasa Aiyangar and *B. Somaya* —for Respondents.

Sadasiva Aiyar, J.—The plaintiff is the appellant. He purchased the plaint village of Bojinaickampatti (or Posinaickenpatti) from Narasimhalu Naidu who acted on behalf of himself and his brother. They made the said sale as mittadars in 1901 under Ex. 3. Plaintiff had formerly brought a suit for rent against the defendants, who had obtained a kayam saswatham lease in 1839 from the original mittadars. That suit for rent was Original Suit No. 988 of 1904. In that suit, the defendants (the kayam saswatham lessees) denied that the plaintiff was the owner of the mitta and denied also the title of the plaintiff's vendors, Narasimhalu Naidu and his brother, to sell the property to the plaintiff. They set up the title of Venkatarama Naidu (the father of the plaintiff's vendors) who had parted with his rights in favour of his sons in 1897. The first Court decreed that suit of 1904 brought for rent, overruling the lessees' objections and establishing the title of the plaintiff as landlord. The lessees appealed, denying again in the appellate Court the plaintiff's title as landlord and continued such denial notwithstanding that Venkatarama Naidu (the father of the plaintiff's vendors, who had been made a party to the suit) mentioned in an application made to the appellate Court that he did not want any longer to contest the plaintiff's title in that particular suit, and his name was thereupon removed from the record on his expressing the intention of putting an end to

the plaintiff's title afterwards by instituting a future suit for cancellation of the deed executed by him in favour of his sons.

The lessees failed in the appeal also and yet they preferred a second appeal again denying the plaintiff's title as landlord. On these facts, and also on the allegation that before filing of the present suit in ejectment (on the ground of forfeiture by denial of the landlord's title by the defendants) the plaintiff sent a notice to the defendants on 25th January 1908 requiring them to deliver up possession of the village, the plaintiff instituted the present suit for possession. The defendants set up that the plaintiff's two brothers not having joined him in the suit, the suit was bad for nonjoinder, that the plaintiff's purchase was bad for champerty and maintenance, that the defendants had a permanent lease right and that no notice of intention to take advantage of the alleged forfeiture was given in 1908 as alleged by the plaintiff. The District Munsif held on a construction of the kayam lease-deed (Ex. 1 of 1839) that it did confer a permanent heritable right on defendants' predecessor-in-title. He however decided that the defendants incurred forfeiture of that right of permanent tenancy by their denial of the plaintiff's title as their landlord not only in the written statement in the former suit in the first Court but also by their denials in the District Court and the High Court. He states in para. 10 of his judgment that

"there was a clear and mala fide denial of plaintiff's title in the District Court and also in the High Court and that there was a forfeiture."

He further found that the plaintiff had given the notice, Ex. K, insisting on the forfeiture. The learned District Munsif was further of opinion that no notice to quit was necessary under the circumstances, because (I take it) the T. P. Act was not applicable to the rights and conditions of the lease, Ex. 1, created in 1839. As regards nonjoinder of plaintiff's brothers, one of them, as plaintiff's witness, denied that plaintiff's brothers had any right. This contention of defendants, though thus patently frivolous, was persisted in the appeal memorandum. On appeal the learned Subordinate Judge agreed with the District Munsif in holding that the kayam lease deed, Ex. 1, conferred a permanent heritable right. On the other question, viz. the question of forfeiture, however he held that, as the defendants did not attorn to the plaintiff after the purchase of the mitta village by the latter in 1901, the denial by the defendants of the plaintiff's title as landlord did not work a forfeiture. As regards the question whether their denial was bona fide or not, he does not give any definite finding except that the denial at the time of the written statement in the first Court in the former suit may not have been mala fide. The Subordinate Judge admits that the defendants made an unsuccessful attempt before the plaintiff's purchase to buy the property themselves from Narasimhalu Naidu and his brother and he also admits that the defendants "attempted to attack the plaintiff's right" as mittadar of this village in a suit instituted by them against the plaintiff and others. He observes

"that these two facts can never be said to be recognition of plaintiff's title."

So far as the first fact is concerned, it may not be a recognition of the plaintiff's title though it was clearly a recognition of plaintiff's vendor's title. As regards the second fact (see Ex. D which is an application by defendants for attachment of plaintiff's right as mittadar), I am wholly unable to understand the Subordinate Judge's observation that it is not a recognition of plaintiff's title. As regards the notice Ex. K, the Subordinate Judge does not give any finding as to whether it was sent by the plaintiff or not. He however found in para. 15 of his judgment that such a notice was not necessary if a forfeiture had been incurred.

In this second appeal, the questions which have been argued before us are (1) whether the lease deed, Ex. 1, conferred a permanent, heritable right or only a right during the lifetime of the grantee; (2) whether there have been several denials of the plaintiff's title during the course of the former suit of 1904; (3) whether any or all of those denials entailed a forfeiture of the tenancy; (4) whether any notice showing an intention to take advantage of the forfeiture was necessary, even after such denials, as a pre-requisite for the maintainability of this suit; and (5) whether the notice, Ex. K, was really given. So far as the first point is concerned, I do

not think it is necesaary to give any final decision, though it should not be thought that I agree with the lower Courts in their construction of Ex. 1. If the matter were res judicata, I might probably have agreed with them. But having regard to the cases in *Rajaram* v. *Narasinga* (1) *Venkataramana* v. *Venkatapatti Nayani Garu* (2) and *Foulkes* v. *Muthusami Goundan* (3), I am not sure whether the question is not concluded by authority in favour of the restricted right of the grant as merely a grant for the lessee's lifetime. However, as I said, it is unnecessary to express any final opinion on that point for the decision of this case.

Assuming that Ex. 1 created a permanent heritable tenancy, it is clear that even such a tenancy can be forfeited by a denial of the landlord's title: see *Rama Iyangar* v. *Anga Gurusami Chetti* (4) and *Kally Dass Ahiri* v. *Monmohini Dassee* (5). It was argued for the respondents that a denial of a derivative title can in no circumstances work a forfeiture, and the case in *Doorga Kripa Roy* v. *Sree Janoo Lathak* (6) was replied upon. That case was quoted in *Rama Iyangar* v. *Anga Gurusami Chetti* (4), but was dissented from and I respectfully adopt the reasoning in the judgment in *Rama Iyangar* v. *Anga Gurusami Chetti* (4) on this point. So far as the question of denials in the former suit is concerned, there can be no hesitation on the perusal of the records of the former suit (Exs. A, B, C, 2, 4, 14) in holding that the lessees denied the plaintiff's title on different occasions, and in each of the Courts through which that litigation passed; and so far as the Courts of appeal are concerned, such denial could not have been bona fide. If a tenant honestly doubtful and not intending to identify himself with a third party who sets up a title in himself against the real landlord, merely puts his alleged derivative landlord to the proof of the latter's title before the tenant could recognize him as such, such conduct may not work a forfeiture of the tenancy and may not constitute such a disclaimer of the title of the landlord as would work a forfeiture. But it is impossible to hold, having regard to the defendants' conduct both in the former suit and in this suit, that the defendants did not intend to disclaim the plaintiff's title and their tenancy under the plaintiff, but merely in good faith wanted to have their doubts cleared whether the plaintiff was their legal landlord or whether anybody else was their legal landlord. The question whether there was a denial in appeal and in second appeal in the former litigation was not decided by the lower appellate Court in this case; but upon the admitted facts there can only be one conclusion, and that is that the denial by the defendants was deliberate and malicious and that they did not care whether Venkatarama Naidu still owned the landlord's title or not, their only object being to defeat the plaintiff by all means even after Venkatarama Naidu practically gave up his contest with the plaintiff.

Then the next question is whether a separate act by the plaintiff indicating his intention to act upon the forfeiture is a necessary pre-requisite for the maintainability of the suit. It is clear that the Transfer of Property Act does not apply to this lease, because the lease was created in 1839 long before the Transfer of Property Act was enacted. I am further of opinion that it is an agricultural lease and on that ground also the Transfer of Property Act does not apply. The same view has been held in *Padmanabaya* v. *Ranga* (7) and in *Rama Iyangar* v. *Anga Gurusami Chetti* (4) in respect of leases prior in date to the Transfer of Property Act. We are therefore thrown back upon the law as it existed before the Transfer of Property Act came into force. That law has been fully considered in the case in *Rama Iyangar* v. *Anga Gurusami Chetti* (4), and I agree with the conclusion arrived at therein that where there was a forfeiture by disclaimer of landlord's title, no separate preliminary act on the part of the landlord is necessary to enable him to maintain a suit in ejectment. The case in *Venkatarama Bhatta* v. *Gunda Raya* (8) quoted for the respondents has been explained in *Padmanabaya* v. *Ranga* (7), and that explanation seems to have been accepted in *Rama Iyangar* v. *Anga Gurusami Chetti* (4) also. Assum-

(1) [1892] 15 Mad. 199.
(2) [1915] 29 I. C. 188.
(3) [1898] 21 Mad. 503.
(4) [1918] 46 I. C. 62.
(5) [1897] 24 Cal. 440.
(6) [1872] 18 W. R. 465.
(7) [1910] 34 Mad. 161=6 I. C. 447.
(8) [1908] 31 Mad. 403.

ing, however, that notice is necessary, the Munsif found that the plaintiff did send the notice, Ex. K. The plaintiff has gone into the box and proved that he sent the notice and had it properly served through his Amin. Defendant 1's denial is worthless. I see no reason to disbelieve the plaintiff, and Ex. K, containing the usual endorsement by the person who served the notice that a copy was left with the person who received it. As the appellate Court has not dissented from the finding of the Munsif on this question, and has not given a finding of its own, I think we are entitled to find it ourselves. In the result I would reverse the decision of the lower appellate Court and restore that of the District Munsif except that the figure for damages, Rs. 1,000 mentioned in the Munsif's decree be altered into Rs. 750, at Rs. 250 a year in accordance with the finding of the lower appellate Court on that question. The respondents will pay the plaintiff's costs throughout.

Spencer, J.—I agree.

S.N./R.K. *Appeal allowed.*

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* A. I. R. 1919 Madras 269
Full Bench

WALLIS, C. J., AYLING AND SADASIVA AIYAR, JJ.

Thattantavita and *others* — Appellants.

v.

Puthalathu Kandi Kombi Aliassan and *others*—Respondents.

Appeal No. 106 of 1917, Decided on 25th April 1919, against order of Temporary Sub-Judge, Tellicherry, D/- 5th March 1917, in appeal Suit No. 596 of 1916.

*** Limitation Act (9 of 1908), Arts. 165 and 181— Application for restoration of property in excess of that decreed is governed by Arts. 181 and not by 165: 21 *Mad.* 494, *Overruled.***

An application by a judgment-debtor for the restoration of immovable property in excess of what has been decreed is governed by Art. 181 and not by Art. 165: 21 *Mad.* 494, **Overruled** 38 *All* 339, *Foll.* [P 271, C 2]

C. Madhavan—for Appellants.

K. P. M. Menon—for Respondents.

Order of Reference

Ayling, J.—This is of the nature of a second appeal against an order of the District Munsif of Nadapuram directing restoration to respondents 1 to 8 of certain property, which he held to have been wrongly delivered to appellant under a decree of his Court. The sole question before us now is whether respondent's application was time barred; and this turns on whether Art. 165, Sch. 1, Lim. Act, is applicable to the case. Respondents were defendants in the original suit and judgment-debtors under the decree and we are asked by their counsel to hold that Art. 165 only applies to applications by other persons under O. 21, R. 100, and not to petitions by judgment-debtors under S. 47, Civil P. C. On this point there is a conflict of rulings. In *Abdul Karim* v. *Islamunnissa Bibi* (1) the learned Judges held in a carefully considered judgment that applications of this kind by judgment-debtors were governed by Art. 181, and not Art. 165. In this view I fully concur: as also in the reasoning which supports it. On the other hand a Bench of this Court has held in *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2) that Art. 165 applies: the judgment is in this respect of the briefest and assigns no reasons. With all respect I think this view is wrong; but as it has never been overruled and is reported in the regular series I do not feel justified in refusing to follow it without a reference to a Full Bench. I would therefore refer to a Full Bench the question of whether Art. 165, Sch. 1, Lim. Act, is applicable to applications by a judgment-debtor for restoration of immovable property in excess of what has been decreed.

Krishnan, J. — This appeal against appellate order arises from an application by respondents 1 to 8 against the appellant, under S. 47, Civil P. C., for recovering with mesne profits possession of certain properties alleged to have been wrongfully taken possession of by him in execution of the decree in Original Suit No. 762 of 1909 from their lessee respondent 9 who was defendant 15 in the case. Respondents 1 to 8 are the legal representatives of one Ahmed Kutti who was defendant 10 in the suit. They had first put forward their present claim as a suit Original Suit No. 392 of 1913, but on objection being taken by the appellant it was converted into an application under S. 47, as they are the representatives of defendant 10 in Original Suit No. 762 of 1909. Both the lower Courts have held that they are entitled

(1) [1916] 38 All. 339=34 I. C. 23.
(2) [1898] 21 Mad. 494=8 M L. J. 75.

to the relief claimed by them as the decree in Original Suit No. 762 of 1909 did not include the properties in question and have directed the properties to be redelivered to them with mesne profits at Rs. 20 a year. Appellant's plea that the respondents' application was time barred under Art. 165. Lim. Act. having been made nearly 2 years and 11 months after possession was taken by him was overruled the lower Courts holding that the 3 years' rule of limitation applied, apparently under Art. 181 though they do not say so expressly.

The appellant has again raised before us the same question of limitation. His learned counsel contends that Art. 165 applies and relies upon the observation in the case in *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2), where the learned Judges say:

"There can be no doubt as held by the lower appellate Court that Art. 165, Sch. 2, Lim. Act, is applicable to a case where the applicant is a party bound by the decree as well as where he is a stranger: see *Vythilinga Muppanar* v. *Seethalakshmi Ammal* (3), Appeal Against Appellate Order No. 25 of 1889 (unreported)."

That observation is no doubt directly in the appellants' favour but the question was recently considered by the Allahabad High Court in *Abdul Karim* v. *Islamunnisa Bibi* (1) where the learned Judges held dissenting from the view taken in the Madras case, that Art. 165 did not apply to an application by a judgment-debtor for restoration of immovable property seized by the decree-holder in excess of what had been decreed but Art. 181 applied. With all respect to the learned Judges in the Madras cases I am inclined to think that the view expressed in the Allahabad case is correct and should be adopted. I fully agree with the reaaons given by the learned Judges in that case and I need not repeat them. I would however add that if Art. 165 should be read as applicable to an application like the present one under S. 47, it would be equally justifiable to apply it to a defendant who claims to recover by way of restitution proceedings immovable property taken by the decree-holder from him for he would also be a person dispossessed of immovable property applying under the Code of Civil Procedure, and disputing the right of the decree-holder to be put into possession. It has however always been held that Art. 181 is applicable to such a case. Furthermore as Art. 165 cannot by its terms apply to the recovery of movable property or of money taken by the decree-holder in excess of what he is entitled to under the decree the application of Art. 165 to the recovery of immoveable property so taken will lead to the extraodinary postion that in the case of the latter the judgment-debtor will only have 30 days, whereas in the case of the former he will have 3 years, a result that the legislature can hardly have intended. The wording of Art. 165 and its position in conjunction with Arts. 166 and 167 would seem to indicate that it is properly applicable only to applications under O. 21, R. 100, Civil P. C. I may also observe that when as in the present case a person dispossesses another of property not included in the decree it seems doubtful if the latter can be considered to be "a decree-holder" qua that property within the meaning of the article.

In *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2) there is no discussion of the question before us as the learned Judges merely follow the unreported case. It would also seem as pointed out in *Abdul Karim* v. *Islamunnissa Bibi* (1), that the observation in it is in reality an obiter dictum, as the Judges were dealing with the case of a minor to whom they held no limitation applied. On examining the unreported case in Appeal Against Appellate Order No. 25 of 1889 [*Vythilinga Muppnaar* v. *Seethalaashmi Ammal* (3)]. I find it is no doubt a decision in point. But the judgment in it is based entirely on the absence of the words "other than a judgement-debtor" in the article. This is no doubt at first sight an important point, but I am inclined to think that it does not affect the consideration in favour of the opposite view.

It is only if the article can be applied to the case of a judgment-debtor, that the omision will be material. But, if, as I think, the article applies only to applications under R. 100, it was unnecessary and even incorrect to introduce an exception in favour of jndgment-debtors into it when the rule is sufficient to exclude them as it does. The form of the article is thus quite consistent with my view. I therefore agree to the reference to the Full Bench proposed by my learned brother.

(3) [1891] 1 M. L. J. 42.

Opinion.

Wallis, C. J.—The period of limitation prescribed by Arts. 165 and 168 may be traced back to Ss. 230 and 269, Civil P. C. 1859, which dealt only with obstructions by, and dispossessions of, persons other than the defendant. The provision in S. 230 was re-enacted as Art. 158 (now 165), Lim. Act, 1871, as follows:

"Under the Code of Civil Procedure, by a person dispossessed of immovable property and disputing the right of the decree-holder to be put into possession."

This, in my opinion, must be read as meaning

"disputing the right of the decree-holder to be put into possession under the decree."

That question had been decided against the defendant in the suit itself, and it was not open to him to raise it again in execution. This shows that Art. 158 was intended to apply only to a case covered by S. 230 of the Code, where a person other than the defendant had been dispossessed, and that is in accordance with the ordinary presumption that no substantial alteration is intended when a particular provision is transferred from one Statute to another. Art. 158 of the Act of 1871 did not provide for applications by a decree-holder who had been resisted by third persons in taking possession under the decree, whereas Art. 160 (now 167) dealt with complaints in the case of Court sales both by the purchaser and by persons dispossessed by him (S. 269 of the Code of 1859). In the Act of 1877, Art. 158 was reproduced as Art. 165 and amended by inserting after decree-holder the words "or purchaser at a sale in execution of a decree," and Art. 167 was amended by extending it to complaints of obstruction by decree-holders as well as by purchasers (a case not dealt with by the Act of 1871), and by making it applicable to applications complaining of dispossession, not only by auction purchasers, but also by decree-holders. Both these cases were however covered by Art. 165 as amended, and the latter portion of this article was therefore not reproduced in Art. 167 of the Act of 1908. In Appeal Against Appellate Order No. 25 of 1889 [*Vythilinga Muppanar* v. *Seethalakshmi Ammal* (3), which was followed in *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2), the learned Judges relied on the fact that Arts. 165 and 167 do not in terms exclude the judgment-debtor, but their attention was not called to the fact that the articles were transferred from the Code of 1859 where the restriction was to be found. They further observed that:

"unless the articles referred severally to judgment-debtors as well as third parties, there would be tautology."

There was however tautology in the Act of 1877 in either view and in the Act of 1908, Art. 167 was amended so as to remove it. There is in my opinion nothing in these changes to show any intention of widening the scope of the article so as to make it applicable to defendants.

The decision in *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2) having stood so long unquestioned in this Court and elsewhere I have felt great doubt as to whether we should not continue to follow it, having regard to the nature of the points decided, on the principle of stare decisis. The legislature has however itself restricted the scope of Art. 165 by restricting in the Code of 1908 applications by third parties under O. 21, R. 100, to applications with reference to property covered by the decree or sale in pursuance thereof, and the fact that this procedure is not now applicable to complaints by third parties of dispossession of property not covered by such decree or sale appears to me to afford an additional reason for excluding from the scope of the article similar complaints by defendants who, as I am satisfied, were never intended to be covered by it. I think moreover that the rights of defendants are sufficiently restricted by their being required to apply under S. 47 within the period limited by Art. 181. Agreeing with the decision in *Abdul Karim* v. *Islamunnissa Bibi* (1) I would overrule *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2) and answer the question in the negative.

Ayling, J.—I agree.

Sadasiva Aiyar, J.—In this case, I shared with my Lord (if I may respectfully say so) the hesitation he felt in overruling the old decision in *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2). But I am convinced after regarding his opinion that that decision is erroneous. As cases of wrong delivery of judgment-debtors' property in excess of that decreed are rare and and as it is very unlikely that many titles could have been created arising from alienations of such property by decree-holders to purchasers who believed the title to have been perfected

by the default of judgment-debtors to file their applications within the shorter period of limitation till now prevailing, and as most of even those titles would have been perfected by the lapse of three years since the dates of such alienations, I agree in the answer proposed by my Lord.

S.N./R.K. *Reference answered.*

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SADASIVA AIYAR AND NAPIER, JJ.

Mooriath Variath and *another*—Defendants—Appellants.

v.

Meledath K. Kunji Nangayaramma and *another*—Plaintiffs—Respondents.

Second Appeal No. 501 of 1918, Decided on 10th January 1919, against decree of Sub-Judge, South Malabar, in Appeal Suits Nos. 88 and 61 of 1917.

(a) Transfer of Property Act (1382), Ss. 76 (1) and 83—S. 76 (1) does not apply to money due to mortgagee for improvements in Malabar because it is not money due on mortgage within S. 83.

Section 76 (i) has no application to money due for improvements to a mortgagee in Malabar, because the value of improvements effected by such mortgagee cannot be brought under the expression "amount due on the mortgage" in S. 83 of the Act. [P 272 C 2]

(b) Malabar Law—Mortgage — Mortgagee entitled to possession till satisfaction or ejectment in decree—He is not liable for mesne profits till either happens.

A mortgagee in Malabar has a right to remain in possession till he is actually paid or till he is ejected by decree of Court and hence he is not accountable for mesne profits till either of those events happens: 43 *I.C.* 173, *Foll.* [P 272 C 2]

(c) Malabar Compensation for Tenants Improvements Act (1 of 1908), S. 5—S. 5 applies to all tenants except such as have been paid—Policy of the Act stated—Compensation is to be determimed by Court—Right cannot be taken away by tender of sufficient amount.

Per *Napier, J.*—S. 5, Malabar Compensation for Tenants' Improvements Act applies to all tenants except such as have been paid. If payment has been made and the term is determined or the mortgage has been discharged, the section has no application. If the "compensation is so due," i. e., has not been paid, then the section applies.

According to the policy of the Act, the compensation is to be ascertained by the Court. If a tenant accepts payment he waives his right, but if he claims assessment by the Court, there is nothing to deprive him of his statutory right under S. 5, even if the amount tendered is found to be sufficient. [P 273 C 1]

T. Eromani Unni—for Appellants.

K. Subramanya Aiyar—for Respondents.

Sadasiva Aiyar, J.—The contentions as to defendant 1's (appellant mortgagee's) right to additional compensation for improvements (that is, in addition to what has been awarded to him by the lower Court) raise questions of fact which we cannot entertain in second appeal.

The Subordinate Judge however was wholly unjustified in assuming that the provisions of the Transfer of Property Act were not in the minds of the Benches of this Court which decided *Chami* v. *Ana Pattar* (1) and *Parmeswara Ayyan* v. *Kittunni Valia Mannadiar* (2) and in awarding mesne profits to plaintiff after the date of the tender made in Court by the respondents under S. 83, Act 4 of 1882. Seshagiri Aiyar, J., does refer to S. 83 of that Act in his judgment in the former case. S. 76 (i) refers to S. 83 by using the words "in manner hereinafter provided" and the language of the two sections (one speaking of "the amount for the time being due on the mortgage" and the other "the amount remaining due on the mortgage") is very similar when referring to the mortgagee's right to be paid his money before redemption.

Seshagiri Aiyar, J., clearly says in *Chami* v. *Ana Pattar* (1) that he agreed with the appellant's vakil in that case "that the value of improvements cannot be brought under the expression "amount due on the mortgage" in S. 83, T. P. Act."

It follows that S. 76, Cl. (i), also has no application to the money due for improvements to a Malabar mortgagee.

Nothing that has been advanced by the respondent's learned vakil in the arguments in this case has tended to throw any doubt on the opinion I expressed in *Parameswara Ayyan* v. *Kittunni Valia Mannadiar* (2) that the mortgagee in Malabar has a right to remain in possession till he is actually paid or till he is ejected by decree of Court, and hence that he is not accountable for mesne profits till either of these events happens. The legislature cannot have intended to make a mortgagee tenant liable for mesne profits on tender, but not a lessee tenant, which would be the result if the respondent's contention is accepted, S. 5, Malabar Compensation for Tenants' Improvements Act, making no difference between

(1) [1916] 32 I. C. 861.
(2) [1918] 43 I. C. 173.

a mortgagee tenant and a tenant holding on a mere verumpattam or on a mere Kuzhikanom right.

The lower Court's decrees will therefore be modified by striking out of the first Court's decree the words beginning with "and future mesne profits" and ending with "from this date."

The parties will bear their respective costs in this second appeal.

Napier, J.—I agree with the decision in *Parameswara Ayyan* v. *Kittunni Valia Mannadiar* (2). The matter seems to me to be concluded by the language of S. 5, Malabar Compensation for Tenants' Improvements Act. That section seems to apply to all tenants except such as have been paid. If payment has been made and the term is determined or the mortgage has been discharged, the section has no application. If the compensation is so due that is, has not been paid, then the section applies. The legislature could have added the words "or a proper sum tendered", but has not thought fit to do so, although in the same section it speaks of payment or tender of the mortgage money. We are asked to import S. 76 (i), T. P. Act. I agree with Seshagiri Aiyar, J., in *Chami* v. *Ana Pattar* (1) that this does not apply and I further think that if it was to be applied, it would introduce a special rule in cases of mortgages while another rule based on the Malabar Compensation for Tenants' Improvements Act remained for leases, which constitute a number of cases in which compensation has to be paid. I am unable to follow Seshagiri Aiyar J.'s reasoning at the end of his judgment in *Chami* v. *Ana Pattar* (1), as I do not understand his reference to Cl. 2, S. 5, Malabar Compensation for Tenants' Improvements Act. The Act may operate against the landlord in some cases, but that can be dealt with in Court. It must also be borne in mind that according to the policy of the Act the compensation is to be ascertained by the Court: vide S. 19 of the Act. If a tenant accepts payment he waives his right, but if he claims assessment by the Court, I can see nothing in the Act which deprives him of his statutory right under S. 5 of the Act even if the amount tendered is found to be sufficient.

S.N./R.K. *Decree modified.*

1919 M/35 & 36

A. I. R. 1919 Madras 273

SESHAGIRI AIYAR AND PHILLIPS, JJ.

Chidambaram Pillai—Plaintiff—Appellant.

v.

M. C. M. Duraiswamy Chetty—Defendant—Respondent.

Second Appeal No. 2302 of 1917, Decided on 28th November 1918, against decree of Dist. Judge, Tanjore, in Appeal Suit No. 241 of 1917.

(a) Civil P. C. (1908), O. 2, R. 2—Vendor assigning arrears of rent—Suit on assignment—Subsequent suit for rent due since purchase is not barred.

Where the vendee of certain property got an assignment of the uncollected rents from the vendor and sued the defendant first for arrears of rent under his assignment and afterwards for rent that had accrued due since his purchase, basing it on title :

Held : that the causes of action for the two suits were different and the second suit was not barred under O. 2, R. 2. [P 271 C 1 ; P 273 C 2]

(b) Civil P. C. (1908), O. 2, R. 2—Test is whether plaintiff was bound to sue.

Under O. 2, R. 2, the test is not whether the plaintiff could have sued for both the claims in the same suit but whether he was bound to have sued. [P 273 C 2]

E. S. Chidambaram Pillai and *P. N. Marthandam Pillai*—for Appellant.

K. S. Jayarama Aiyar—for Respondent.

Judgment.—The question in this case is whether O. 2, R. 2, Civil P. C., bars the present suit. The plaintiff obtained a sale of certain property. Subsequently the right of the vendor for uncollected rent was assigned to him. The plaintiff first sued for arrears of rent due under his assignment. The second suit is for the rent based on title. In our opinion the causes of action for the two suits are not the same. It is true that under O. 2, R. 3, Civil P. C., the plaintiff could have joined both the causes of action in one suit. But that is not the test. As was pointed out in *Dasarthy Naidu* v. *Palala Kumaramull* (1), the test is not whether the plaintiff could have sued for both the claims in the same suit, but whether he was bound to have sued. Mr. K. S. Jayarama Aiyar contended that the only obligation was to pay rent and that all the breaches of that obligation form but one cause of action. In the present case, the obligations are different. The one was incurred to the assignor and he could have sued separately notwithstanding the fact that he subsequently sold the property in respect of which

(1) [1918] 45 I. C. 969.

rent had accrued due. The obligation in the second suit relates to the right arising from the title to property itself. As was pointed out in *Naro Hari* v. *Anpurnabai* (2) printed as foot-note in *Vishnu Sakharam Nagarakar* v. *Krishnarao Malhar* (3) and in the cases following it, it is not the final breach that constitutes the cause of action but the right and the infringement taken together. In this view, the two suits were based on two different causes of action. The case is practically on all fours with *Muhammad Abdul Aziz* v. *Rafiunnissa Bibi* (4) and we are of opinion that that case enunciates the true principle applicable to such cases. In *Ittappan* v. *Manavikrama* (5) this Court's definition of the term "cause of action" accords with the view taken in Allahabad.

For these reasons, we must reverse the decree of the District Judge and restore that of the District Munsif with this modification, that plaintiff should be given interest at one per cent per mensem on Rs. 87-8-0 from 1st March 1913 up to date of suit and on the other Rs. 87-8-0 from 1st March 1914 to date of suit, and thereafter at 6 per cent per annum till date of realization. Parties will pay and receive proportionate costs here and in the Courts below.

S.N./R.K. *Appeal allowed.*

(2) [1887] 11 Bom. 160n.
(3) [1912] 17 I. C. 833.
(4) [1887] 11 Bom. 153.
(5) [1898] 21 Mad. 153.

A. I. R. 1919 Madras 274 (1)

WALLIS, C. J. AND SADASIVA AIYAR AND SPENCER, JJ.

Kozhikot Kizhakka Kovilagath—Defendant—Appellant.

v.

Zamorin Raja of Calicut—Plaintiff—Respondent.

Letters Patent Appeal No. 3 of 1918, Decided on 11th April 1918, against judgment of Oldfield, J., in Appeal Suit No. 18 of 1917.

Malabar Law—Stanom — Party alleging that alienation by stanee is binding on his successor must prove that it is for benefit of estate.

The party who alleges that an alienation by a stanee is valid beyond the lifetime of the grantor that is, that it is binding on his successor, ought to prove that the alienation was for the benefit of the estate, or in other words that it was such as would be binding on the members of a joint Hindu family if made by a manager of the family other than the father. [P 274 C 2]

C. V. Anantha Krishna Ayyar—for Appellant.

A. Sundaram—for Respondent.

Judgment.—The party who alleges that an alienation by a stanee is valid beyond the lifetime of the grantor, that is, that it is binding on his successor, ought to prove that the alienation was for the benefit of the estate, or (to put it in a different way) was such as would be binding on the other members of a joint Hindu family if made by a manager of the family (who was not also the father of the other members). The defendant in this case did not take any steps to discharge the burden of proof and the disputed alienation was a lease for 72 years by an old gentleman almost on his death-bed in favour of a near relative. We therefore hold that the lower Court rightly decided that the alienation was not binding on the successor of the grantor. The Letters Patent appeal must be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 274 (2)

KUMARASWAMI SASTRI, J.

Tantravahi Bapiraju and *others* In re —Accused—Petitioners.

Criminal Revn. No. 147 of 1919 and Criminal Revn. Petn. No. 119 of 1919, Decided on 7th August 1919, against judgment of First Class, Deputy Magistrate, Peddapur, in Criminal Appeal No. 83 of 1918.

Criminal P. C. (1898), S. 530 (4)—Absence of member of Bench when evidence is recorded vitiates conviction by such Bench.

It is illegal for a Bench of Honorary Magistrates to convict in a case in which the evidence is recorded and the judgment delivered in the absence of one of the members of the Bench. [P 274 C 2]

T. Ramchandra Row—for Petitioners.

Public Prosecutor—for the Crown.

Order.—It appears from the affidavit filed and the attendance register that one of the Magistrates, Hussain Khan Sahib, was absent on 2nd May 1918 when the case was taken up and witnesses examined, and also on 25th July 1918 when judgment was delivered.

I think that the absence on 2nd May 1919 of one of the Magistrates vitiates the conviction. I need only refer to *Subramania Iyer, In re* (1), where it was held by Ayling, J., that a conviction was illegal. A similar view was taken

(1) [1915] 38 Mad. 304=29 I. C. 329.

by a Bench of this Court in Criminal Revision Case No. 416 of 1918 (Criminal Revision Petition No. 357 of 1918).

I set aside the conviction and direct that the case be retried by the Second Class Magistrate of Cocanada. The fine, if paid, will be refunded. Conviction set aside and retrial ordered.

S.N./R.K. *Conviction quashed.*

A. I. R. 1919 Madras 275 (1)

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Vaithilinga Mudaliar and *others*—Petitioners.

v.

Srirangathanni and *others*—Opposite Parties.

Civil Misc. Petn. Nos. 2389, 2705 and 1761 of 1917, Decided on 22nd October 1918, for leave to appeal to His Majesty in Council in appeal Suits Nos. 206 and 207 of 1908 and Nos. 11, 14 and 12 of 1909.

Civil P. C. (1908), S. 110, O. 45, R. 4—Suit by reversioners in respect of separate properties against different alienees decreed—Separate appeals by defendants—Single decree in all appeal—Leave to appeal to Privy Council separately—Leave can be granted only in cases in which subject-matter would be over Rs. 10,000.

Plaintiffs sued to set aside different alienations made by a Hindu widow of whom they claimed to be the reversioners and to recover possession of the property from the different alienees. The Court of first instance decreed the suit in favour of the plaintiffs. The defendants-alienees preferred separate appeals to the High Court which drew up only one decree under R. 105, Civil Rules of Practice. On an application for leave to appeal to the Privy Council against the decision of the High Court in each of the appeals:

Held: that leave could be granted only in those cases in which the subject-matter was over Rs. 10,000 in value [P 275 C 2]

T. V. Gopalaswami Mudaliar and *S. Gopalasawami Aiyangar*—for Petitioner.

T. Rangachariar—for Opposite Parties.

Order.—In this case the plaintiffs sued as next reversioners on the death of the widow of the alleged last male holder and joined various defendants who were in possession of properties which they alleged formed part of the estate of the last maleowner. There were really different causes of action against the defendants, but they were allowed, according to a well-established practice, to be joined in the same suit. The Subordinate Judge passed a decree in favour of the plaintiffs against the alienees of the several items of property. These alienees and the other defendants filed separate appeals in the High Court and the appeals of some of the defendants-alienees were allowed on the ground that the items in question were not shown to have formed part of the estate of last male owner. Although several separate appeals were filed, in accordance with R. 105, of the Civil Rules of Practice, only one appellate decree was drawn up. Some of the appeals of the defendants-alienee which were allowed by us relate to items of property which are said to be of less value than Rs. 10,000 and it is objected by these defendants as respondents to the petitions that in these circumstances, the petitioners are not entitled to a certificate under S. 110, Civil P. C., We think that the fact that only one appellate decree was drawn up in all these appeals cannot affect the rights either of the appellants or the respondents in those appeals with reference to a further appeal to His Majesty in Council and that the applications must be considered as if a separate decree had been passed in each appeal. Otherwise, the effect of the Civil Rules of Practice would be to interfere with the right of appeal or the right to retain the judgment of this Court without appeal both very valuable substantive rights as has often been pointed out. This is a matter with which we have no power to interfere by means of the Civil Rules of Practice. [The rest of the judgment is immaterial for the purpose of this report. Ed.]

S.N./R.K. *Order accordingly.*

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* A. I. R. 1919 Madras 275 (2)

ABDUR RAHIM AND NAPIER, JJ.

Palani Goundan and *another*—Plaintiffs—Appellants.

v.

Kasi Goundan and *others*—Defendants—Respondents.

Second Appeal No. 390 of 1917, Decided on 16th December 1918, against the decree of Sub-Judge, Coimbatore, in Appeal No. 85 of 1916.

*** Hindu Law—Partition—Suit for partition by minor—Decree can be passed only if minor's interest are likely to be advanced thereby or likely to be protected.**

In a suit for partition by a Hindu minor, the Court should not pass a decree for partition unless the minor's interests are likely to be advanced thereby or protected from danger. [P 278 C 1]

The mere possibility of future births in the family is not a good ground for partition, nor is the fact that the minor's father has married a

second wife and the minor's mother is in consequence living away from her husband. [P 278 C 1]

To entitle a minor to claim partition on the ground of malversation of the properties by the father, actual malversation need not be proved, it is sufficient if the interests of the minor in the joint family property are in danger: 4 *Bom. L. R.* 883, *Expl.* [P 278 C 1]

L. A. Govindaragava Aiyar—for Appellants.

A. Krishnaswami Aiyar and *T. M. Krishnaswami Aiyar*—for Respondents.

Abdur Rahim, J.—This second appeal arises out of a suit for partition instituted by two minors through their maternal grandfather as the next friend. Defendant 1, who is the main respondent in the appeal, is the father of the plaintiffs. The only question for consideration is whether upon the facts proved and found, the lower appellate Court was justified in refusing to pass a decree for partition. It is settled law that a Court is not bound to grant a decree for partition of joint family property as a matter of course in a suit instituted on behalf of minors: see *Chelimi Chetty* v. *Subbanna* (1), following *Bachoo* v. *Mankorebai* (2), and *Kamakshi Ammal* v. *Chidambara Reddi* (3). So far the law is not disputed, but there has been much discussion as to the nature of the grounds which would justify the Court in decreeing partition at the instance of a minor. The facts found by the lower appellate Court are: defendant 1, the father of the minors—who are only 6 and 4 years of age—has married a second wife; there had been estrangement between him and the mother of the minors and the latter has gone away to her father's house and is unwilling to come back to defendant 1. The Subordinate Judge characterises her allegations against defendant 1, as to ill-treatment and immorality as a myth and holds that the plaintiffs have not made out that defendant 1 refused to maintain the plaintiffs or their mother or that he had in any way neglected them. He finds that some old family debts have been discharged though apparently with money found by defendant 1's mother during his minority. It is admitted however that defendant 1, has sold a house belonging to the family, but the Subordinate Judge has refrained from considering whether the sale was for necessity or not, though the Court of trial was disposed to regard it as an act of malfeasance. Upon the facts the conclusion of the Subordinate Judge is as stated in his words:

"I can find no circumstances to suggest that the minor's interest is likely to suffer if the property is allowed to continue in the hands of defendant 1. . . .",

but he thought that this was a proper case in which he shall obtain a written undertaking from defendant 1, not to alienate the family property during the minority of the minor plaintiffs and that if any necessity arises in the future for making an alienation he will apply for permission of the Court for that purpose. The District Munsif in decreeing the suit was under the impression that a suit for partition by a minor member of a joint family stood on the same footing as a suit by an adult co-parcener. In this he was undoubtedly wrong: in the former case the Court, as laid down in the rulings above mentioned, has a discretion, that is to say it will not decree partition unless it finds that it will be for the benefit of the minor that there should be a partition while where a major co-parcener seeks partition the Court has no option but to pass a decree to that effect. On the merits the District Munsif based his judgment in favour of the plaintiffs mainly on the ground that defendant 1, who is only 24, is likely to have sons born to him by his second wife which will necessarily diminish the plaintiffs' share in the family property and therefore a partition would be decidedly beneficial to the minors. The Subordinate Judge, in my opinion is right in holding that this is not sufficient and valid consideration and that there is much cogency in his argument that if it were otherwise directly a son is born it would lie with anyone who so chooses to break up the family by instituting a suit for partition as next friend of the minor. Mr. Govindaraghava Iyer who argued the case for the appellants has not been able to cite any sort of authority in support of his proposition.

The joint family tenure of property is the normal condition of the Hindu social system and the Court should not take the responsibility of depriving a Hindu minor co-parcener of the advan-

(1) [1917] 41 Mad. 442=42 I. C. 860.
(2) [1907] 31 Bom. 373=34 I. A. 107 (P.C.).
(3) [1866-67] 3 M. H. C. R. 94.

tages of that system unless it is satisfied that in the circumstances of the particular case it would be clearly to his benefit that he should be separated from the joint family. It is an incident of the joint family system that the share of a Hindu co-parcener in the family property is liable to diminution by accession of new members by births; on the other hand, he enjoys the chance of having his share augmented by deaths. It seems to me that it is not for the Court to speculate how far the one chance counterbalances the other.

As for the decided cases the Court has decreed partition in suits on behalf of a minor where the actual existing circumstances of the family made it manifest that a partition would be for the benefit of the minor and not merely on remote hypothetical grounds. In *Kamakshi Ammal* v. *Chidambara Reddi* (3), which is the earliest decision in this Presidency on the subject that has been brought to our notice, defendant 1 had denied the plaintiff's adoption and set up a will by the adoptive father of the infant which conferred on the defendant an exclusive title to the whole estate. Innes and Collett, JJ., held that in such a case partition should be granted. Both the learned Judges were of opinion that it was not necessary that there should be actual malversation of the property of the co-parcener as was the opinion of the lower Court and in the language of Innes, J.,

"an action will not indeed lie, unless there is something clearly indicating that the interests of the infant will be advanced by a partition because ordinarily speaking the family estate is better managed and yields a greater ratio of profit in union than when split up and distributed among several parceners, and as a general rule therefore it is more profitable for an infant parcener that his share should continue an integral portion of the whole estate in the hands of kinsmen."

Collett, J.'s judgment is to the same effect, and it will be sufficient to quote only the general proposition laid down by him, viz., that

"generally so great a change in the condition of a minor as a partition operates ought not to be allowed to take place unless it is clearly for his benefit that it should be so."

In *Thangam Pillai* v. *Suppa Pillai* (4) the co-parceners had persistently denied that the minor plaintiff was their brother and it was held by Muthuswami Aiyar and Wilkinson, JJ., that this fact showed that the minor's interest in the joint family property would be in danger if left under the management of the appellants and that justified a decree for partition. The case in *Chelimi Chetty* v. *Subbanna* (1) has already been noticed where Oldfield, J., and myself accepted the proposition that in a suit for partition on behalf of a minor the Court will not grant a decree unless it is satisfied that it will be for his benefit. In this we followed the judgment of the Privy Council in *Bachoo* v. *Mankorebai* (2), which affirmed the decision of Tyabji, J., in *Bachoo* v. *Khushaldas* (5). The present question it may be mentioned, was but incidentally under consideration in *Chelimi Chetty* v. *Subbanna* (1), the point for decisions there being whether the institution of a suit on behalf of a minor ipso facto created a separation. In *Bachoo* v. *Khushaldas* (5) and *Bachoo* v. *Mankorebai* (2) it was found that a partition, when it was asked for, would not be beneficial to the minor plaintiff as division of the properties could not be effected without selling certain valuable properties and their sale at that stage would result in considerable loss. The proposition that was accepted by Tyabji, J., was that

"some malversation, danger or loss to the minor on the one hand or some benefit or advantage on the other must be proved before the Court can compel partition, for all the co-parceners are minors."

It does not appear to me that any exception can be taken to this proposition considering it in the light of the facts which gave rise to it. In *Mahadev Balvant* v. *Lakshman Balvant* (6), partition on behalf of a minor was allowed, the allegation in the plaint of disputes between the minor plaintiffs' mother and their stepbrother, separate residence of the former and the defendant's failure to support the plaintiffs being found sufficient to maintain the suit. Ranade, J., in the course of his judgment lays down that the Court has to see whether a partition would promote the interest of the minor plaintiffs in the circumstances as found by him. It seems to me that this is the test which is countenanced by all the authorities Kumaraswami Sastri, J., in *Shadagopa Naidu* v. *Thirumalaswami Naidu* (7) sitting singly held that where

(4) [1889] 12 Mad. 401.

(5) [1902] 4 Bom. L. R. 883.
(6) [1895] 19 Bom. 99.
(7) [1915] 30 I. C. 272.

a father sets up a hostile title and denies the right of his minor son to any share in the joint family properties and the father has been living apart from his wife with a concubine, it is the duty of the Court to order partition in a suit on behalf of the minor.

He quotes with approval the proposition of Ranade, J., in *Mahadev Balvant* v. *Lakshman Balvant* (6) that no suit by a minor co-parcener for partition should be decreed unless his interests were likely to be advanced thereby or protected from danger. As regards the second condition, no exception could be taken to it and as regards the first I do not think that either Ranade, J., or Kumaraswami Sastri, J., intended to countenance any speculative considerations such as the possible birth of other coparceners as a ground for partition. In *Bhola Nath* v. *Ghasi Ram* (8) it is laid down by Stanley, C. J., that the Court has to determine on the entire circumstances of the case whether it would be for the benefit of the minor that a partition of a joint family property should be effected. In my opinion this proposition is entirely in accord with the other authorities already noticed. It will serve no useful purpose to attempt to define any further the circumstances in which partition should be granted or refused at the instance of the minor. All that is necessary in this case to lay down, having regard to the arguments addressed to us, is that a mere possibility of births of other coparceners in the family is not a good ground for partition. It is not necessary that actual malversation should be proved; it is sufficient if the interests of the minor in the joint family property are in danger. All the circumstances have to be taken into consideration in determining whether it would be for the benefit of the minor that his share should be set apart and secured for him.

We have here the fact that plaintiff's father, though a young man, has married another wife and that there have been quarrels between plaintiffs' mother and their father, with the result that they have been living separately. It is almost admitted that a house belonging to the family has been sold by the father. If the sale of the house was without necessity, that would be a strong circumstance to be considered along with other facts in connexion with the question whether there should not be a partition. The lower appellate Court, in my opinion, was not justified in holding that the sale of the house, even if made without necessity, would not affect the question whether there should be a partition. It is now contended before us by the respondents that the sale took place before the birth of the plaintiffs. I would therefore ask the Subordinate Judge to find whether the sale of the house took place before the birth of the plaintiffs, and if not, whether the sale was justified by necessity, whether a proper price was obtained and what happened to the sale proceeds and the total value and income of the family properties. He will allow the parties to adduce fresh evidence on this point. The time for the return of the finding will be two months from the date of the receipt of the records and ten days for objections.

Napier, J.—This is a suit for partition against a father brought by his minor sons through their next friend, their maternal grandfather. The lower appellate Court has found that no case has been made out which would entitle the Court to decree a partition. Mr. Govindaraghava Aiyar has argued before us, first, that where it can be shown that there is a probability that the minor's financial position will in future be better if he has been divided from his father, the minor is entitled to a partition, and secondly, that if that proposition is too broad, on the facts found, he should be given a decree. He has contended that the sole question is, whether partition can in any way benefit the minor and he relies on the use of the word "benefit" in certain reported cases, in support of his contention. The latest case is that reported as *Chelimi Chetty* v. *Subbanna* (1) and the language is as follows:

"The Court has to consider in such cases whether a decree for partition would be for the benefit of the minor."

My learned brother who was a party to that decision states that he did not intend to lay down that the probability of monetary advantage was the sole test, and, if I may say so, this is clear from the fact that the Court relied on the decision reported as *Kamakshi Ammal* v. *Chidambara Reddi* (3), the earliest case on the subject. Mr. Govindaraghava Iyer has claimed however that that case also

(8) [1907] 29 All. 373.

supports his proposition. It was one in which a suit was brought on behalf of an infant against a co-parcener not his father for partition. The lower Court had declined to grant it, as it was not alleged by the plaintiff that the infant's interests were in danger through malversation. On appeal, it was argued that it was not necessary to prove malversation. Innes, J., begins his judgment as follows:

"The true rule seems to be that a suit on behalf of a minor for partition will lie if the interests of the minor are likely to be prejudiced by the property being left in the hands of the co-parceners from whom it is sought to recover it."

I lay special stress on the use of the words "true rule," because it seems to me that any passage in the judgment which might appear to state a wider proposition must be read in a limited sense, so as to bring it into accord with the statement. He then goes on to say that there is no foundation for the position that an infant can only claim partition when there is malversation, and in this connexion he continues:

"An action will not indeed lie, unless there is something clearly indicating that the interests of the infant will be advanced by partition."

Then with reference to the facts of the case, he points out that the co-parcener has set up a sole title to the property, and thereby assumed a position adverse to the interests of the infant, by bringing forward a will which, if genuine, would be inconsistent with the existence of any rights in the infant; and he therefore concludes that the interests of the infant would not be safe in the co-parcener's hand. Collett, J., agrees that it is not necessary to prove malversation. He says that the plaint does set out facts which, if true, go to show that the minor's interests might be exposed to risk if the suit were not now brought; and quotes Strange's Hindu Law, p. 206, as authority for the proposition that waste by the co-parcener is not the sole occasion, but is only an instance that it may be for the benefit of a minor that a suit should be brought for partition. In that connexion, he says

"so that, as we might expect, the benefit of the minor is what justifies such a suit."

He then refers to the texts and commentary quoted in 3 Digest, p. 544, and says that the rule is

"that a partition during the minority of a co-parcener cannot take place to the damage of his interests, but the motive is the protection of his interests, and consequently if it is in fact, as it may very well be, greatly for his benefit and for the protection of his interest that there should be a partition, a suit on his behalf may be brought."

Then comes a passage which is, I think, very important:

"It is obvious that it often may not be for the benefit of a minor that he should have a partition. If his rights are not denied or the property not mismanaged, it might not be so, he would lose for instance, the possible benefit of a survivorship, and generally so great a chance in the condition of a minor as a partition operates, ought not to be allowed to take place, unless it is clearly for his benefit that it should be so."

I read these cases as laying down three propositions, first, that presumably it is for the benefit of a minor that he should remain a member of a family whose interest is to look after him, and secondly, that a possible financial position is not the test, and thirdly, that he has no right to claim partition unless there is an apprehended danger to his interest as it exists at the date of the suit. I cannot detach the use of the words "benefit of the minor" from the rule laid down by Innes J., at the beginning of his judgment that a suit will lie if the interests of the minor are likely to be prejudiced. Reliance is also placed on a passage in a case reported as *Bhola Nath* v. *Ghasi Ram* (8) which is as follows:

"The question for the Court to determine is whether or not it is shown to be for benefit of the minor that partition of the joint family property should be effected."

This language however must be read with the facts of the case and the other observations. The suit was by a minor for partition of his share in a joint family consisting of himself, his father and his uncle. He alleged that his father had admitted to a share in the property the son of a deceased uncle, who, according to the plaintiff, had separated from the rest of the family long before the date of the suit. The first Court dismissed the suit on the ground that there was no evidence of malversation. The High Court pointed out that that was not necessary: that the allegations, if proved, show that the family was endeavouring to deprive the plaintiff of a part of his lawful interest in the family property. The Court then used the following words:

"The Subordinate Judge has overlooked the fact that there are circumstances other than malversation which, according to the authorities, will justify the institution of a partition suit. These are such circumstances as in the interest of the minor render it advisable that his share should be set aside and secured for him."

Undoubtedly if those facts were proved it would be necessary even against the father in that case that the minor's share should be secured to him at once, and in my opinion, the case is no authority for any broader proposition than this. Then there is a decision of Tyabji, J., in *Bachoo* v. *Khushaldas* (5). That was a suit by a minor against his uncle and an alleged adopted son of the uncle. The learned Judge, in considering whether he should be given partition, states that some malversation, danger or loss to the minor on the one hand, or some benefit or advantage on the other hand, must be proved before the Court will compel partition. He then examines the condition of the estate; and comes to the conclusion that there would possibly be heavy monetary sacrifices in realizing the estate, and adds that if the plaintiff were separate, he would entirely lose his chance of gaining the whole estate by survivorship, if the alleged son died before him. It is suggested that the language of the learned Judge indicates that malversation, danger or loss need not be proved, If some benefit or advantage can be proved (vide the language on p. 888) and that in this case it must be to the benefit of a minor to be separate from a father who has married a second wife and will possibly have other children.

If this is what the learned Judge meant it goes beyond the principle stated in *Kamakshi Ammal* v. *Chidambara Reddi* (3) and I am not prepared to follow it. Rather to the same effect is the decision in *Mahadev Balvant* v. *Lakshman Balvant* (6). Speaking for myself, I find some difficulty in understanding what Ranade, J., meant in this latter case by his distinction between the positive and negative aspect of the case, but if he means that even where nothing is shown against the father, it can yet be for the benefit of the minor to be removed from the family, I am unable to follow him. A recent decision of this Court is that of a single Judge reported as *Shadagopa Naidu* v. *Thirumalaswami Naidu* (7). There the learned Judge states as follows:

"It is now settled law that a minor plaintiff can file a suit for partition if there are circumstances which show that it would be for his interest to separate his share, and it is not necessary to prove malversation on the part of adult members."

He refers to Ranade, J's discussion of the subject in *Mahadev Balvant* v. *Lakshman Balvant* (6) with approval. That case however was one in which it was found that partition was necessary to protect the minors' interest from danger; and the learned Judge states as follows:

"The defendant has set up a hostile title and has denied the rights of the minor plaintiff to any share of the properties, and while this is found against, it is the duty of the Court to safeguard the interest of the minors by declaring their rights and giving effect to such a declaration."

He then refers to the case reported as *Kamakshi Ammal* v. *Chidambara Reddi* (3) with approval and to *Thangam Pillai* v. *Suppa Pillai* (4). I have pointed out what in my opinion is the law laid down in *Kamakshi Ammal* v. *Chidambara Reddi* (3). As to *Thangam Pillai* v. *Suppa Pillai* (4) that was a case in which an illegitimate son of a Sudra sought a partition of the family property against his father's legitimate sons. The legitimate sons denied that he was their illegitimate brother, contending that his mother was a married woman. The Court having found in favour of the illegitimate son on the facts, held in the circumstances it could not be said that the plaintiff's interest in the joint family property was not in danger in being left in the management of the defendants. I do not think therefore that Kumaraswami Sastri, J., intended to lay down any proposition wider than that in *Kamakshi Ammal* v. *Chidambara Reddi* (3). If the language of Tyabji, J., and Ranade, J., in the Bombay cases does intend to give a wider meaning to the rule, their view is not in accordance with that taken in this Court, and I should not be prepared to accept it. The proposition as stated in Mayne's Hindu Law, Edn. 8, p. 662, is as follows:

"A suit cannot be brought by or on behalf of a minor to enforce partition, unless on the ground of malversation or some other circumstances, which make it for his interest that his share should be set aside and secured for him. Otherwise he might be thrust out of the family at the very time when he was least able to protect himself."

This proposition is in my opinion in entire accord with the law as laid down in *Kamakshi Ammal* v. *Chidambara Reddi* (3) and does not warrant the contention put forward for the appellants. The next question is whether on the facts the case is brought within this limited rule. The lower appellate Court

finds that the plaintiffs' mother went to her father's house for confinement and did not return in spite of her husband's entreaties, and that in consequence he married a second wife about a year after this occurrence. He points out that the marriage of the second wife is not opposed to law and considers that such a marriage cannot be made a ground for partition, unless it was done with a view to act prejudicially to the interest of the children by his first wife. He then finds all the allegations against defendant 1, of waste of the property, extravagance. drinking and concubinage to be false and states that there is but one piece of evidence against the father, namely, that he alienated a house. We are now told in this Court that the alienation was before the birth of the children. We cannot of course take that as a fact but I should, speaking for myself, rather be inclined to accept the finding of the lower appellate Court that the plaintiffs have not shown that this alienation was made against the interests of the minors. As however my learned brother is of opinion that we should have a finding as to the circumstances in which the house was sold, I agree with the order proposed by him.

[In pursuance of the order contained in the above judgments, the Subordinate Judge submitted the following:]

Findings.—In pursuance of the order of the High Court directing this Court to take evidence and to submit findings on the following issues the following findings are submitted. The issues are:
(i) Whether the sale of the plaint house took place before the birth of the plaintiffs; and if not whether the sale was justified by necessity; whether proper price was obtained; and what happened to the sale proceeds.
(ii) What were the total value and income of the family properties?

The first part of issue 1.—The sale deed in question is dated 25th June 1907. The sale deed is Ex. 10. The plaintiffs' case is that plaintiff 1 was born or at least was in the womb of his mother on that date. The defendant's case is that plaintiff 1 was born on 11th March 1909, i.e. subsequent to the sale deed in question. It is admitted on the plaintiffs' side that plaintiff 2 was born subsequent to the date of the sale deed, the difference in age between plaintiffs 1 and 2 being admittedly two years. In the plaint filed in the suit on 4th November 1914 the age of plaintiff 1 is given as about 6 and that of plaintiff 2 as about 4, and that of their mother, defendant 2, is given as 22. These ages are given by the plaintiffs' maternal grandfather and next friend. Defendant 2, when examined by this Court on 25th November 1916, i.e., about four years after the date of the plaint, deposes that her age at that time was 26 and that the plaintiffs were five years and three years old respectively when she left her husband's house three years prior to that date. It appears from the plaint that she left her husband's house about seven or eight months before the date of the plaint.

If appears from Ex. D that defendant 1 also admits her having gone away one year before that date, 26th March 1915, i. e., about March 1914. It is seen therefore that plaintiff 1 was aged about 5 in March 1914, that is, he must have been born in the year 1909. Taking the age given in the plaint as 6 for plaintiff 1 at the time of the plaint (4th November 1914), plaintiff 1 must have been born in 1908 or 1909. Then the defendants produced an extract (Ex. 3) from the birth register of Rakkiapalayam where the plaintiffs were admittedly born, and the original birth register for the year 1909 is marked as Ex. 14. It appears from Exs. 13 and 14 that a son was born to Kasia Gounden of Avanasilingampalayam on 11th March 1909. Plaintiffs' next friend examined as P. W.1 admits that he is the monigar's gumastah for Rakkiapalayam; that he was writing the birth register for all these 17 years and submitted them to the taluk office; and also that he wrote entries relating to the birth of the two plaintiffs in the birth registers. The defendants' case is that this relates to the birth of plaintiff 1. But the suggestion on the plaintiffs' side is that it probably relates to plaintiff 2. It may be noted that the plaintiffs' next friend has not even attempted to get an extract from the birth register to prove the date of the birth of plaintiff 1 or of plaintiff 2, though he must be expected to know that that is the best evidence available. The defendants took out summonses for the production of the birth register from 1906 to 1910, but the Tahsildar has sent only the register of 1909 (Ex. 14) and

has sent a letter (Ex. 15) to the effect that he is searching for the other registers. So, these Exs. 14 and 15 support the defendants' case that plaintiff 1 was not born on the date of the sale deed, Ex. 10, unless this extract relates to plaintiff 2. Seeing that the defendants have not produced the extract from the birth register with regard to the other plaintiff, I am inclined to hold that this relates to plaintiff 1.

It is argued for the plaintiffs that defendant 1 at one place of his deposition now taken in this Court, states that his second marriage was four years ago; that his first marriage was ten years prior to that: that plaintiff 1 was born two years after the marriage and that this takes us to the year 1906 as the year of plaintiff 1's birth. Then again it is argued that defendant 1 has stated in 1916 that he was married ten years prior to that (p. 7, printed papers, line 15) and that plaintiff 1 must therefore have been born sometime about March 1908 and he must have been conceived about June 1907. Defendant 1 states in Ex. D, his plaint, dated 27th March 1915, that he had been married to defendant 2 about nine years before that. If it be remembered that these periods of time are given only approximately, no such definite inference can be drawn as suggested by the plaintiffs' pleader. Then the plaintiffs' pleader relies upon the medical certificate given by the Assistant Surgeon of this place. It is marked as Ex. C. Therein, the medical officer examined as P. W. 4 states that the boy (plaintiff 1) has completed 11 years according to his opinion. In his evidence also he gives the same opinion. The grounds upon which he has given his opinion are: (i) permanent canines are present, (ii) anterior premolars or bicuspids are present.

It may be stated at once that the opinion of experts cannot be taken to be absolutely accurate, as has been observed in Taylor's Medical Jurisprudence, p. 143 ; *Boisogomoff* v. *Nahapiet Jute Company* (9), *Basrur Venkata Row, In re* (10) and *Jarat Kumari Dassi* v. *Bissessur Dutt* (11). Then coming to the reasons given in the certificate, it appears that they are not sound. No doubt, it appears from the medical books that permanent canines make their appearance between the ages of 10 and 13 and permanent anterior premolars or bicuspids make their appearance between the 9th and 10th years : vide Lyon and Waddle's Medical Jurisprudence, p. 40, and Taylor's Medical Jurisprudence, p. 144. In India, there is a chance of these teeth even cutting earlier. If the grounds given by the expert witness be correct, his inference that the boy must be aged between 10 and 13, will also be taken to be correct. But there appears no reason for his saying that the boy must have completed 11 years. It is only his opinion not based on any specific grounds. The witness, while in the box, was asked to examine the boy's teeth and he admits that one of the anterior premolars or bicuspids is just now making its appearance in the left lower jaw and that that tooth is generally cut between 9 and 10 ; and that the other three anterior premolars are milk teeth and have not yet been shed.

He also admits that the ridge observed in temporary teeth between the crown and the fan is not seen in this boy's teeth, though it is generally visible in the case of milk teeth but sometimes it is imbedded in the gum and is not visible. He also assumes, admittedly without any reason, that the ridge in the case of this boy is not imbedded in the gum. So, he is not justified in saying that the canines are permanent canines. Very probably, they are milk teeth, because it is only just now that one of the anterior premolars is making its appearanee. It is generally after the cutting of the anterior premolars between the 9th and 10th years that the canines make their appearance between the 10th and 13th years. I think it may be taken therefore to be clear that the canines are not permanent teeth but are only milk teeth, and that the boy (plaintiff 1) is aged between 9 and 10. This conclusion corroborates the defendants' case that the Birth Register (Exs. 14 and 15) relates to the birth of plaintiff 1. I must therefore find that plaintiff 1 was born on 11th March 1909 and was not born on the date of the sale deed, Ex. 10, and was not even in his mother's womb at that time. Consequently, plaintiff 2 also was not in existence on the date of the sale deed, Ex. 10.

Second part of the issue 1 :—I have to decide this issue on the assumption

(9) [1902] 29 Cal. 587.
(10) [1912] 36 Mad. 159=14 I. C. 418.
(11) [1912] 39 Cal. 245=13 I. C. 577.

that both the plaintiffs or plaintiff 1 at least had been born or at least had been conceived before the date of the sale deed, Ex. 10. The plaintiffs' case in the plaint is that defendant 1 unnecessarily sold the house and spent the sale proceeds for immoral purposes instead of utilizing it for the purpose of plaintiffs' family. There is no allegation that the house was sold for an inadequate price. The defendants' case is that the house was sold for a proper value and there was a necessity for digging a well in the family garden and that a well was sunk with the sale proceeds soon after the sale. In deciding this issue, I shall first consider the fact whether a new well has been sunk by defendant 1 in the garden belonging to the family, or not. The plaintiffs' case is that no new well has been dug ; that there were two wells in the garden at the time of the partition ; and that there are even now two wells. Defendant 1 and his witnesses state that a new well was sunk by defendant 1 immediately after the sale to the north of the northern well previously in existence, and that the earth removed by digging that well was used to fill up the old northern well, which was not in a good condition and in which water could not be properly baled out for the reason that the soil was bad and the piccota could not stand steadily for the purpose of baling water.

No doubt, two wells are mentioned in the partition deed, Ex. B, as existing at that time in the garden. Now also admittedly, there are only two wells. But it will be seen from a reference to the old survey plan and the new survey plan (Exs. 11 and 12) produced by defendant 1 that the old northern well was situate farther south of the present northern well : there is nothing to show that these plans are inaccurate. They have been prepared by the Survey Department and it must be taken to be correct unless and until any mistake is pointed out therein. The new survey was in 1909. So, the new well must have been dug before the year 1909, and this supports the defendants' case that he dug the well in the year 1907 soon after the sale of the house. I find therefore that a new well, that is the present northern well, was dug by defendant about the year 1907 after the partition Ex. B.

With regard to the price obtained for the sale deed, it is mentioned in Ex. 10 and it is also proved to be Rs. 400. According to the defendants' witnessos, it is a proper price ; and seeing that the house was purchased by Arumugatha Gounden who is the owner of the house next adjoining the house in question, he is likely to have paid a higher price than what the others would have offered. Even according to P. W. 1's (i. e., plaintiffs' next friend's) present evidence, the house would have been worth only Rupees 500 at that time, but it must be remembered that the price of the house is given in the plaint as Rs. 200, and the value now given by P. W. 1 must certainly be somewhat exaggerated. I find therefore that the price obtained for the house, viz., Rs. 440, was a proper price. As to what happened with regard to the sale proceeds, defendant 1 states that he dug the new well with the sale proceeds and that the new well cost him about Rs. 400. His witnesses also state that he sunk a new well soon after the sale of the house, and that the cost of the well would be about Rs. 400 or Rs. 500. P. W. 1, Karichi Gounden, states that he has recently sunk a well, admittedly a smaller one (as seen from the measurements given by him), at a cost of Rs. 200. His present evidence must be taken with a certain amount of discount. I think the defendants' evidence could be believed. Seeing that the well was sunk soon after the sale of the house and seeing that there is no evidence to show defendant 1 was in possession of other funds for sinking the well, I hold that the sale proceeds were utilized for the purpose of sinking the new well.

Whether the sale was justified by necessity :—It appears from the evidence of defendant 1 and his witnesses that there was a necessity for digging a new well as the old northern well was not fit for use. It is only if there were means of irrigation that a number of crops could be raised in the garden and more profits could be obtained, I think that the purpose, viz., sinking a well, is a necessary purpose in the course of the management of the joint family property. It is suggested on the plaintiffs' side that defendant 1 could have borrowed money instead of selling this house. But borrowing of money implies the liability to pay interest periodically. Whereas the sale of one house from which no income could be derived and which was not necessary

for residential purposes, there being another house for their residence, incurs no such liability to pay interest and does not deprive the family of any income which they had been getting. I find therefore that the sale of the house was justified by necessity.

Second issue :—I think that this issue relates to the value and the income of the family properties at the time of the sale deed Ex. 10. No doubt evidence has been adduced however with regard to the present value and income and with regard to the value and income about 10 years ago. Defendant 1 states that the garden belonging to the family, i e., Suit Nos. 81 and 82, are worth Rs. 4,000 now and yield an income of about Rs. 200 or Rs. 300 ; and he states that the value 10 years ago was about Rs 2,000 or 3,000 and income about Rs. 150. D. W. 5 Kasia Gounden, cousin of defendant 1, states that the garden is now worth Rs. 6,000 to Rs. 7,000 and the income will be about Rs. 400. He adds that the value 10 years ago would have been about Rs. 4,000 and the income Rs. 200. P. W. 1, Karichi Gounden, states that the present value of the garden is Rupees 10,000 and the income about Rs. 800 ; and he adds that the property was worth about Rs. 7,000, 10 years ago and that the income was Rs. 600 or Rs. 700. P. W. 5 Rama Gounden, states that the net income now will be about Rs. 650 and it was about 10 years ago about Rs. 400. As regards the other items of properties (immovable), they are :—(1) The house in which defendant 1 is living now ; (2) A kadu or punja in Palankarai (item 3 of the plaint). The residential house is valued in the plaint at Rs. 200. Defendant admits it is worth Rs. 300. As regards the punja kadu, it is seen from the evidence on both sides (defendant 1, D. W. 5 and P. W. 1) that it was worth about Rs. 100 about 10 years ago ; and that it is now worth Rs. 200 or Rs. 300.

It appears to be generally used as pasture lands and in some years, horsegram or some other gram (naripayar) is raised and even then the latter are allowed to be grazed by cattle. I do not think that this property was yielding any appreciable income. The total income of the properties, as given in the plaint is only Rs. 500, though the plaintiffs' next friend would now raise it to over Rs. 800. There is no other evidence that the family owned any other property, but defendant 1 admits that he has got cattle worth about Rs. 200 and that he has outstandings to the extent of Rs. 1,000. Taking all these facts into consideration, it appears to me that the garden (items 1 and 2 in the plaint Sch. 2, Part 3) was worth about Rs. 5,000 about 10 years ago and is now worth about Rs. 7,000 ; that its income was about Rs. 300, and it is now about Rs. 400. As regards item 3, its value 10 years ago must be fixed, I think, at about Rs. 100 and its present value will be fixed at Rs. 200 ; and it is not capable of producing any appreciable income. As regards the other house also, there is no income derivable therefrom. On the whole, I fix the value of the properties about 10 years ago at Rs. 5,400 excluding the house sold under Ex. 10 and the present value at Rs. 7,500. I fix the income of the properties at Rs. 300 about 10 years ago, and at Rs. 400 at present.

[This second appeal coming on for final hearing after the return of the findings of the lower appellate Court upon the issues referred by this Court for trial, the Court delivered the following:]

Judgment.—The finding being against the appellants, the appeal is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 284

SESHAGIRI AIYAR AND NAPIER, JJ.

Iyathurai Aiyar and *another*—Plaintiffs—Appellants.

v.

Kuppamuthu Padayachi—Defendant—Respondent.

Second Appeal No. 122 of 1916, Decided on 11th October 1918, against decree of Sub-Judge, Negapatam, D/- 23rd September 1915, in Appeal Suit No. 1 of 1915.

Transfer of Property Act (1882), S. 95—Usufructuary mortgage by father and son—Subsequent division between father and son—Redemption by father and subsequent lease by him—Purchase of son's rights by lessee—Suit for possession by father on expiry of lease — Father held entitled only to interest on moiety paid by him to mortgagee.

Plaintiff and his son usufructuarily mortgaged certain properties. They subsequently effected a division of their properties. The father then redeemed the whole mortgage and leased it to the defendant. The latter purchased the plaintiff's son's share in Court auction after the lease

In a suit by plaintiff to recover possession of the property on the expiry of the lease:

Held : that, by redeeming the whole property, plaintiff did not step into the shoes of the mortgagee and that he was not entitled to anything more than interest from the defendant on the moiety which he had paid to the mortgagee : 2 *Mad.* 223 and 21 *Mad.* 18, *Dist.* [P 285 C 1]

V. Purushotham Aiyar—for Appellants.

S. T. Srinivasagopalachari—for Respondent.

Judgment.—Plaintiff, the father, and his son gave a usufructuary mortgage of certain properties. Subsequently there was a division between father and son. The father redemed the whole of the properties and leased them to the present defendant who in court-sale purchased the son's share since his lease. The suit was to recover possession based on the lease. The District Munsif decreed the suit. The Subordinate Judge, we think very properly, directed a partition of the properties between the plaintiff and the defendant. The real question before us is whether the plaintiff is entitled to any thing more than interest from the defendants on the moiety which he paid to the mortgagee. Mr. Purushothama Aiyar relies on *Asansab Ravuthan* v. *Vamana Rau* (1) and *Nainappa Chetty* v. *Chidambaram Chetti* (2) for the proposition that a party redeeming the whole property is entitled to stand in the shoes of the mortgagee. But S. 95, T. P. Act, is clear that the person redeeming is not entitled to the rights of the mortgagee, but only to a charge for the excess sum he paid. As regards *Asansab Ravuthan* v. *Vamana Rau* (1), it is enough to say that that decision was passed before the Transfer of Property Act. As regards *Nainappa Chetti* v. *Chidambaram Chetti* (2), it was a case of simple mortgage. Consequently the question whether the person redeeming could obtain higher rights than that of a charge holder was not necessary for consideration in that case. In the face of the language of S. 95, T. P. Act, we are unable to give effect to the appellant's contention.

Another point has been raised regarding the plaintiff's rights to mesne profits since the expiry of the lease in 1912 and before possession was surrendered to him under the decree of the Court. Defendant contends that he was in possession only of the moiety purchased by him. The Subordinate Judge has not dealt with the question. We must ask him to submit a finding whether the defendant was in possession of the moiety now decreed to the plaintiff and if so, what is the amount of mesne profits payable to him in respect of that half from July 1912 to the date he took possession. No fresh evidence will be admitted. The finding will be submitted in six weeks and seven days are allowed for filing objections.

Finding.—I have been directed by the High Court to submit my finding on the following issue:

"whether the defendant was in possession of the moiety now decreed to the plaintiff, and if so, what is the amount of mesne profits payable to him in respect of that half from July 1912 to the date he took possession."

2. The plaintiff leased the whole of the suit lands to the defendant in 1910 and under that lease the defendant enjoyed them for two years 1910-1911 and 1911-1912. The defendant acquired ownership of one-half of them belonging to the plaintiff's son, Sambasiva Aiyar, on 2nd January 1912: vide Ex. 3. The accounts between them as regards the rent payable for the said two years were completely settled on 1st September 1912, on which date the plaintiff granted the receipt, Ex. D, to the defendant in evidence of the settlement and the payment of Rs. 58-13-4 in pursuance of the same. The question for determination under this issue is whether the defendant cultivated the whole of the lands consisting of the plaintiff's share and the plaintiff's son's share acquired by him through Ex. 3 from 1912 onwards, as he was doing in the two years preceding that year under the lease granted to him by the plaintiff or whether he cultivated only his share.

3. The defendant's case is that he refused to cultivate the plaintiff's share in 1912 and asked him to make his own arrangement for its cultivation and that he (defendant) has been cultivating and enjoying his half share only ever since. The plaintiff's case, on the other hand, as presented in the argument before me seems to be that as there was no partition by metes and bounds of the two shares he was not in a position to take possession of his half-share, that the defendant, as one originally let into possession of the whole lands as his lessee, should have delivered possession of the

(1) [1878-80] 2 Mad. 223.
(2) [1898] 21 Mad. 18.

whole extent to the plaintiff, if he did not want to cultivate the plaintiff's share and should have sought his remedy for possession of his share by calling upon the plaintiff to come to a partition, that a mere expression of unwillingness on his part to cultivate the plaintiff's share did not amount to placing the plaintiff in possession of that share after the termination of the lease and that therefore the defendant is bound to pay mesne profits for the plaintiff's share till he was given actual possesssion of the same through Court. I think that the aspect from which the plaintff's pleader wants me to look at the defendant's conduct is too technical and that the correct way of looking at it will be to find out whether as a matter of fact, the defendant has been enjoying his half-share only in the suit lands or enjoying the whole. The very fact that the plaintiff's suit for possession of both the shares has failed shows that the said argument is unsound.

As it has been found that there was no partition of the two shares, the defendant must be deemed not to have been, no doubt, in a position to state to the plaintiff in 1912 what specific portions belonged to him and what to the plaintiff and to confine his cultivation to specific portions as constituting his share. But the evidence shows that he as a matter of fact, began to cultivate from 1912 onwards specified portions only in them, as constituting his share. It must be noted in this connexion that according to the defendant, there was a partition by metes and bounds of the two shares between him and the plaintiff, in which the portions cultivated by him fell to his share. This renders the defendant's case that he was enjoying specified portions as constituting his half-share intelligible, and probable, though his case that there was a partition to which the plaintiff was a party and in which he got the said portions for his share with the plaintiff's consent has not been accepted by the Courts. Though his case of partition has not been accepted, it might well be that he confined his enjoyment to specified portions as constituting his share at least to support the case set up by him.

The evidence also clearly shows that the defendant would not have enjoyed the whole. On 28th September 1912 the plaintiff sent a notice to the defendant demanding payment of his share of the kuruva crop then standing on the suit lands: vide Ex. H, dated 28th September 1912. The defendant swears that he gave a reply to it stating that he did not cultivate the plaintiff's share and the postal acknowledgment, Ex. 1, dated 2nd October 1912, supports his evidence that he sent a reply. The plaintiff stated in his chief examination that he did not receive any reply for Ex. H, but admitted in his cross-examination that the signature in Ex. 1 was his. I think that the fair inference to be drawn is that the defendant did send a reply notice to the effect that he did not cultivate the plaintiff's share. It is also noteworthy that in Ex. D, by the date of which also kuruva produce must have been raised on the suit lands, not a word was mentioned about the defendant having trespassed upon the plaintiff's share and cultivated that also. According to the plaintiff, there was an actual trespass of his share in July 1912 and not a mere holding over by the defendant after the expiration of the original lease granted to him by the plaintiff (as was the case in 1911) and kuruva cultivation of his share by the defendant without his consent. Under these circumstances one would expect some mention in Ex. D of such unauthorized cultivation. But on the other hand, Ex. D is couched in such terms that it leaves the impression in the mind of the reader that there was a complete adjustment of accounts between the plaintiff and the defendant as lessor and lessee and that nothing more remained to be done as between them with regard to the suit lands. No reservation of the plaintiff's rights to proceed against the defendant for the trespass was made therein.

Even the witness for the plaintiff, P. W. 2, states that the defendant told plaintiff that he did not want to cultivate the plaintiff's share and that plaintiff might make his own arrangement for its cultivation. He further states that on the dates of Ex. D, the plaintiff stated to the defendant, after granting that receipt, that nothing was due from the defendant to him. D. W. 2 the kurnam states that in Vyasi, i. e., May-June 1912 the defendant told the plaintiff to lease his share to somebody else, but that the plaintiff went away saying (do as you will). D. W. 3 also supports the defendant on this point. The evidence of

the defendant's witnesses is to the effect that after the defendant gave out that he would not cultivate the plaintiff's share, he has been cultivating his share only and that the plaintiff's man a parayah, cultivated the plaintiff's share. There is no evidence on the plaintiff's side except the plaintiff's own word to counterbalance this.

It is also to be noted that though the District Musif has found against the theory of partition set up by the defendant, he was of the view that the defendant began to enjoy only specified portions of the suit lands as constituting his share some time after the symbolical delivery of his half-share obtained by him through Ex. G, though without the plaintiff's consent: vide para. 14 of his judgment. I find on this issue that the defendant has not enjoyed the plaintiff's share at any time after July 1912 and that therefore he is not liable to pay mesne profits for that share during the period mentioned in this issue, i. e., from July 1912 to the date when the plaintiff got delivery of his share through Court. Tha actual date on which the plaintiff got delivery of his share is not ascertainable from the record and I am therefore unable to arrive at a finding as to the quantum of mesne profits payable by the defendant to the plaintiff, in the event of my finding that he is not liable to pay any mesne profits not being accepted by the High Court.

[After the return of the finding upon the issue referred the Court delivered the following:]

Judgment.—We accept the finding and dismiss the second appeal; we make no order as to costs in this Court.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 287

COUTTS-TROTTER, J.

Mahomed Ibrahim Mahomed Jaffir Sahib and Co.—Plaintiffs.

v.

Nalam Lakshmikantam and *another*—Defendants.

Original Civil Suit No. 147 of 1917, Decided on 5th November 1918.

Contract Act (9 of 1872), Ss. 56 and 73—Sale of goods—Transit by canal in boats—Delivery of part—Balance of goods under dispatch—Shortage of water in canal—Delay in delivery—Rescission of contract by vendee—Shipment of goods does not amount to delivery—Absence of facilities in transit does not excuse vendor on ground of impossibility of performance—Delay in delivery owing to causes beyond control—Vendee's repudiation of contract held unjustifiable.

Plaintiffs agreed to purchase from defendant 1 5,000 bags of Covelong salt at a fixed price and paid to defendant 1 as advance therefor Rs. 1,000 on 30th November 1916. The conditions of the contract were inter alia that defendant 1 was to dispatch the salt by boats from Covelong to Elephant Gate Basin, Madras, through the Buckingham Canal, and the amount due for each consignment was to be paid by the plaintiff before taking delivery at the Elephant Gate Basin. No time was fixed however for the delivery of the entire quantity of salt. The course of business adopted was that along with each consignment a watchman was sent by the vendor who was responsible for its custody. The dispatch of the salt and its expected arrival in Madras were notified by the vendor, not to the purchasers, but to his own agents in Madras and, when it did arrive, the latter either sent a delivery order to the purchasers or sent one of their own men to meet the boats with the purchasers' representative and indicate that delivery was to be made to the purchasers. Defendant 1 sent two consignments on 8th and 17th January 1917, totalling 740 bags, which were shipped on twelve canal boats. The remaining quantity was detained at Pappanchavidi, 13 miles from Covelong, as water in the canal was very low and the boats could proceed no further. The plaintiffs after complaining of the delay in delivery of the balance of the stipulated salt, formally rescinded the contract on 20th February 1917, and brought the present action for damages. The defendants pleaded: (1) that shipment of the salt amounted to delivery, (2) that they could not be held liable for the contract becoming impossible of performance owing to the state of the canal, and (3) that they had substantially performed the contract and that the plaintiffs' action in rescinding it was premature.

Held: (1) that the property in the goods did not pass on shipment, but that the vendor kept them as his property until they were paid for and delivered and that the appropriation at Covelong was conditional only; (2) that the absence of facilities in transit could not excuse defendant on the ground of impossibility of performance. The principle of the Coronation cases, *Krell* v. *Henry*, (1903) 2 *K. B.* 740, *Expl.*; (3) that the defendant having substantially performed the contract and discharged his obligation and the delay being attributable to causes beyond his control, plaintiffs' repudiation was unjustifiable.

[P 290 C 2, P 291 C 1, P 292 C 1]

C. P. Ramaswami Aiyar—for Plaintiffs.

Venkatasubba Rao and Radhakrishnaya—for Defendants.

Judgment.—This is a suit for damages for nondelivery of certain salt contracted to be delivered by the defendants to the plaintiffs. The facts of the case have taken some trouble to elucidate, but at the end of the case they were practically not in dispute. Defendant 2, Messrs. Holst and Nathan were added as parties to the suit on the motion of

defendant 1, but a perusal of the agreement of 11th December 1915 between defendants 1 and 2 makes it clear that defendant 1 was to sell the salt covered by the agreement and that no privity of contract could possibly exist between Messrs. Holst and Nathan and third parties with whom defendant 1 entered into contracts. The contract sued upon is dated 30th November 1916. It recites an advance of Rs. 1,000 by the plaintiffs to defendant 1 for the supply of 5,000 bags of Covelong salt and is in the following terms:

"Received from Messrs. Mahomed Ibrahim Mahomed Jaffir and Co., Madras, the sum of Rupees 1,000 being the advance for the supply of 5,000 bags of Covelong salt for export from Madras to Calcutta under the following terms: (1) That the abovesaid company shall supply gunnies and twine at the Covelong Salt Factory. (2) That on receipt of gunnies, necessary application will be made for removal of salt. (3) That on obtaining permission from the Inspector for removal, the gunnies will be filled in as per rules of the department and the bags will be dispatched by boats from Covelong to Elephant Gate Basin, Madras. (4) That the said company will take delivery of the salt bags from boats immediately on arrival at the Basin. (5) That the rate fixed and approved for each bag of salt so delivered at Elephant Gate Basin is Rs. 3-4-6 per bag. (6) That the amount due for each consignment of salt at the abovementioned rate will be paid before taking delivery of the bags at the Elephant Gate Basin. (7) That the advance amount of Rs. 1,000 lodged with us will be adjusted at the last consignment while settling the whole account."

The course of business is this: the salt is collected from lands over which the sea flows in the neighbourhood of Covelong and put into the Government Salt Factory at that place for cleansing and refinement. It is taken out of the factory by the contractors in the position of the defendants, who have to provide gunny bags to pack it with and to pay the price and the tax. The Buckingham Canal goes past Covelong and there is a wharf within the boundaries of the factory, from which the bags of salt can be loaded into boats for conveyance by the canal to Madras. By the terms of the contract the plaintiffs were to supply the gunny bags and twine for receiving the salt. In practice the defendants take a lump sum from the plaintiffs to cover the cost of the bags and provide them themselves. It is now beyond dispute that there was ample salt at Covelong at the disposal of defendants for them to fulfil their contract and they could not and do not attempt to show that there were not enough bags into which to pack the salt. The trouble arose over the conditions of the waterway and the facilities of dispatch. The first two consigments were sent off on 8th and 17th January and totalled 740 bags shipped on 12 canal boats. The subsequent dispatches were as follows:

Date of Dispatch.	No. of boats.	No. of bags.
25th January	4	300
1st February	6	507
2nd ,,	6	400
9th ,,	10	600
10th ,,	12	745
16th ,,	17	1,000
5th March	7	500

Under normal conditions the transit from Covelong to Madras takes three or four days, and I think I may assume that, if the boats had arrived in Madras after the normal interval from their dispatch from Covelong, there would have been a substantial compliance with the terms of the contract. In fact during the latter part of January and whole of February the water in the Buckingham Canal was very low and the boats arrived as far as Papanchavadi, which is some 13 miles from Covelong and 9 to the Elephant Gate Basin, and proceeded no further. It is suggested that the boats might have been got to Madras by one or two methods, either by using portage over the shallow places and reloading the cargo where the water was deep enough again or by distributing the cargo of the fully laden boats among other boats and so ensuring that no boat had so heavy a load that she could not be pulled through the shallowest part. I do not doubt that both of the suggested courses were physically possible. I am convinced that as a matter of business both were commercially impracticable. It is reasonably clear from the evidence that there were not enough boats available for all the cargo to be carried through in half-laden boats, and with regard to the portage scheme, though it may be theoretically possible, the evidence is conclusive that no one has ever attempted to do it with a cargo of salt. The figures given by the lock-keeper at Adayar South Lock appear to me to be conclusive on this point. He has produced the record of the boats carrying salt cargoes for the months of January, February and March, and it speaks for itself. In the month of January 80 boats went through the lock with salt cargoes, 29 from 1st to

10th, 21 from 11th to 20th and 30 from 21st to 31st. In the month of February not one single boat went through with a salt cargo, though 264 boats went through loaded with cargoes of different descriptions. In the month of March no salt boat went through from 1st to 20th and one only from 21st to 31st. During that month 346 boats went through carrying other cargoes. The result was that the boats laden with salt destined to fulfil this contract stopped at Pappanchavidi, nine miles from their destination, and the evidence has satisfied me that it was commercially impracticable that they should do otherwise.

The effect of this state of things on the contracting parties and how they dealt with it can be seen from the correspondence to which I now turn. The shortage was beginning to be felt towards the end of January and the plaintiffs' vakil, Mr. Narayanasawmi Aiyar, addressed a letter on 22nd January to defendant 1 in the following terms:

"With reference to the letter dated 18th January 1917 addressed by Messrs. Holst and Nathan to my clients Messrs. Mahomed Ibrahim and Mahomed Jaffiir & Co., carrying on business at No. 55 Kandappa Chetty Street, Georgetown, Madras, I have been instructed to state that though my clients have been going to Elephant Gate and making inquiries there and also of you for the last three days, they are informed that no boats containing the consignment referred to in the said letter have yet arrived at Elephant Gate Basin. My clients further instruct me to state that by agreement dated 30th November 1916 you have agreed that on obtaining permission from the Inspector for removal of salt and for exporting the same to Calcutta you would dispatch the salt to my clients, that you on or about 20th December 1916 obtained permission from the Inspector for such removal and export and that you have not yet sent the salt stipulated for in the said agreement to my clients. My clients further state with each consignment of goods stipulated for you must send a certificate that it contains Covelong salt. My clients again instruct me to call upon you to deliver to them the balance of 4,660 bags of Covelong salt with the certificate referred to above and also send them the permission from the Inspector mentioned above, and to give you notice that if you fail to comply with the said request on or before the 31st of this month, they will cancel the agreement entered into by them with you on 30th November 1916 and sue you for damages incurred by them for breach of the said agreement."

That was answered by a letter from defendant 1 on 24th January of which the material passage is as follows:

"We have come to understand that owing to there being no water in the Buckingham Canal the passage of boats has become very difficult and we are not in the least responsible for the delay in transport of these bags, as we have no control over this contingency. We have to make you distinctly understand that we have not made any contract to supply the goods within any stipulated time."

It is quite true that there was no stipulated time for the performance of the contract, but is not disputed that whatever the defendant was under an obligation to do under the terms of his contract, and that is a matter which I will discuss hereafter, he had to do it within a reasonable time. On 30th January another letter was sent by the plaintiffs' vakil which complained of the shortage of the supply of salt and threatened to cancel the contract if delivery of the outstanding balance of over 4,000 bags was not made within five days. That was answered by a letter from the defendant, which bears no date but was obviously written at the beginning of February, explaining that the failure of water in the canal was the cause of the shortage of supply and offering to give delivery at Papanchavidi and to make concession in the question of the cost of conveyance by land from Papanchavidi to Elephant Gate. On 20th February a letter was written on behalf of the plaintiffs, which in effect was a repudiation of the contract. It is not disputed that at that time no more than the first consignment of 740 bags dispatched early in January had reached the plaintiffs and it is equally clear that upwards of 4,000 bags had been loaded by the defendant at Covelong. The question I have to decide is whether that repudiation was justified or not. That again turns upon the question, whether the delay in transit under the terms of the contract and the course of dealing between the parties falls upon the plaintiffs or the defendant. A point was taken for the defendant, which I suggested myself in the course of the argument and which I think being entirely a point of law on the construction of the contract was open to the defendant, viz., that he discharged his obligation when he shipped the goods on board the boats at Covelong. Cl. 3 of the contract provides that the bags are to be dispatched by boats from Covelong to Elephant Gate Basin, and it is urged that, when they were put on boats at Covelong, the obligation of the defendant in that respect was discharged, in other words, that this was in effect an

f. o. b. contract. *Fragano* v. *Long* (1), *Tregelles* v. *Sewell* (2) and *Wiltshire Iron Company, In re Pearson, Ex parte* (3) were cited as illustrating this position. But in the English shiping cases one usually has a bill of lading or a policy of insurance or both, the custody of which at any given moment of the transaction is a guide to help one in determining at what point of time the property passed, and in this case, of course, there is nothing of the sort.

The plaintiffs relied upon the latter clauses of the contract, Nos. 7, 5 and 6, as showing that the property in the goods was not intended to pass until they were delivered on payment at Elephant Gate Basin. The defendant contends that these terms relate merely to payment, and, while conceding that the effect of the contract may be to disentitle him from suing for the price of the goods until they arrived at Elephant Gate Basin, argues that he is nevertheless not liable for damages for delay during transit. If that were the position in law, it would approximate to that in the well-known case of *Calcutta and Burmah Steam Navigation Company Limited* v. *De Mattos* (4). In that case De Mattos agreed to ship coal from London to Rangoon there to be delivered to the buyers. Half the price was to be paid on shipment against delivery of invoices and bills of landing and a policy for half the invoice amount. Some of the goods were lost during the voyage and it was held that the property passed to the buyers on shipment although by the special terms of the contract the vendor was not entitled to recover the price until the goods arrived at Rangoon. That state of things is admirably expressed in a passage of the judgment of Blackburn, J., at p. 328, which runs as follows:

"But the parties may intend an intermediate state of things; they may intend that the vendor shall deliver the goods to the carrier, and that when he has done so, he shall have fulfilled his undertaking so that he shall not be liable in damages for a breach of contract if the goods do not reach their destination; and yet they may intend that the whole or part of the price shall not be payable unless the goods do arrive. They may bargain that the property shall vest in the purchaser, as owner as soon as the goods are shipped, that they shall then be both sold and delivered, and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving; just as they might, if they pleased, contract that the price should not be payable unless a particular tree falls, but without any contract on the vendor's part in the one case to procure the goods to arrive, or in the other to cause the tree to fall. Where the contract is of this kind, the position of the vendor and purchaser, in case the goods do not arrive is analogous to that of freighter and shipowner, in the ordinary contract of carriage on board a ship in case the goods are prevented from arriving by one of the excepted perils. The shipowner is not bound to carry and deliver at all events; but, though he is excused if prevented by the excepted perils, yet no freight is earned or payable unless the goods are delivered."

Certain facts relating to the course of business were proved in this case which, to my mind, preclude me from holding that the property passed to the buyer on shipment. The effect of that evidence is shortly this, when the salt was dispatched on its journey, a watchman was sent with it who was responsible for its custcdy and who was employed and paid by the vendors. The dispatch of the salt and its expected arrival at Madras was notified by the vendors from Covelong not to the puchaser but to their own agents in Madras; and when it did arrive, the vendors in Madras either sent a delivery order to the purchaser or sent one of their men to meet the boats with the purchaser's representative and indicate that delivery was to be made to the purchaser. These facts appear to me to establish that the vendors effectually reserved to themselves the jus disponendi and that though the placing of the salt in bags marked with the purchaser's initials at Covelong was undoubtedly an appropriation of the goods, it was a conditional appropriation only : see *Mirabita* v. *Imperial Ottoman Bank* (5), *Gabarrow* v. *Kreeft* (6) and *Moakes* v. *Nicolson* (7). I am therefore of opinion that by this contract the property in the goods did not pass on shipment, but that the vendor kept them as his property until they should be paid for and delivered and that the appropriation at Covelong was conditional only.

It was next argued for the defendant that this case fell within the principle of what are called the Coronation cases, *Krell* v. *Henry* (8) and the rest, and that assuming the vendor to have taken the

(1) [1825] 4 B. &. C 219
(2) [1862] 7 H. &. N. 574.
(3) [1868] 3 Ch. 443.
(4) [1863] 32 L. J. Q. B. (n. s.) 322.
(5) [1878] 3 Ex D. 164.
(6) [1875] 10 Ex. 274.
(7) [1865] 19 C. B. (n. s.) 290.
(8) [1903] 2 K. B. 740.

responsibility of carriage and delivery upon himself, he was excused by the impossibility of performance. I understand the Coronation cases and the older cases which they followed to establish this proposition, that where the contract between the parties is made wholly with reference to a state of things which was supposed to exist and on the supposition that that state of things does exist, the contractual obligation is dissolved if, in fact, the circumstances on which the whole contract is based do not exist. A contract to sing or play in a particular hall is dissolved if, unknown to the parties, the hall has been burned down. A contract with a hirer of seats to view a public ceremony is dissolved if that public ceremony is cancelled and cannot take place. I do not think that the principles enunciated in these cases have any application here. It seems to me impossible to say that these parties based their contract on the supposition that clear facilities of transport existed between Covelong and Madras in such a sense that their contract could be said to be deprived of its fundamental assumption and to become meaningless and insignificant if those facilities did not exist.

The last point taken by the defendant is to my mind conclusive. Accepting the position that he reserved the property in the goods to himself and that it did not pass on shipment, and admitting there was no such impossibility as would excuse him on the principle enunciated in the Coronation cases, he contends that he has substantially complied with the obligations cast upon him by the contract. His obligation on this footing no doubt was to deliver the goods at Madras, but the mode of transit contemplated by the parties was that he should ship the goods at Covelong on the boats ordinarily available for conveying salt from Covelong to Madras by the Buckingham Canal. That being the method of transit contemplated by the parties. the defendant contends that he is not in default and that he has shown his ability to deliver the goods "within reasonable time." The plaintiffs' repudiation was on 20th February. Had they not repudiated on that date, it is reasonably clear and I so find as a fact that they would have had delivery of the balance of the contract quantity at the end of March and the beginning of April. The question is whether that is delivery "within a reasonable time." On this point I shall refer to the well-known cases relating to a charter's liability for demurrage or damages for detention when he is under an obligation to discharge the ship according to the custom of the port with due dispatch : see *Postlethwaite* v. *Freeland* (9), *Hick* v. *Raymond* (10), *Carlton Steamship Company* v. *Castle Mail Packets Company* (11) and *Hulthen* v. *Stewart & Co.* (12). These cases appear to me to lay down the principle that the question of what is a reasonable time for the performance of the contract is one to be decided not by general abstract considerations but by the particular circumstance of each case. The principle appears to me to be most clearly expressed in the words of Lord Watson in *Hick* v. *Raymond* (10), where his Lordship uses these words:

> "When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application, and is not confined to contracts for the carriage of goods by sea. In the case of other contracts the condition of reasonable time has been frequently interpreted; and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably."

The unsuccessful contention in each of these cases was that you could ascertain what was a reasonable time in normal circumstances for discharge of the ship and translate the indefinite words of the contract into terms of days and hours. The House of Lords throughout refused to accept this contention and laid it down that in every case you must have regard to the particular circumstances and conditions existing at the moment. Following that principle I think I must hold that I must have regard to the failure of water in the Buckingham canal at the material times, to the number of boats actually available and to the fact that no one attempted to to carry salt cargoes beyond Pappanchavidi in February and March as indicating that the delay in transit was attributable to causes beyond the con-

(9) [1880] 5 A. C. 599.
(10) [1893] A. C 22.
(11) [1898] A. C. 486.
(12) [1903] A. C. 389.

trol of the vendors and that they had acted neither negligently nor unreasonably.

I must accordingly find that the defendant has discharged his obligations under the contract and is not liable in damages for delay in delivery to the plaintiffs. On the other hand, he cannot, in my opinion, retain the advance of Rs. 1,000 and the money paid for the gunny bags, except in so far as he can set off against them the price of the 740 gunny bags actually delivered. In the result there will be judgment for the plaintiffs for Rs. 2,491 with vakil's fee and institution fees on that amount as costs. The whole case was fought on the question of damages as to which the defendant has succeeded. I decline therefore to give plaintiffs the hearing fees. On the other hand the defendant did not bring into Court the money due on the deposit and the bags; and I must therefore decline to give him costs, though on the issue really fought he has succeeded. Interest at 6 per cent on this amount. The plaintiff must pay the costs of defendant 2: but may add them to the costs he recovers from defendant 1: see *Bullock* v. *London General Omnibus Company* (13).

S.N./R.K. *Order accordingly.*

(13) [1907] 1. K. B. 264.

A. I. R. 1919 Madras 292

WALLIS, C. J. AND KRISHNAN, J.

Ayya Krishnaswami Thathachariar and *others*—Plaintiffs—Appellants.

v.

Veeraswami Mudali and *others*—Defendants and Plaintiff—Respondents.

Second Appeal No. 987 of 1917, Decided on 10th October 1918, against decree of Dist. Judge, Chingleput, in Appeal Suit No. 253 of 1914.

Limitation Act (1908), Art. 124—"Defendant" includes person through whom he claims—Suit for possession of office of archaka against existing incumbent—Defendant can tack on possession of his predecessors to his in establishing adverse enjoyment.

The word "defendant" in Col. 3, Art. 124, includes the persons from or through whom a person derives his liability to be sued [P 293 C 1]

Therefore in a suit, for the possession of the office of archaka of a temple against the existing incumbent, who has been in possession for less than 12 years, the defendant is entitled to tack on the possession of his predecessors to his own in establishing a plea of adverse enjoyment, where all of them owed their appointment to the trustees of the temple. [P 293 C 1]

T. Narasimha Aiyangar and *N. K. Rangasami Aiyangar*—for Appellants.

S. Swaminathan—for Respondents.

Judgment.—In this second appeal, the question which arises is whether plaintiffs, who, according to the finding, were at one time hereditary archakas of the suit temple but had been out of possession and enjoyment of that office for about 60 years, were barred under Art. 124, Lim. Act, when they brought this suit against defendant 5, the archaka in possession, and defendants 1 to 4 the trustees of the temple, by whom this archaka and the preceding archakas for many years have been appointed. In the plaint the plaintiffs claimed to recover possession of the office of archaka from defendant 5, and they claimed an injunction restraining defendants 1 to 4, the trustees, from causing any obstruction to them or to any one else who performed the duties of archaka on their behalf. Under Art. 124, Lim. Act, for possession of an hereditary office, time runs against the plaintiff from the time when the defendant takes possession of the office adversely to the plaintiff, and to preclude any difficulty as to what was meant by the possession of an hereditary office, the explanation says :

"An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed."

It is not denied that defendant 5 in this case has taken possession of the office, but it is said that he took possession within 12 years, so that the suit is not barred as against him. The question then aries whether under the definition of "defendant" in S. 2, sub-S. (4), Lim. Act, which enacts that "defendant includes any person from or through whom a defendant derives his liability to be sued," the present defendant 5 must not be considered to derive his liability from or through his predecessors in the office, all of whom like himself for many years held the office of archaka by virtue of their appointment by the trustees of the temple. The trustees of the temple are the persons in whom the right to appoint archakas is vested, when that office is not hereditary. Now it has been held in *Raja of Palghat* v. *Raman Unni* (1), following other cases including *Pydi-*

(1) [1917] 41 Mad. 4=42 I. C. 22

gantan Jagannadha Row v. *Rama Doss Patnaik* (2), that in the case of successive holders of a stanom, they claim from or through each other within the definition of "plaintiff" in the Limitation Act, and there are similar decisions about heads of mutts and other persons in a similar position. We think that the same principle applies to the present case. Here all these successive archakas had held office one after another, claiming under the same right, namely, appointment by the trustees of the temple. In the case of stanikas, it is the peculiar rule of succession that confers their appointment upon them. In this case the rule of law is that a trustee of a temple can appoint archakas where the office is not hereditary. There is no substantial distinction, it seems to us, between the two cases. Here all the archakas, who have been in possesion of their office now for nearly 60 years have held their office by virtue of their appointment by the temple trustees. We think that the word "defendant" in Col. 3, Art. 124, includes defendant 5's predecessors, and therefore as more than 12 years have elapsed since the defendant took possession, the suit is barred. As was pointed out by Subramania Aiyar, J., in *Pydigantam Jagannadha Row* v. *Rama Doss Patnaik* (2), any other ruling would go far to destroy the effect of the Limitation Act, because there would be no limit of time whatever unless the defendants were able to prove that some particular holder of the archaka office had been in possession for more than 12 years.

Defendant 5 did not appeal from the decree passed against him by the District Munsif. But the District Judge held that the plaintiffs' suit was barred, and appears to have dismissed the suit against him also. In this, we think, he was quite right. It was necessary to give effect to the rights of the parties as established by the decree that the suit against him also should be dismissed and the plaintiffs prevented from interfering in the affairs of the temple. In the result, the second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(2) [1905] 28 Mad. 197.

A. I. R. 1919 Madras 293

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Ponniah Nadan and *others*—Defendants—Appellants.

v.

Deivanai Ammal and *others*—Plaintiffs—Respondents.

Appeals Nos. 241 to 251 of 1917, Decided on 15th August 1918, against decrees of District Judge, Tinnevelly.

(a) Landlord and Tenant — Raiyatwari village—Claim of occupancy rights—Burden of proof.

Where a person claims to have acquired occupancy rights under a raiyatwari pattadar, the onus lies heavily on him to establish his claim: 43 *I. C.* 977, *Diss. from*; 20 *I. C.* 374, *Expl.* [P 296 C 1 P 301 C 1]

(b) Landlord and Tenant — Occupancy rights—Proof of.

Mere continuity of possession for sometime, the payment of a uniform rate of rent where it is not inappreciable, or alienations made by the tenant behind the back and without the knowledge of the landlord, are not sufficient to establish a claim to occupancy rights. History of raiyatwari system and nature of the raiyatwari pattadar's rights examined by Seshagiri Aiyar J. [P 297 C 1]

(c) Land Acquisition Act (1 of 1894), S. 11 —Compulsory acquisition of land—Tenant is entitled to claim apportionment of compensation.

Where land is compulsorily acquired, under the provisions of the Land Acquisition Act, the tenants from year to year in respect of such land are entitled to have their share of the compensation apportioned. [P 303 C 2]

T. Narasimha Aiyangar—for Appellants.

T. R. Venkatarama Sastri—for Respondents.

Wallis, C. J.—The question is whether the compensation awarded under the Land Acquisition Act for certain lands in a village in Tinnevelly should be apportioned between the pattadar, a registered holder, which in this case is a temple, and the raiyats under it on the basis that the raiyats have occupancy rights in the lands, a claim which the District Judge has rejected. The fifth report speaks of a practice in Tinnevelly under which land, which had been under cultivation by the mirasidars or hereditary owners and had afterwards been left uncultivated by them, was cultivated by others who paid them 13 per cent. of the produce as swami bogam and divided the rest between the Government and themselves. There was a somewhat similar usage in Chingleput, Mr. Venkatarama Sastri for the respondent in this case says that it has not been proved

that these lands were cultivated by the tenants in this way. All that we know is that in 1817 a pious founder acquired at a revenue sale a five-sixths interest in the lands in this village, and that he acquired the remaining one-sixth under Ex. JJ. Ex. JJ. is a sale of the one-sixth share of the land and does not refer to the existence of any persons on the land in the enjoyment of occupancy right. As regards the remaining five-sixths also, the presumption would appear to be that at the revenue sale what was purchased was the land. It may be that some, at any rate, of the predecessors of these tenants were on the land at that date but of that there is no evidence. Ex. CC/ 1835 is an order of the Board of Revenue to the Collector to ressume the villages owing to diversion of the revenues to private purposes. It probably meant that the Collector was to manage under Regulation 7 of 1817. Ex. DD of 1842 ordered the villages to be handed over to the founder's son, who is to make arrangements to "manage the cultivation" and other business. Mr. Venkatarma Sastri relies strongly on this expression as negativing the existence of hereditary cultivators and showing that the trustee on behalf of the temple had the right to cultivate the land himself. If so this would be against the claim to occupancy right.

Exhibit FF is a cadjan muchilika executed by the tenants in 1856, in which they acknowledge they have received an adaolai or lease from the temple. If they do not observe its terms they are to be liable to eviction. They are to wait on the trustee every three years and to receive an adaolai like the one that had been granted to them, and in default were to abide his pleasure. This document does not seem to be conclusive either way, and was found not to have been proved by Mr. Goldie, the District Judge, in the appeal referred to below. Ex. GG of October 1857 and the following documents show that there was a dispute as to the proper entries to be made in the village accounts. Till 1856 the patta had been in the name of the temple and the names of the cultivators had been shown as in actual enjoyment, but apparently without reference to separate plots. As he considered the cultivators had only the right of cultivation, the karnam in the new accounts had not entered their names. The trustee was anxious that his name should be entered, but the Collector's Assistant thought it better that he should be shown as being in enjoyment as hukdar. Ex. GG 1, the register of personal complaints of 17th January 1859, shows that in that year the cultivators complained that "though the village had all along belonged only to the raiyats." it had been registered in the name of the trustee. The order refused to cancel the right of the hukdar in the patta or to register them as in enjoyment and referred them to a civil suit. Ex. HH is a razinamah setting forth a complaint made by the hukdar's lessee against the raiyats which was settled in the lessee's favour.

Exhibit 2, dated 12th October 1859, shows that the hukdar filed a revenue suit against the tenants to enforce the acceptance of adaolais, which was dismissed by the acting Collector for default. At the same time he passed an order with reference to the raiyats' claim to be entered as in enjoyment. They had admitted that the lands were the property of the pagoda, but objected to the entry of the hukdar as in enjoyment. The Collector observed that the entry of his name in the column of remarks tended to create disputes and mislead the authorities to the possible prejudice of the raiyats' rights in the soil. He accordingly directed the trustee's name to be struck out and the names of the raiyats entered. For arrears of revenue the raiyats' crops were not to be liable but the land. This order was apparently confirmed by the Collector, and thereupon the hukdar filed Original Suit No. 28 of 1856 in the Tinnevelly Munsif's Court. The plaint Ex. A alleges in para. 4 that prior to 1856 the hukdar had been in the habit of leasing the village to defendants 2, 5, 18, 43 and 46, who were cultivators in the village, and that these lessees let out the land to the other defendants for cultivation and cultivated it. It was very common for the landlord to arrange with a few leading villagers for the cultivation of the village and leave them to make their own arrangements with the other villagers and as pointed out in *Chidambara Pillai* v. *Thiruvengadathiengar* (1) this, if established, would negative the existence of occupancy right. The plaint also relied on Ex. FF in the present suit, the mu-

(1) [1897] 7 M. L. J. 1.

chilika executed on 25th November 1856 by 33 defendants said to be the leading villagers, and alleged that defendant 7 had refused to execute the muchilika and induced the other tenants not to pay their rents. Several of the defendants asserted that the lands had been reclaimed by them, and alleged that the temple was only entitled to the swami bogam. 71 defendants admitted the plaintiff's claim. The principal Munsif gave a judgment for the plaintiff. The District Judge confirmed the decrees as regards the 71 who had admitted the plaintiff's claim, but reversed it for misjoinder as regards the other defendants: Ex. A-4 of 12th June 1861. Eighty-eight of the other defendants then conpromised the case in the District Court, Exs. B to B-4 series, to avoid the expense of suit on the terms of accepting the decree of the Munsif's Court directing them to surrender possession. Twenty-eight defendants held out and after decrees had been passed against them by the Munsif succeeded in getting those decrees reversed by the District Court in Appeal Suit No. 110 of 1864, Ex. V dated 2nd February 1865, and the connected suits, which were confirmed on second appeal by the High Court. The District Judge in Ex. V gave reasons for not accepting the genuineness of Ex. FF already referred to and stated that the plaintiff's own witnesses admitted that the defendant had been in possession of the lands in suit for nearly 20 years and of the house for over 30 years, and considering the defendant had proved that the disputed lands had been in his and his family's undisturbed possession for a very long period and that his tenancy was a permanent tenancy dismissed the plaintiff's suit in ejectment. It had been previously ruled by Scotland and Holloway, JJ., in *Alagaiya Tiruchittambala* v. *Saminada Pillai* (2) that the question whether raiyats under the mirasidar have a title to the permanent occupancy of land subject to the payment of the mirasidar's share for the most part depended on established usage and custom, which had to be proved. The High Court in the second appeals apparently accepted the findings of the District Judge that it had been proved in this case. We next come to Original Suit No. 31 of 1884 on the file of the Subordinate Court of Tinnevelly, another suit for ejectment and other similar suits. In his judgment II-2, dated 17th December 1885, the Subordinate Judge gave judgment for the plaintiff on the ground that the defendant's father had admitted the plaintiff's right in the suit of 1859.

Exhibit T, dated 21st July 1886, is judgment in Original Suit No. 42 of 1884, a suit to fix the rent payable by plaintiff to defendant on account of defendant's refusal to receive rent at a rate alleged to have been fixed by his father in 1867 in one of the areas in which permanent tenure had been established in the litigation already mentioned. In Ex. V (c) in Original Suit No. 9 of 1901 in the District Munsif's Court of Srivaikuntam, a suit by the hukdar for ejectment, it was found by the District Munsif that the tenants were not entitled to occupancy rights by virtue of the decisions in the previous suit but that their right of occupancy was established independently' In Ex VII (e), Original Suit No. 23 of 1905, in the District Munsif's Court, a suit for ejectment was allowed to be withdrawn with liberty to bring a fresh suit In Original Suit No. 637 of 1906 in the District Munsif's Court, another suit for ejectment, it was held to be res judicata as regards the particular land that there was no occupancy right. The trustee also relies on NN series which he took in 1884.

The appellants rely on numerous transfers since 1884, sales both private and in execution and mortgages of their interests by tenants The District Judge has held that these were not brought to the knowledge of the plaintiff. If the transfers were genuine the plaintiff must have received the rents from the transferees and I think the appellants are entitled to contend that his failure to produce his accounts raises an inference against him in this respect.

Now as to the presumption to be applied to the case, the reason that the Courts, even before the passing of the Madras Estates Land Act 1908, raised a presumption of occupancy right in favour of raiyats holding under a permanently settled zamindar, and not in favour of raiyats holding under a raiyatwari pattadar was that there was no presumption in the case of the permenently settled zamindar that he was the owner of the land except as assignee

(2) [1862-63] 1 M. H. C. R. 264.

of the Government interest therein, whereas the scheme of the temporary raiyatwari settlements was to settle the revenue with the owner of the land himself. In neither case it is well established was there any intention to interfere with the legal relationship that might exist between the person with whom the revenue settlement was made and those holding under him.

The presumption being that the raiyawari pattadar was the owner of the land the Courts have proceeded on the view that the burden is on his tenants claiming a permanant right of occupancy to proveit. I have recently dealt in *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar* (3) with the Tanjore temple cases in which this was laid down, and followed the ruling in *Chidambara Pillai* v. *Thiruvengadathiengar* (1), which has been approved in subsequent cases. Those Tanjore cases had a special history and facts in common which differentiate them from cases such as the present, and led, except in one case, to the rejection of the claim to occupancy right. All that was laid down generally in *Chidambara Pillai* v. *Thiruvengadathiengar* (1) and cases which followed it was that the onus was on the tenant and that mere length of enjoyment in the capacity of tenants or purakudies, irrespective of other circumstances, did not raise a presumption of occupancy right. The qualification is important, because it shows that the inference as to occupancy right is to depend on a consideration of the whole circumstances of the case, and among those circumstances are the continuance of the lands in the same hands at unenhanced rents, especially if they are low, the recognition of the tenant's right to transfer his holding, etc., as pointed out by the Privy Council in *Ram Chunder Dutt* v. *Jugesh Chunder Dutt* (4), *Naba Kumari Debi* v. *Behari Lal Sen* (5), *Upendra Krishna Mandal* v. *Ismail Khan Mahomed* (6) and *Nilratan Mandal* v. *Ismail Khan Mahomed* (7). The same thing was laid bown in *Peria Karuppan* v. *Annasawmi Ayer* (8) and *Venkatachala Goundan* v. *Rangaratnam Aiyar* (9). These are facts which it is for the tenant to establish.

The task of drawing the right inference in the present case is one of some difficulty, which is increased by the fact that the claim is in respect of compensation awarded for land taken from different holdings, as to which, owing to the facts set out above, the rights of the tenants may be different, and because the evidence does not enable us to trace the history of the respective holdings from which the acquisition was made in the dispute about the existence of occupancy right which has been going on with varying fortunes in the village for the last 60 years. The fifth report shows that in Tinnevelly before the settlement of the revenue at the beginning of last century there were raiyats holding with rights of occupancy under the mirasidars. If that was the case in the suit village I do not think that it matters that a five-sixths share in the village was purchased for the temple at a revenue sale because, even if the land was sold free of encumbrances, the presumption in the circumstances would be that the temple continued the tenancies on the old footing. There is however no evidence that this was the state of things in the suit village, and the order of 1848, Ex. DD, as to the temple arranging for the cultivation points the other way. The fact that 28 raiyats established their occupancy rights in the litigation which began in 1859, though it does not make the issue res judicata as regards the lands now in suit, is entitled to considerable weight, but the reversing judgment of the District Judge, which was confirmed by the High Court without comment on second appeal apparently, as a finding of fact, does not appear to me to give reasons which would now be regarded as sufficient to establish the claim to occupancy rights. On the other hand, we have the fact that the great majority of the tenants had given up their claim to occupancy rights at an earlier stage of the litigation.

As regards the rates of rent the sharing or waram system seems to have prevailed until 1867 as regards nunja or wet land and to have been commuted at that time. It is not shown that the temple's shares was less than that of ordinary owners, or that the punja

(3) [1918] 44 I. C. 894.
(4) [1874] 12 B. L. R 229 (P.C.).
(5) [1907] 34 Cal. 902(P.C.).
(6) [1905] 32 Cal. 41=31 I. A. 144 (P.C.).
(7) [1905] 32 Cal. 51=31 I. A. 149 (P.C.).
(8) [1911] 12 I. C. 1.
(9) [1913] 20 I. C. 374

money rates were unduly low. As regards the evidence that the rents have not been raised since, and the evidence, which is all of it fairly recent, that the tenants have been freely allowed by the temple to transfer their holdings, I do not think that in the present case it can be treated as a recognition by the temple of the existence of occupancy rights, because it is clear that for the last 60 years the temple has been openly and notoriously contesting the existence of occupancy rights in the village in the numerous proceedings which I have mentioned above. In these circumstances I have come to the conclusion that there are not sufficient reasons for differing on the main question from the conclusion on the evidence at which the learned District Judge has arrived and which has also been arrived at by my learned brother. In this and other respects I agree in the order proposed by him.

Seshagiri Aiyar, J.—These 11 appeals have been preferred against the judgments of the District Judge of Tinnevelly refusing compensation under the Land Acquisition Act to the appellants, and awarding it entirely to the respondents. The lands are situated in a village called Kachanavilai. It is common ground that about the year 1817, five-sixths of the village was purchased at a revenue sale by one Vengu Mudaliar; and the other sixth at a private sale. The lands were dedicated as an endowment for the performance of a kattalai in a temple. The respondents represent the founder of the kattalai and claiming to be the sole trustees contended that the proprietary right in the lands belongs exclusively to the kattalai. The defendants, on the other hand, alleged that they and their ancestors have been in uninterrupted enjoyment of the lands paying the Sircar kist either direct or through the hukdar and paying the hukdar a low and uniform rate of rent. They therefore claimed to have occupancy right in the lands. The District Judge held that the occupancy right was not established. Hence these appeals.

A brief narration of the previous litigation in connexion with this village must be given in order to appreciate properly the arguments addressed to us on the present occasion. The raiyatwari patta for the village stands in the name of the temple (vide MM series). As to when the first patta was granted there is no reliable evidence. But we know from Ex. DD, dated 7th September 1842, that the Collector ordered the Tahsildar to issue patta to the temple. MM (1858-1859) is the earliest patta that has been produced. A few years before MM the cultivators of the village executed a joint muchilika in which they stipulated that they shall receive on adaolai every three years in respect of the properties under their cultivation. There is a condition in it that if the cultivators failed to act properly, the hukdar was entitled to resume the lands. This was on 25th November 1856. Then some correspondence passed as to whether the hukdar's name should be entered in the patta. The tenants apparently claimed even at this date that their names should be inserted as persons in occupation (vide GG series). In consequence of these disputes the Collector ordered that the name of Vengu Mudaliar should be struck out and that the cultivators' names should be entered instead (Ex. 2). This was on 12th October 1859. Thereupon Vengu Mudaliar brought a suit in the Court of the Sadar Amin, Tinnevelly, to eject the cultivators and to recover arrears of rent from them (vide Ex. A dated 17th December 1859).

The principal Sadar Amin gave a decree, as prayed for (Ex. A-4). It may be mentioned here that there was, but one suit against all the cultivators, who numbered nearly 270. 71 of them admitted the right of the plaintiff. A number of other defendants did not file any written statement. 65 defendants alone contested the plaintiff's claim. An appeal was preferred against the judgment of the Sadar Amin. Mr. Goldie, the then District Judge, without expressing any opinion on the merits held that the suit was bad for misjoinder of parties and causes of action and reversed the Sadar Amin's decision (Ex. 5). Even after this reversal a large number of the defendants entered into a razinamah with Vengu Mudaliar by which they acknowledged the title of the hukdar to eject them and agreed that if they failed to obey the condition of the razinamah, they shall be bound by the decree passed by the Sadar Amin on the merits. The one suit was split up into a number of suits and the Sadar Amin once again went into the merits of the case and came to

the same conclusion as before. Against his decree 28 cultivators preferred appeals to Mr. Goldie. He held that as the cultivators had been in possession for 20 or 30 years they were entitled to occupancy rights. The special appeals preferred to the High Court were summarily dismissed. It is apparent from what I have stated that 28 of the defendants who were originally impleaded in the suit established their rights in the High Court. Exs. D, E, F, G to S show that proceedings in ejectment were taken against some of the other cultivators.

The next litigation was in the year 1884 (vide Ex. T), in which the question regarding the proprietary rights in the soil was not considered. The question was about the rates of rent that should be paid to the hukdar. Then comes Ex. 5 (c), which was a suit instituted in the year 1901 in the District Munsif's Court, Srivaikuntam. About 11 cultivators contested the right of the hukdar to eject them. The Munsif came to the conclusion that they had acquired occupancy right. It is not clear whether there was any appeal in these cases. Matters seemed to have gone on smoothly until the Government proclaimed in 1915 that they intended to acquire the lands in dispute for the Tiruchandur Railway. As a consequence of this notification the cultivators have preferred claims to a share in the compensation on the ground that they have occupancy rights in the land.

Four of these appeals may be disposed of at once. They are Appeals Nos. 241, 245, 248 and 249. The District Judge in the last paragraph of his judgment says that the lands in respect of which compensation was claimed in these four appeals were delivered over to the respondents' predecessor-in-title by virtue of proceedings in execution taken by him. Ex. C shows that a large number of the cultivators were evicted from their holdings for failure to comply with the conditions of the razinamah embodied in Ex. B. The District Judge has stated that the appellants in those four appeals were among those against whom proceedings were thus taken. There was no ground of appeal disputing the correctness of the statement made by the District Judge. We are not prepared to allow that question now to be reopened. We must therefore hold that the proceedings taken under Ex. C are binding upon the appellants and that they are estopped from claiming occupancy rights.

Now we have to deal with the seven appeals on the merits. Mr. Narasimha Aiyangar for the appellants contended that the facts established in evidence are sufficient to warrant the conclusion that his clients have occupancy right in the lands. The first circumstance relied on for this purpose is the payment of a uniform rate of rent. It is clear from a reference to Ex. T-1 that the present rate was fixed in 1866. We may therefore take it that for 47 years the same rate was continuously paid to the hukdar. I do not accept the learned vakil's contention that it was only a nominal rent that was paid. It was in the year 1868 that commutation from waram was made regarding the rate of rent. The sum of Rs. 2-7-0 per acre of nanja paid to the landlord after deducting the sircar kist cannot be regarded as a low rate. The next circumstance relied on was continuity of possession. There is evidence on the side of the hukdar, which is to some extent specific, showing that the cultivators were changed from time to time. The District Judge has expressed no opinion upon this evidence, and I do not desire to base my judgment upon that deposition. But having regard to the usual mamool in this country of not changing a cultivator unless it be under very exceptional circumstances, I am not prepared to attach much weight to this contention. In the southern parts of this Presidency instances can be cited of persons cultivating the same land for generations.

This is largely due to the feeling on the part of the proprietor that it is a sin to turn a cultivator out of the field which he has ploughed and enriched, and to the feeling and veneration which the latter entertains for his master. I am averse to basing any conclusion regarding rights in the soil upon continuous possession, even granting that the contention of the appellant is well founded. I must also point out that no attempt has been made in the Court below by the cultivators to prove that they, their fathers and their grandfathers have been continuously in occupation of the same land for any length of time. The next circumstance relied on was that the cultivators have been alienating

the lands as if they were the owners thereof.

The District Judge points out that it has not been shown that any of those alienations were made to the knowledge of the hukdar. Mr. Narasimha Aiyangar has drawn our attention to one single instance in which the hukdar's kariasthan is said to have written the deed of mortgage. This is not enough to bring home to the hukdar the fact that the cultivaters were dealing with the property as if they were the proprietors. Moreover most of these transactions are of a very recent date, and I do not think they are of any consequence in determining the rights of the parties. There is no doubt of the fact that some of the tenants did succeed in obtaining a decision in their favour establishing their occupancy right. In the pre ent case no attempt has bsen made to show that any of the appellants derived title under these cultivators. Therefore the plea of res judicata is not available to them. Nonetheless those judgments are evidence of the right now put forward. But their probative value is not much as the judgment of Mr. Goldie solely proceeded upon possession for 20 or 30 years, a fact which the Judicial Committee in *Mayandi Chettiyar* v. *Chokkalingam Pillay* (10) and the High Court in recent cases have held to be insufficient to prove occupancy right. On the other side Mr. Venkatarama Sastriar referred us to the fact that a majority of the cultivators accepted the position of tenants-at-will by executing muchilikas. He also referred us to certain compensation proceedings of 1868, in which the right of the hukdar was accepted by the Government to the total exclusion of the cultivators: see evidence of P. W. 8. Both the learned vakils relied upon the use of the word "swamibogam" in support of their contentions. It is true that the expression denotes that the person receiving it is the owner and proprietor of the land. Wilson in his glossary gives this as the correct rendering of the expression. On the other hand Mr. Hodgson seemed inclined to the view that the expression connoted that the cultivators had an interest in the land: see Fifth Report, Vol. 3 p. 346. To sum up, the factsin favour of the appellants are:

(a) Payment of a uniform rate of rent for nearly 50 years; (b) an alleged continuous occupation from father tc son for the same period; (c) alienation of the property in their possession without the knowledge or consent of the hukdar during recent years; (d) two judgments on two different occasions in their favour establishing occupancy right after contest. The circumstances against their contentions are: (1) the majority of cultivators in the village have agreed to hold their lands as tenants-at-will; (2) in a previous land acquisition proceeding some of the tenants did not set up a right of occupancy; and (3) they are cultivators under riyatwari patta holders. I have held as regards (a) that the rent paid is not insignificant; as regards (b) I am not satisfied that there has been continuous occupation from father to son; as regsrds (c) no weight can be attached to it as the transactions were behind the back of the hukdar; as regards (d) it cannot be disputed that the judgment of Mr. Goldie, if it comes up for consideration before the High Court today, will not be upheld on the grouuds mentioned by him. As regards the judgment of the District Munsif he was largely influnced by the judgment of Mr. Goldie and had referred to a few other circumstances which do not advance the case of the tenants any further. The circumstances referred to us being against them detract very much from the value to be attached to the points established in their favour. My decision would therefore largely depend upon the view I take as to onus of proof in this case. If I come to the conclusion that the burden is upon the cultivators to establish their right of occupancy, I shall have no hesitation to decide that they have failed to discharge it. If, on the other hand, I hold that it is for the hukdar to show th t he has the sole proprietary right, I would hesitate before holding that they have proved their case.

Therefore it becomes necessary to consider the question of the burden of proof. In order to come to a proper conclusion on this point it is necessary to consider the nature of the right which a raiytawari pattadar has in the soil. Contemporaneous with the permanent settlement under Regn. 25 of 1802, the question was considered on what basis the remaining land should be settled. There were a number of conflicting views. Some revenue offi-

(10) [1904] 27 Mad. 291=31 I. A. 83=8 Sar. 587 (P.C.).

cials recommended the Mutta system, that is a system by which a number of villages were intended to be granted to a single owner making him responsible for the Government assessment. Others were in favour of the village system, by which it was expected that each village would be handed over to the headman or some respectable person in the village who would parcel out the lands to the cultivators and would also be responsible to the Government for kist. And lastly, there were others who advocated the raiyatwari system by which it was intended that small holdings should be allotted to a large number of persons. Sir Thomas Munro was a strong advocate of the raiyatwari settlement. In the Ceded Districts, to which he was appointed Principal Collector after the war with Tippu, he tried the experiment and succeeded beyond expectation in showing that both the raiyats and the Government were benefited by the raiyatwari system. Although the Government of the day recognized the success of the experiment in these districts, they were not prepared to give effect to it in the other districts. In a letter addressed to Sir George Barlow, the then Governor of Madras, by the Board of Revenue, the Board while remarking that

"under the raiyatwari settlement the officers of Government supposed settle and collect the rent from each farmer,"

pointed out that what was achieved by Colonel Munro in the Ceded Districts could not be expected of other officers in the other districts and that the system was fraught with danger to Government revenue. This letter was signed by Mr. Hodgson as a member of the Board of Revenue. Thereupon the Governor-in-Council accepted the recommendation of the Board, and ruled that the raiyatwari system should not be introduced in the other districts. Meanwhile Sir Thomas Munro went to England, and was invited to give evidence before a Select Committee of the House of Commons on 15th April 1812. He strongly advocated the Ryotwari settlement. This is what he said in his evidence:

"Every Raiyat, who is likewise a cultivating proprietor of the land which he holds, is permitted to hold that land at a fixed assessment as long as he pleases; he holds it for ever without any additional assessment. If he occupies any waste or additional land, he pays the assessment that is fixed upon that land and no more; his rent undergoes no alteration."

Apparently his view prevailed, as we find that the Court of Directors agreed to introduce the raiyatwari settlement in Madras. On 16th December 1812, the Court wrote:

"It remains for us to signify our directions that in all the provinces that may be unsettled when this despatch shall reach you, the principle of the raiyatwari system, as it is termed, shall be acted upon, and that where village rents upon any other principle shall have been established, the leases shall be declared to be terminable at the expiration of the period for which they may have been granted."

The next question that I propose to consider is, what was the nature of the right that was secured by the raiyatwari system. I have already referred to the evidence of Sir Thomas Munro before the Select Committee. In one of his minutes dated 15th August 1807 this is what he says about the raiyatwari system:

"That it is better adapted to preserve simplicity of manner and good order, because every raiyat will, on his own estate, be at once proprietor, farmer and labourer; because the division of property by engaging men in labour for their maintenance is favourable to quiet."

Baden Powell in his Land System of British India gives this definition of the raiyatwari system:

"A system of land revenue administration in which there is no middleman or landlord over the individual raiyats who are severally liable for the land revenue assessment on the holding."

Again, quoting from the Settlement Manual for Madras he describes the raiyatwari system thus, Vol. 3, p. 130:

"Under the raiyatwari system every registered holder of land is recognized as its proprietor. He is at liberty to sublet his property or to transfer it by gift, sale or mortgage. He cannot be ejected by Government, so long as he pays the fixed assessment, and has the option of diminishing his holding or of entirely abandoning it. The raiyat under this system is virtually a proprietor on a simple and perfect title, and has all the benefits of a perfect lease without its responsibilities."

It is clear from the extracts which I have quoted that the settlement by the Government under the raiyatwari system was with the actual cultivator of the soil whereas in settlements under Regn. 25 of 1802, the proprietor had only the right to receive rent from persons who were in occupation of the lands. Of course there are cases under the raiyatwari system in which certain classes of the community who are not in the habit of tilling the soil have been given a raiyatwari patta. But in such cases a pattadar is the undoubted proprietor of the land with liberty to get it cultivated by leasing it to cultivators. This being the history of

the system and the incidents of the system being what I have already described them to be, it seems to me that if a person claims to have acquired occupancy right under a raiyatwari holder, the burden lies heavily upon him to establish it. One other aspect of the question will also lead to the same conclusion. Under Madras Act 2 of 1894 the land for which the Patta is given is held liable for the payment of revenue. If the patta-holder makes default in paying the revenue, the holding can be sold irrespective of the fact that cultivators are on the soil for generations together. There can be no question that the rights of these cultivators would be swept away by the sale for arrears of revenue. This is an indication that the Legislature and the Government of the country do not recognize a permanent occupancy right in the soil under a raiyatwari pattadar.

It is not easy to say what would be the residue of interest that would be left to the raiyatwari pattadar, if he has the Governmeut above him who can sell the lands under the patta straightaway for arrears and if he must recognize an occupancy raiyat under him whose interest in the soil must be very considerable. The conception is opposed to the recommendations of those who advocated the raiyatwari system. Virtually the occupancy raiyat in a raiyatwari village deprives the pattadar of all rights save that of being the recipient of a permanent rent.

Before dealing with the cases which have been quoted at the Bar, I shall refer very briefly to the history of the raiyatwari settlement in the Tinnevelly District. Contemporaneous with Sir Thomas Munro in the Ceded Districts Mr. Hodgson was apparently the Collector of Tinnevelly. As I pointed out before, he was very much against the raiyatwari system. Sir Thomas Munro had induced the Court of Directors to accept his view in preference to the view of the Board of Revenue; subsequently when he was appointed to the Governorship of the Presidency, he directed that the raiyatwari system should be introduced in all the districts. So far as Tinnevelly was concerned, we are told attempts were made to introduce this system from 1827 onwards. By the year 1834 it was introduced in a number of villages (vide the Tinnevelly Gazetteer). But apparently no further progress was made for sometime. It was in the year 1861 when Mr. Puchle was the Collector, the Government of the day decided that the district should be surveyed and that the raiyatwari tenure should be introduced at once. From the fact that in 1842 a raiyatwari patta was given to the temple, we may take it that this was one of the villages upon which the principle was experimented between the years 1827 and 1834. In all probability the predecessors-intitle of Vengu Mudaliar were themselves cultivators of the lands when they were sold to the temple. There is nothing in the history of the system as applied to the Tinnevelly District to lead to the conclusion that, prior to the acquisition of the property by the temple, the present cultivators had acquired any interest in the lands. That being in short the position of the raiyatwari pattadar in the district, it seems to me that no special considerations arise in dealing with the lands situated in Tinnevelly different from those which would apply to lands in Tanjore or Trichinopoly. At any rate there is nothing on the record in this case to lead me to hold that the Tinnevelly cultivator should be treated differently from the cultivator in the other districts of the southern part of the Presidency.

The facts referred to above establish at least this much, that at the time when five-sixths of the lands were sold for arrears of revenue to Vengu Mudaliar the interest of the cultivators, if any, ceased to exist. Consequently it is clear that they had no subsisting rights when the Mudaliar acquired the property for the temple. Secondly when the Collector in 1842 directed that raiyatwari patta should be granted to the hukdar, he must have had before him the instructions of the Madras Government contained in the Settlement Manual and in the minute of Sir Thomas Munro. The inference is that at this time persons who were cultivating the soil had no occupancy right in it. It follows from the above two conclusions that the present cultivators must have been let into possession either by Vengu Mudaliar or by his descendants Mr. Goldie in the judgment already referred to speaks of 20 or 30 years' possession in 1864. This lends support to my view that the appellants' predecessors probably came in as cultivators after the issue of the raiyatwari patta to the huk-

dars of the temple. Their occupation was not immemorial as was suggested in the course of the arguments in these appeals.

Now I proceed to consider the decisions that have been quoted. Most of these decisions have been reviewed fully in the judgment which the learned Chief Justice delivered in *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar* (3) Therefore I shall not attempt to deal with every one of them. A few of them, however require consideration in the light of the history of the raiyatwari settlement which I have sketched above. *Krishnasami Pillai* v. *Varadaraja Ayyangar* (11) was a decision of the Full Bench and in view of the fact that Muthuswami Aiyar, J., who took part in *Chidambara Pillai* v. *Thiruvengadathiengar* (1) was also a party to this decision, it should be considered with some care. Sir Charles Turner, with whose judgment Muthuswami Aiyar, J., concurred, says at p. 357:

"Without attempting to define what period of occupation should confer a right of occupancy —a matter which can be only dealt with by the Legislature—we consider ourselves at liberty to say that an occupation for upwards of 70 years is sufficient, under the circumstances of this case, to throw upon those who seek to disturb it the burden of showing that the tenancy was not accompanied with a right of occupancy and that the plaintiff has not succeeded in doing so."

This passage shows that the learned Chief Justice laid the burden in the first instance upon persons who asserted the right of occupancy, but that in his opinion the facts proved in that case shifted the burden on to the pattadar. In the judgment of Kindersley, J., the facts are fully set out and I find that there was a previous litigation in which the right of the tenants to remain on the lands so long as they paid rent regularly was upheld. The learned Chief Justice refers to a number of documents which according to the evidence, constitute an engagement not to eject the tenants from their holdings. It is true that there are observations in the judgment tending to show that a cultivating raiyat is entitled to some interest in the soil. In p. 357 reference is made to the custom of the country and of the district. No such custom has been sought to be established in this case and I, therefore do not think that this decision, which proceeded upon the special features of that case and which did not in the first instance throw the burden upon the proprietor is an authority for the proposition contended for by Mr. Narasimha Aiyangar. That this is the correct interpretation of the decision is clear from a reference to *Chidambara Pillai* v. *Thiruvengadathiengar* (1), to which Muthuswami Aiyar, J., was a party. In that case the law is laid down in these terms:

"The claim of an occupancy right as overriding the proprietor's right to cultivate his own land is of a special character, and as such it is one which the party, seeking to derogate from the ordinary incidents of property is bound to establish. . . . Mere length of enjoyment in the capacity of tenants or purakudies irrespective of other circumstances is not prima facie proof of occupancy right."

I have shown already what the incidents of a raiyatwari tenure are, and the judgment in *Chidambara Pillai* v. *Thiruvengadathiengar* (1) entirely supports the view I have taken. When we remember that Muthuswami Aiyar, J., was first a Deputy Collector, and afterwards an Inam Commissioner, the value of his pronouncement acquires very great weight. This view of the burden of proof was accepted unreservedly by Shephard and Subramania Ayyar, JJ., in *Cheekati Zamindar* v. *Ranasooru Dhora* (12). In *Rangasami Reddi* v. *Gnana Sammantha Pandara Sannadhi* (13) Subramania Aiyar, J., and Moore, J., acted on that view. Moore, J., quotes the passage which I have already cited and accept it as good law. Sadasiva Aiyar, J., and Napier, J., in *Naina Pillai* v. *Ramanathan Chettiar* (14) have examined the case law very fully and have accepted the conclusions stated in *Chidambara Pillai* v. *Thiruvengadathiengar* (1). We have a very full discussion by the learned Chief Justice and Sadasiva Aiyar, J., in *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar* (3), wherein the principle enunciated in *Chidambara Pillai* v. *Thiruvengadathiengar* (1) is accepted and restated. As against these decisions Mr. Narasimha Aiyangar quoted *Peria Karuppan* v. *Annasawmi Iyer* (8), *Venkatachala Goundan* v. *Rangaratnam Aiyar* (9) and *Chandrasekharaswami* v. *Nainar Ammal* (15). As regards *Peria Karuppan* v. *Annasawmi Iyer* (8) it is enough to say that the proposition there-

(11) [1882] 5 Mad. 345 (F.B.).

(12) [1900] 23 Mad. 318.
(13) [1899] 22 Mad. 264.
(14) [1907] 41 I. C. 788.
(15) [1918] 43 I. C. 977.

in laid down is not disputed by those who allege that the burden of proof is upon the person claiming occupancy right. What the learned Judges say is that it should not be laid down that in all cases of raiyatwari lands a cultivating tenant cannot have a right of occupancy in the lands.

This contention is not advanced now. It is no doubt an anomalous position. But it is easy to conceive of a grant of occupancy right which is only in other words a permanent lease by a raiyatwari holder in favour of a cultivator. Such leases are very common in South Kanara. It is also imaginable that the limited right of holding the land on payment of a fixed rate of rent with the incidents of occupancy right may be acquired by a cultivator Therefore it is not necessary to say that under no circumstances can an occupancy right be acquired against the raiyatwari proprietor. Therefore the proposition which is stated in *Peria Karuppan* v. *Annasawmi Iyer* (8) seems to be exceptional as far as it goes. It is in *Venkatachala Goundan* v. *Rangaratnam Aiyar* (9) that a further extension seems to have been attempted. In this latter case the learned Judges, quoting without disapproval the dictum of Muthuswami Aiyar, J., in *Chidambara Pillai* v. *Thiruvengadathiengar* (1) and also the statement of law contained in *Rangasami Reddi* v. *Gnana Sammantha Pandara Sannadhi* (13) and *Cheekati Zamindar* v. *Ranasooru Dhora* (12). say:

"There is nothing in the observations above cited to warrant the opinion that in the case of every raiyatwari village there is necessarily a presumption that a raiyat holding under a mirasidar has no occupancy right."

If the judgment stood there, no exception can be taken to it. But almost towards the end the learned Judges seem inclined to hold that the burden is upon the proprietor to show that a cultivator who has been long on the land has not acquired a right of occupancy. It seems to me that this proposition is not warranted by the decisions which the learned Judges have quoted without dissent in the body of their judgment. I will not examine this case any further, as we were told that it is under appeal to the Privy Council. Now I come to the last case quoted before us, *Chandrasekharaswami* v. *Nainar Ammal* (15). There are two statements in it; one is that the second appellate Court is bound by the findings of fact on the question of occupancy right at which the District Judge has arrived. If the judgment has been based upon that view of the functions of the second appellate Court, no exception could be taken to the conclusion arrived at in this case. But the learned Judges also proceed to lay down the principles upon which the case should be decided. I cannot help observing that in the body of the judgment the use of the words tenant and landlord, which is the very fact to be established by the evidence, has to some extent clouded the issue to be decided. The expressions tenant and landlord have special meanings assigned to them in our legislative enactments. One feels, on reading the decision as if the principle applicable to cases under the Estates Land Act had been unconsciously adopted in the disposal of the case. No doubt *Chandrasekharaswami* v. *Nainar Ammal* (15) is based upon *Peria Karuppan* v. *Annasawmi Iyer* (8) and *Venkatachala Goundan* v. *Rangaratnam Aiyar* (9). I have stated my opinion about these two decisions. With all respect I am not prepared to accept the principle as to the onus enunciated in *Chandrasekharaswami* v. *Nainar Ammal* (15). I prefer to follow the view taken by Collins, C. J., Muthuswami Aiyar, J., Shephard, J., Subramania Aiyar, J., Sadasiva Aiyar, J., Napier, J., as well as by the learned Chief Justice. In my opinion the burden is upon the cultivators to show that they have got an occupancy right in these raiyatwari lands which have been taken up by Government under the Land Acquisition Act and the evidence they have let in is not sufficient to discharge that burden. I therefore agree with the District Judge that they are not entitled to compensation on the footing of being occupancy tenants. At the same time I think that in respect of their interest in the land as tenants from year to year, they are entitled to have their share of the compensation apportioned, and we fix it at one anna in the rupee. Subject to this modification, we dismiss the appeals with costs. The vakil's fee will be Rs. 352 in all the appeals together.

S.N./R.K. *Appeals dismissed.*

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* A. I. R. 1919 Madras 304

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

P. Bhashyakarlu Naidu—Defendant -Petitioner.

v.

Nungambakkam Andalammal—Plaintiff—Opposite Party.

Civil Revn. Petn. No. 2 of 1918, Decided on 24th September 1918, from the judgment and order of Sm. C. C. Chief Judge in F. B. Appln. No. 77 of 1917, in Suit No 3295 of 1917.

* **Specific Relief Act (1877), S. 12—Suit by vendor for recovery of consideration, expressing readiness to execute conveyance, is in effect one for specific performance of contract—Form of decree to be passed in such suit indicated.**

Ordinarily a suit will not lie for the specific performance of a contract to pay money. But the case of a vendor is an exception to the rule and the Court will grant the vendor specific performance of his contract against the purchaser. Where the plaint. in a suit by a vendor for recovery of the unpaid sale consideration, expresses the plaintiff's willingness to perform his part of the contract and execute a conveyance, the suit is, in effect, one for specific performance and is not cognizable by a Small Cause Court. The fact that the contract between the parties stipulated for payment by the vendee first and execution of the conveyance by the vendor afterwards will not make any difference. [P 304 C 1]

The form of the decree in such a suit is that the plaintiff is to be at liberty to prepare and execute a conveyance to the defendant as an escrow to be delivered to the defendant on payment of the purchase money within the time limited and that the defendant is to pay the purchase money after the conveyance is ready. Where however the contract is that the vendee should pay the purchase money first and the vendor should execute the conveyance afterwards the proper decree would be a direction that the defendant should pay followed by a direction that the conveyance should be executed after payment.

[P 304 C 1, 2]

K. S. Jayaram Aiyar—for Petitioner.

C. P. Venkataraghavachariar — for Opposite Party.

Wallis, C. J.—This is an application to revise a decision of the Full Bench of the Court of Small Causes, Madras, which came before me yesterday and was referred to a Bench. It raises the question whether the plaint discloses a suit for specific performance of a contract to sell land. If it lies, then admittedly the Court of Small Causes had no jurisdiction. Ordinarily of course, a suit will not lie for specific performance of a contract to pay money. But the case of the vendor, as pointed out in Fry's Specific Performance, p. 33, is an exception to that rule, and the Court will grant the vendor specific performance of his contract against the purchaser; and the form of the decree in such a case will be found in *Morgan* v. *Briscoe* (1) and is set out in Seton's Judgments and Orders, Vol. 3, pp. 2174 and 2175. The form is that the plaintiff is to be at liberty to prepare and execute a conveyance to the defendant as an escrow to be delivered to the defendant on payment of the purchase money within the time limited, and that the defendant is to pay the purchase money after the conveyance is ready. It was stated that there was a difficulty about this in India, as under the Stamp Act the money for the purchase of stamp has to be found by the vendee. But this presents no real difficulty as the duty may be paid by the vendor added to the purchase money which the vendee has to pay under the decree.

That being so we have to look at this plaint, and see whether it is framed so as to disclose a suit for specific performance. In the passage cited to us in Halsbury's Laws of England, Vol. 27, p. 83, it is stated that the vendor in a suit for specific performance must declare that he is ready and willing to execute a conveyance. In para. 3 of the plaint, the plaintiff recites a contract by which the defendant bound himself to pay the sum therein mentioned as soon as the High Court of Madras reopened after the summer vacation in July 1914, the plaintiff on her part undertaking to reconvey the said properties to this defendant by executing a conveyance in his favour and getting it registered. Para. 5 of the plaint says that the plaintiff avers that she is even now ready and willing to perform her part of the contract. Although the prayer only asks for the payment of Rs. 301-13-0, taking the plaint as a whole with the averment that the plaintiff is ready and willing to perform her part of the contract, I think it must be taken as a prayer for specific performance. That is sufficient to dispose of the present case.

The question has been argued before us whether, supposing the contract between the parties stipulated for payment by the vendee first and execution of the conveyance by the vendor afterwards, that would make any difference. I am disposed to think it would not, and that the plaint would still be for specific perform-

(1) [1886] 31 Ch. D. 216.

ance of the contract, and the proper decree in such a case would be a direction that the defendant should pay, followed by a direction in the decree that the conveyance should be executed after payment. The distinction, it seems to me, is whether the suit is to be regarded as a suit for money payable under the contract, in which case it is strictly a suit for specific performance, or as a suit for damages. As I read the plaint, I think it is clear that the plaintiff has prayed for specific performance and therefore the petition must be allowed and the decree of the Small Cause Court set aside and the plaint returned for presentation to the proper Court. Costs to abide.

Seshagiri Aiyar, J.—I agree. The law as stated in Fry's Specific Performance at p. 34 is:

"It is well established that the remedy is mutual, and that the vendor may bring his action in all cases where the purchaser could sue for specific performance of the contract."

The question in this case is whether the plaint is substantially one for specific performance. If there were no contract between the parties and if their relations were regulated by S. 55, T. P. Act, there can be no doubt that the plaintiff will not be entitled to any money, and the suit will be regarded as premature, if there was no offer for executing a conveyance. It was suggested that under the terms of the contract there was a right to get money prior to the execution of the document and that the liability to execute the conveyance was to follow some time after. I have asked the translator to translate the document once again, and I am satisfied that the right to the money and the right to the conveyance are practically contemporaneous. The word "thodanai" suggests that the execution of the conveyance is to follow immediately on the payment of the money and therefore this was a case of a mutual and dependent contract. The right to the money would not accrue unless the other party is ready and willing to execute a conveyance. In that view of the document, it seems to me that we must put a reasonable construction on the plaint in this case. If it is to be regarded not as a suit for specific performance, the suit is liable to be dismissed on the ground that there is no present right to the money. We have also to see whether the averments in the plaint are such as to enable us to regard the suit as one for specific performance. As my Lord has pointed out, there is an offer to execute a conveyance, and the document also says that other conveyances in respect of other portions of the property have already been executed. Therefore it seems to me that what the plaintiff wanted was that he should get his money on his executing a conveyance. That, as pointed out by the learned Chief Justice, is really a suit for specific performance, and as such the Small Cause Court has no jurisdiction. I entirely agree with the order as regards the return of the plaint to the proper Court.

S.N./R.K. *Petition allowed.*

A. I. R. 1919 Madras 305

ABDUR RAHIM AND OLDFIELD, JJ.

Rajagopalan—Plaintiff—Appellant.

v.

T. S. Subbarama Iyer and *others*—Defendants—Respondents.

Second Appeal No. 111 of 1916, Decided on 9th December 1918, against the decree of Sub-Judge, Tanjore, in Original Suit No. 18 of 1914.

(a) Civil P. C. (5 of 1908), O. 32, R. 7—Endorsement of Court on petition of compromise is sufficient—Civil P. C. (14 of 1882), S. 462.

An order of Court sanctioning a compromise on behalf of a minor party need not on the face of it state in so many words that the Court has considered the terms of the settlement and has come to the conclusion that the settlement is in the interests of the minor.

An endorsment of Court on the petition to sanction the compromise, which sets forth that the compromise is in the minor's interests, to the effect that the petition is granted is a sufficient compliance with the provisions of S. 462, Civil P. C. of 1882: 17 *All.* 531, *Expl.*

[P 307 C 1, 2]

(b) Civil P. C. (5 of 1908), O. 32, R. 7 — Compromise binding—Trial of question forming subject-matter of compromise is barred.

If a compromise is binding, it operates as a bar to the trial of any question forming the subject-matter of the compromise. [P 409 C 2]

(c) Civil P. C. (5 of 1908), O. 32, R. 7 —Arrangement sanctioned by Court—Provisions not embodied in decree can be enforced against minor.

If a Court sanctions an arrangement but some of its provisions cannot be embodied in the decree because they do not relate to the suit, those provisions can be enforced against the minors though not by way of execution of the compromise decree. [P 310 C 1]

(d) Civil P. C. (5 of 1908), O. 32, R. 7 —Guardian ad litem has power to sell property of minor.

Where in pursuance of a compromise a sale of the minor's properties is effected by the father

and also the guardian ad litem of the minor, the sale is good, though the guardian ad litem may not have the power to act on behalf of the minor. [P 311 C 1]

(e) Civil P. C. (5 of 1908), O. 32, R. 7—Court sanctioning arrangement involving sale—Guardian ad litem is competent to effect sale.

Per *Abdur Rahim, J.*—Where an arrangement is sanctioned by the Court involving the sale of a minor's properties, it is within the competence of the guardian ad litem to effect the sale.

S. Srinivasa Aiyanger and *K. Rajah Aiyar*—for Appellant.

K. Srinivasa Aiyangar and *A. Krishnasamy Aiyar*—for Respondents.

Abdur Rahim, J.—The real question for consideration is as to the binding character of the compromise proceedings which resulted in the decree Ex. 10 and whether the conveyances Exs. A, A-1 and B are valid transactions. The compromise was effected in a suit instituted to enforce a mortgage against defendant 1 in this suit and his sons, the present plaintiff and defendants 2 to 5, who were at that time minors, being represented by their grandmother as guardian ad litem. That suit was Original Suit No. 29 of 1899. The main defence to the suit was that the mortgage was not binding on the minor defendants inasmuch as the debts for which the mortgage was executed had been incurred by their father for immoral and illegal purposes. A written statement was filed and issues were framed. The minor defendants were represented by a very respectable pleader of the Kumbakonam Subordinate Judge's Court. While the suit was pending, the parties came to an amicable arrangement and a compromise was effected Ex. 8 is the petition of compromise and along with it was filed a razinamah Ex. 9. A decree, Ex. 10, was passed in accordance with that razinamah. The petition sets out the nature of the suit and the defence, and states that, on an examination made of the accounts with the aid of the minors' relations, and in the light of the investigations made, it was found that the amount mentioned in the hypothecation bond sued upon had been borrowed and spent by defendant 1, i. e., the father, for the benefit of the family and for family purposes. Then it says that it had been settled through mediators that a sum of Rs. 56,500 should be paid by the defendants to the piaintiffs in full satisfaction of the latter's claim. Para. 5 states that in had been arranged by the mediators that for this sum of Rs. 56,500 a sale deed for Rs. 52,500 was to be executed in favour of the plaintiffs by defendent 1 and by the guardian ad litem of the minors on behalf of the minors in respect of the lands in the hypotheceted village, that an indemnity bond should also be executed with respect to the lands of one of the villages and that the defendants should pay to the plaintiffs within 1st March 1901 the belance of Rs. 4,000 with interest. The next paragraph says that

"the said arrangement is most favourable to the said minors' interest and benefit",

and the Court is asked

"to accept the razinamah presented herewith whereby a compromise for Rs. 56,500 has been made as aforesaid with the plaintiffs by me on behalf of defendants 2 to 4."

It is signed by Lakshmi Ammal, the guardian ad litem of the minor defendants. The razinamah referred to embodies all the terms of Ex. 8, excepting what is provided in para. 5 as to the sale of the villages for Rs. 52,500. What it says is that:

"Rs. 56,500 is to be paid in full satisfaction of the claims of the plaintiffs in that suit, and out of this amount, Rs. 52,500 (the amount mentioned in Ex. 8 as the price of the villages sold) is to be paid within 2nd March next and the defendants shall pay to plaintiff 1 within 1st March 1901 the belance amount of Rs. 4,000."

The razinamah is signed both by Lakshmi Ammal and by defendant 1. Both these documents are dated 28th February 1900. and were filed on the same day in the Subordinate Judge's Court. On Ex. 8 the order passed is "granted" bearing date 28th February, and on Ex. 9 the order is "decreed accordingly." The decree is drawn up in the terms of the razinamah and is also dated 28th February 1900. In pursuance of these deocuments Ex. A was executed both by defendant 1 T. S. Subbarama Iyer and Lakshmi Ammal, the guardian of the minors, on 2nd March 1900 with respect to some villages mentioned in Ex. 8. Ex. B is another sale deed with respect to the remaining lands also executed on 2nd March by the same parties. Both these documents refer to the settlement arrived at between the parties by the razinamah and the decree passed in accordance with the razinamah. The first argument advanced by the learned Advocate-General who appeared for the plaintiff-appellant is that the compromise is ineffective inasmuch as no leave of the Court was obtained. This argument is

merely based on a criticizm of the words in the last paragraph of Ex. 8, that is, "the Court will be pleased to accept the razinamah presented herewith". It is suggested that this only meant that the Court was to file the razinamah, not that the Court was asked to apply its mind to the terms of the razinamah in order to see whether they were for the benefit of the minors or not. I think this is merely quarrelling with words. The petition sets out S. 462 Civil P. C., which provided for compromise of suits on behalf of minors. It states that the arrangement is "most favourable to the minors and for their benefit". There can be no doubt that the parties intended to ask the Court to give leave for compromise as required by S. 462 of the old Code. The petition is signed by the guardian ad litem of the minors and the order made is "granted." That can only mean that the Court sanctioned the compromise as being for the benefit of the minors.

The learned Advocate-General next argues that the order itself must show that the Court did, as a matter of fact, applied its mind to the terms of the arrangement and was satisfied that the arrangement was for the benefit of the minors. S. 462 does not require that the order of the Court granting leave should be expressed in any particular form. What it says is that

"any agreement or compromise entered into without the leave of the Court shall be voidable against all parties other than the minors."

No doubt the Court in granting the leave has to consider whether the arrangement or compromise is such as can be said to be for the benefit of the minor, but I do not think that the law requires that the order of the Court should, on the face of it, state in so many words that the Court considered the terms of the settlement, and come to the conclusion that the settlement was in the interests of the minor. The question was before the Privy Council in three of the cases that have been brought to our notice, first in *Manohar Lal* v. *Jadunath Singh* (1). There the compromise was held to be bad as, upon the facts, their Lordships found that leave of the Court had not been obtained as required by law. There was no such petition in that case, as there is here, expressed to be under S. 462. The petition for leave in this case bears the signature of the pleaders appearing for the minors, which is always some guarantee that the requirements of the law have been complied with, and there was no evidence in the Privy Council case, as there is here, that the matter was brought to the notice of the Court and the terms of the settlement explained to it.

All that their Lordships laid down was that it must be shown that leave of the Court was obtained either by an order of the Court or in some other way not open to doubt. In *Ganesha Row* v. *Tulja Ram Row* (2) the principle enunciated in *Manohar Lal* v. *Jadunath Singh* (1) was confirmed. In *Subramanian Chettiar* v. *Rajeswara Dorai* (3) their Lordships refer to the above decisions and confirm the proposition previously laid down by them. If the law were, as contended by the learned Advocate-General, that the order of the Court must contain within its four corners a statement that the Court that considered the terms of the settlement had come to the conclusion that they were for the benefit of the minor, their Lordships would, in all likelihood, have so laid it down. We have however been referred by the learned Advocate-General to a decision of the Allahabad High Court in *Kalavati* v. *Chedi Lal* (4). No doubt, the learned Judges there did say that the Court sanctioning a compromise or giving leave ought to make it clear in the order itself that it had considered whether the compromise was beneficial to the minor. No doubt, the Court ought not to leave a matter of this sort in doubt. But it is a very different thing from saying that, if particular forms of expression are wanting in the order although it is proved otherwise that the matter was fully brought to the notice of the Court and the Court granted leave having before it all the considerations, that the compromise must fail on that account. That this is not the law is just what has been pointed out by Jenkins, C. J., in *Virupakshappa* v. *Shidappa* (5). It may be mentioned, as has been pointed out before, that the new Code has used some-

(1) [1906] 28 All. 585=33 I. A. 128=9 C. 219 (P. C.).

(2) [1913] 36 Mad. 295=19 I. C. 515=40 I. A. 132 (P. C.).

(3) A. I. R. 1915 P. C. 33=32 I. C. 258=39 Mad. 115 (P. C.).

(4) [1895] 17 All. 531.

(5) [1902] 26 Bom. 109.

S. N. DAR, B. A. LL. B.,
Vakil High Court,

what different language with respect to this matter. It requires by O. 32, R. 7, that leave of the Court should be expressly recorded in the proceedings. But this is an alteration of a minor character and here at at all events we have got an order in writing. I have therefore no hesitation in finding that leave of the Court had been properly obtained as required by the law.

The next contention of the appellant was to the effect that what had been sanctioned by the Court was only the arrangement contained in the razinamah Ex. 9 and the decree following upon the razinamah. But this is not, to my mind, a correct interpretation of the order of the Court. The provision regarding sale in para. 5 of the petition was an essential part of the agreement by which the suit was compromised. That was placed before the Court, and the evidence of the pleader who appeared for the minors shows that the terms were properly and fully explained to the Court. He is a leading practitioner of considerable position and the learned Subordinate Judge entirely believed his evidence and nothing has been urged by the learned Advocate-General to throw doubt on it. In fact he did not make any such attempt. According to that evidence the whole of the arrangement was brought to the notice of the Court, and it will not be right to presume that the Court wanted to sanction only a part of that arrangement. The entire argument of the appellant is based on the wording of the latter part of para. 6, where it is prayed that the Court might be pleased "to accept the razinamah presented herewith" but this leaves out of account the previous sentences in the same paragraph that "the said arrangement is most favourable to the said minors' interest and benefit," referring to para. 5 containing the provision for sale as well as to the preceding paragraphs. I trust it was the entire arrangement which the Court was asked to approve as being beneficial to the minors.

So far as I have followed the argument of the learned Advocate-General he has not been able to suggest any plausible reason why the parties entering into an arrangement like this should have asked for the sanction of the Court for only a portion of it. It is perfectly true however that the razinamah was presented along with the petition and the Court was asked to pass a decree in accordance with the razinamah, and neither the razinamah nor the decree contains the stipulation as to the sale of the properties. But that to my mind is easily explained by the practice of the Courts with reference to such matters as it obtained at the time in this presidency. It had been ruled in *Venkatappa Nayanim* v. *Thimma Nayanim* (6) and *Muthu Vijaya Raghunatha Udayana Tevar* v. *Thandavaraya Tambiran* (7) that the relief given by a compromise decree should be the same as that claimed in the plaint or less and that any terms which do not come strictly within the scope of the suit could not be embodied in the decree. There can be no doubt that the practice of the Courts in this Presidency was in accordance with these rulings. In *Venkatappa Nayanim* v. *Thimma Nayanim* (6) the learned Judges laid down:

> "It seems reasonable to hold that the words 'so far as it relates to the suit' in S. 375 must be restricted to relief which the Court could have given in the suit and will not embrace reliefs which could only have been given in a suit based upon a different cause of action."

In a more recent decision however in *Natesan Chetty* v. *Vengu Nachiar* (8), following *Joti Kuruvetappa* v. *Izari Sirusappa* (9), this view of the law has been dissented from. But that was long after the date of these transactions which took place in 1899 and 1900. The frame of the three documents Exs. 8, 9 and 10 clearly shows that the Court and the legal advisers of the parties were fully conscious of the law as it stood at the time. It was for that reason that while the petition stated the terms of the compromise the razinamah left out the provision for sale, for it was apparently thought that such a provision could not properly go into the decree according to the abovementioned ruling in *Venkatappa Nayanim* v. *Thimma Nayanim* (6). At the same time the razinamah as well as the decree cannot be properly understood without reference to para. 5 of the petition for according to the razinamah as well as the decree Rs. 52,500 was to be paid within 2nd March by which time the parties contemplated to complete

(6) [1895] 18 Mad. 410.
(7) [1899] 22 Mad. 214.
(8) [1909] 33 Mad. 102=3 I. C. 710.
(9) [1907] 30 Mad. 478.

the compromise by the execution of proper conveyances as provided in para. 5 of the petition Ex. 8. It may also be pointed out here that this point was never raised in the lower Court; it is not suggested in the plaint no issue was framed with respect to it and the judgment which is an extremely lengthy one does not mention it. The learned Advocate-General argues that this is a question of law and therefore it does not make any difference whether it was raised in the lower Court or not. I do not think that it is a pure question of law. Whether the Court wanted to sanction the entire arrangement or only a part of it depends upon what transpired in Court at the time. Evidence would have been forthcoming as to what was stated to the Court in this connexion and whether this stipulation was brought to the notice of the Court and the Court wanted to sanction it or not. The pleader of the minor defendants in that suit was examined at great length and it was not suggested to him that the stipulation regarding the sale was not brought to the notice of the Court. I think there can be little doubt that this contention of the appellant is entirely unfounded.

The learned Advocate-General further urged that the petition Ex. 8, did not contain some material facts which if brought to the notice of the Court might have induced the Court not to grant leave. It is said that some portion of the debts, amounting to about Rs. 10,000 was borrowed by the minor defendants themselves. No doubt if that was so it ought to have been mentioned in Ex. 8. But that there was any such plea has not been proved. The written statement in suit, although apparently in the possession of the pleader of the present plaintiff, was not produced, and there is nothing to show that any such plea was put forward. Besides in the plaint in this case there is no allegation that any facts were suppressed or concealed from the Court. Then it was also argued that the appellant must be allowed to show, even if the compromise is a valid and binding one, that the debts, or some portion of them, were in fact incurred for immoral and illegal purposes. In my opinion this is an untenable proposition. If the compromise is binding, it operates as a bar to the trial of any questions forming the subject-matter of the compromise.

The next contention of the Advocate-General is that since the stipulation regarding the sale is not embodied in the decree the sale deeds Exs. A, A-1 and B, so far as they affected the shares of the then minors, are not valid. These deeds were executed by Lakshmi Ammal, the guardian ad litem of the minors, on their behalf as well as by their father, defendant 1 in the former suit. The contention of the appellant is first of all that Lakshmi Ammal as guardian ad litem had no authority to execute the conveyance. The question is entirely bare of authority; but so far as I am concerned, I have little hesitation in holding that the conveyances in pursuance of Ex. 8 are valid and binding transactions. It is not necessary to pronounce upon any general question as to how far, if at all, a guardian ad litem or next friend is empowered, in conducting litigation on behalf of a minor, to deal with any property of the minor, whether involved in the suit or not. Mr. A. Krishnasawmy Iyer, the learned vakil for some of the alienees, has cited the analogy of the rule of English law relating to the interpretation of the powers of executors, trustees or public bodies charged with certain duties for a general proposition that where the law requires or empowers a person to do a certain act, that person must be taken to be clothed with all the necessary incidental powers to perform that act. The duty of a guardian ad litem is not confined to the conduct of the defence in the suit, but also extends to execution proceedings in which the guardian continues to represent the minor.

The guardian at litem representing a minor in a suit is empowered with leave of the Court to compromise the suit and also to adjust the decree in execution proceedings; and it is urged that it may often happen that such a person could not discharge these duties properly if he was not empowered with the sanction of the Court to apply the property of the minor in carrying out a compromise or adjustment. It is not necessary to discuss the broad question in connexion with this case. Here the minors were sued upon a mortgage. With the sanction of the Court a compromise decree was passed for a certain amount and the

property was made liable to be sold in pursuance of the decree. Instead of allowing the property to be sold by public auction, it was found beneficial to the minors' interests that a portion of the property should be sold to the mortgagees in satisfaction of their claim. A provision like this seems to me to be a matter quite within the scope of the suit and one which could be properly sanctioned by the Court. I am of opinion that where, as here, as a part of the agreement arrived at between the parties the guardian ad litem who represented the minor applies to the Court to sanction an arrangement by which the compromise decree is to be satisfied, e. g., by sale of some of the properties involved in the suit, and the Court finding the entire arrangement to be in the interests of the minor sanctions it, the provision for sale could be enforced. It was argued that the leave of the Court granted under S. 462 does not necessarily mean any more than that the Court thinks that the arrangement is for the benefit of the minor and that it is no concern of the Court to see whether the arrangement can be effectively carried out and if so, by whom.

But there can be no doubt upon the rulings of this Court, and this has not been disputed before us, that if the Court sanctioned an arrangement, but some of its provisions could not be embodied in the decree because they did not relate to the suit as ruled in *Venkatappa Nayanim* v. *Thimma Nayanim* (6), those provisions could be enforced against the minors, though not by way of execution of the compromise decree. The specific arrangement in this case was that the grandmother of the minors as guardian ad litem in this suit should convey some portion of the mortgaged properties to the mortgagees in satisfaction of the compromise decree. It seems to me that if such an arrangement be not within the competence of a guardian ad litem and the sanction of the Court accorded to it is to be of no effect, it might lead to very far-reaching results. The sale deeds can also be upheld on another ground. They were executed in accordance with the provisions of Ex. 18 not only by the guardian ad litem of the minor defendants in that suit but by defendant 1 their father. It is suggested by the learned Advocate-General that each of these two parties, i. e., the father and the minors through their guardian ad litem purported to deal with their respective shares.

But this suggestion is not at all justified by the terms of the documents. There is no mention in them of anyone's share in any village; each of the parties executing the documents clearly intended to deal with the entire property. That was the scope of the stipulation in para. 5 of Ex. 8 and that is the effect of the conveyances Ex. A, A-1 and B. That being so we may leave out of consideration the part played by Lakshmi Ammal, the guardian ad litem of the minor defendants, in joining in the conveyances. The debts were incurred for the purposes of the family, and in order to discharge those debts the father was competent to dispose of the family property. The mere fact that the minors joined in the deeds through a person who might or might not have had authority to represent them in the transaction cannot make any difference as to the effect to be given to the conveyances as the acts of the minor himself. This is amply supported by the ruling of the Judicial Committee in *Gharibullah* v. *Khalak Singh* (10). The facts of that case were essentially analogous to those of the present case. There a deed of mortgage was executed by the karta or manager of the family, one Khalak Singh, as well as by a person purporting to act as the guardian of his minor brother. Their Lordships held according to well established rulings, that there could be no guardian appointed under the Guardians and Wards Act for a minor member of a joint Hindu family and therefore the person purporting to act as guardian had no authority to represent the minor.

Nevertheless they held that the transaction was valid, inasmuch as the debts were incurred for family purposes and Khalak Singh, the managing member of the family, executed the document. There is a similar ruling of this Court in *Surapa Raju* v. *Venkatyya* (11) and though the case of *Gharibullah* v. *Khalak Singh* (10) was not brought to the notice of the learned Judges, they laid down practically the same proposition. I am unable to see how this case can be distinguished in substance from those rulings which are

(10) [1903] 25 All. 407=30 I. A. 165=8 Sar 483. (P. C.).
(11) [1915] 32 I. C. 802.

based on what seem to me to be obviously good reasons. The father of the present plaintiff was clearly entitled to dispose of the properties in order to discharge these debts, and because the mortgagees or purchasers thought it safer that the minors should also be represented through their guardian ad litem or anybody else, that cannot make any difference as to the validity of the act of the plaintiff's father. I am therefore of opinion that this appeal fails altogether and must be dismissed with costs. It may be mentioned that apart from the general defence, defendant 12 in the suit also relied upon limitation, as he was made a party after the period of limitation had expired. The learned Advocate-General did not press the case against him and did not challenge the dismissal of the suit so far as he was concerned. I may point out that the judgment of the learned Subordinate Judge in this case is unduly prolix, covering 90 printed pages. It begins with verbatim copies of the pleadings, then sets out the issues and under each issue, states the contentions and arguments of the parties at great length. In dealing with the evidence, no attempt is made to concentrate attention upon such evidence as really throws light upon particular issues. Similarly with regard to the reported cases many passages are quoted at length although the observations bearing on the questions at issue could be compressed within much shorter compass. There is a great deal of repetition throughout the judgment, with the result that it has necessarily taken up much of the time of this Court in finding out the conclusions of the learned Judge and the reasons on which those conclusions are based. We take this occasion to point out the desirability on the part of the lower Court to endeavour to set out the facts of the case, the questions for decision and the reasons for their conclusions in a way which would be of help to the appellate Court in ascertaining without unnecessary difficulty how the case has been tried and how far the conclusions of the trial Court were justified.

Oldfield, J.—I have nothing to add to my learned brother's reasons for holding that no argument based on S. 462 of the previous Code has been made good. As regards the next point dealt with by him, viz., the capacity of Lakshmi Ammal to execute Ex. A as guardian ad litem, I am not prepared to adopt his reasons for his conclusion.

It is however unnecessary that I should deal with this point, because I am able to concur in his alternative ground of decision that the execution of Ex. A by T. S. Subbarama Iyer, the father of the plaintiff, was sufficient. In doing so, I desire only to refer to the actual language of Ex. A. The persons executing it are detailed as, firstly, T. S. Subbarama Iyer; then his sons, and their names are given with a statement that they are minors; then Lakshmi Ammal is mentioned as guardian for the said minors and again there is a reference to "Subbarama Iyer, for himself." It is unnecessary that I should follow my learned brother through his treatment of the authorities and his statement of the law on this point, with which I with great respect entirely agree. I only wish to observe that the reference in the document to Subbarama Iyer executing it for himself need not and cannot be, as the learned Advocate-General contended, read simply as meaning that he is executing in respect of his own share. Subbarama Iyer is referred to as executing for himself in order to distinguish his execution from that of Lakshmi Ammal, who is referred to as executing for the minors. The plaintiff's argument here entails that Subbarama Iyer did execute it for himself, firstly, as owner of his share and secondly, as the father of the minors; that is quite sufficient to support the conclusion in favour of the defendants, and there is no necessity whatever to restrict the interpretation of the words referred to as the plaintiff proposes. In these circumstances I concur in my learned brother's decision and also in his observations on the character of the lower Court's judgment. I may add that it seems to me regrettable that the lower Courts should think it necessary to set out the whole of the pleadings, as they usually do, in extenso in their judgments, especially where they are, as here, voluminous, in disregard of the fact that the parties usually think it necessary to print them as in fact has been done in this case.

(This appeal having been set down for being spoken to this day, the Court delivered the following judgment.)

Abdur Rahim, J.—I think the respondents who are represented by Mr. K.

Srinivasa Ayyengar and Mr. A. Krishnaswami Ayyar respectively should be allowed separate fees in this appeal. If they had not succeeded on the preliminary point, it is clear from the grounds of appeal that there would have to be separate arguments on behalf of the two sets of respondents. But Mr. K. Srinivasa Ayyangar has asked us also to apply R. 41 of the Appellate Side Rules (relating to practitioner's fees) to this case. It provides that:

"in cases of special difficulty or importance, the Judge or Bench disposing of an appeal or other matter may, on the application of a party, direct that (1) a higher fee than would ordinarily be admissible under those rules be allowed, (2) two sets of fees be allowed to a party who has engaged more than one advocate, vakil or attorney."

No doubt in this case three senior leading vakils of this Court have been engaged on the side of the respondents and the present rule regarding vakil's fees may be taken to be quite inadequate to meet the costs of respondents in respect of vakil's fees. But R. 41 is meant to apply only to exceptional cases, that is, cases of exceptional difficulty and importance and we are unable to hold that the present case is one of such a nature. It may be that the present rules in force regarding practitioner's fees are not in touch with the actual practice of the profession but that is a matter for the profession as well as the authorities to consider. So long as the rules prevail, we have to give effect to them even though their application in particular cases may work considerable hardship. All that I would order is one set of costs for respondent 8 and another set for respondents 9 and 12 to 14.

Oldfield, J.—I agree.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 312 (1)

WALLIS, C. J. AND NAPIER, J.

Mahboob Bi—Plaintiff — Appellant.

v.

Sherifa Bi and *others* — Defendants—Respondents.

Original Side Appeal No. 44 of 1917, Decided on 8th November 1918, from order of Kumaraswami Sastri, J., D/- 30th April 1917.

Practice—Jurisdiction.

A Judge sitting on the original side of the High Court has jurisdiction to modify the minutes of his order before the formal order is drawn up. [P 312 C 2]

V. V. Srinivasa Aiyangar — for Appellant.

K. C. Desikachariar, V. Ramaswami Aiyangar, T. Ananda Row, A. Narasimhachariar and *T. A. Vijiaragavachariar*—for Respondents.

Judgment. — At the time Kumaraswami Sastri, J., passed his present order, no formal order had been drawn up on the minutes of his previous order, and we think that, as a Judge sitting on the original side of the Court, he had jurisdiction to modify the minutes before the formal order was drawn up: see *In re Suffield and Watts, Ex parte Brown* (1) and *Preston Banking Co.* v. *Allsup* (2). The appeal is dismissed.

S.N./R.K. *Appeal dismissed.*

(1) [1888] 20 Q. B. D. 693.
(2) [1895] 1 Ch. 141.

A. I. R. 1919 Madras 312 (2)

SADASIVA AIYAR AND NAPIER, JJ.

Krishnaswami Naidu—Plaintiff—Appellant.

v.

Akkulammal Avergal and *others*—Defendants—Respondents.

Second Appeal No. 680 of 1917, Decided on 24th July 1918, against decree of Sub-Judge, Madura, in Appeal Suit No. 26 of 1916.

(a) Madras Proprietary Estates Village Service Act (1894), Ss. 10, 11 and 15—Person appointed by proprietor not disqualified under S. 10 (1)—Appointment duly reported—Divisional Officer cannot act under S. 11.

Where a person appointed by the proprietor under S. 15, Madras Proprietary Estates Village Services Act of 1894, is not disqualified under any of the five heads (a) to (e), sub-S. (1), S. 10 of the Act, and the appointment has been duly reported to the Divisional Officer, the latter has no right to take action under S. 11 and exercise the power of making an appointment himself. [P 314 C 1]

(b) Madras Proprietary Estates Village Service Act (1894), S. 15 (3)—Divisional Officer is alone competent to make appointment where no report is made—Order cannot be interfered with in appeal or otherwise.

Clause (3), S. 12, vests the power of making an appointment, where no report has been submitted in accordance with the last sentence of Cl. (1), in the Divisional Officer alone and neither the Collector nor the Board of Revenue can interfere with his order by way of appeal or otherwise. [P 314 C 2]

(c) Madras Hereditary Village Officers Act (1895), S. 21—Per *Sadasiva Aiyar, J.*—Suit for declaration that appointment of village headman under S. 15 is illegal and that

plaintiff is legally entitled headman is cognizable by civil Court—*Napier, J., contra.*

Per *Sadasiva Aiyar, J.*—S. 21, Madras Hereditary Village Officers Act prohibits civil Courts from deciding any claim to succeed to particular offices, but not any claim to be appointed in the first instance to any of those offices. A suit therefore for a declaration that an appointment of village headman made under S. 15, Madras Proprietary Estates Village Services Act is illegal and that plaintiff is the legally entitled headman is cognizable by a civil Court. [P 313C 2]

Per *Napier, J., dissenting*—A suit to declare that the plaintiff is a person eligible for a village office under the Madras Hereditary Village Officers Act of 1895 and that therefore the appointment of another person not eligible under the Act is bad, is not cognizable by a civil Court.

It is not open to a man who has no right and claim in himself, and does not bring the suit as a member of the public affected by the appointment, to ask for a declaration that the person appointed is not a person qualified to hold the office. [P 316 C 1]

(d) Madras Proprietary Estates Village Services Act (1894), S. 15 (3) — Proprietor selecting person outside family — Power of appointment does not vest in Divisional Officer.

Section 15 (3) does not vest the power of appointment in the Divisional Officer by reason of the proprietor having selected a person outside the family of the last holder of the office. [P 315 C 1]

(e) Madras Hereditary Village Officers Act (1895), S. 21—Office of headman may be held by two persons.

The office of headman may be held by two persons, one exercising Police and Magisterial functions and the other performing revenue and other duties. [P 314 C 2]

A. Krishnaswami Aiyar and *T. M. Krishnaswami Aiyar*—for Appellant.

V. Ramesam and *T. Rangachariar*—for Respondents.

Sadasiva Aiyar, J.—The plaintiff is the appellant. His suit was for a declaration that the appointment of defendant 3 to the office of headman of the new village of Muthalapuram created by the amalgamation of two old villages, was illegal and that therefore the plaintiff's appointment by the Divisional Officer affirmed by the District Collector conferred the office upon the plaintiff. He also sued for recovery of the arrears of emoluments received wrongly by defendant 3. Defendant 3 among other pleas contended that the civil Court had no jurisdiction by the provisions of S. 21, Hereditary Village Officers Act, Madras Act 3 of 1895, to entertain such a suit. The lower Courts overruled this plea as to jurisdiction, but on the merits dismissed the plaintiff's suit. I shall first deal with the question of jurisdiction. S. 21 of Madras Act 3 of 1895 provides:

"No civil Court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified in S. 3 or any question as to the rate or amount of the emoluments of any such office or, except as provided in prov. (ii). sub-S. (1), S. 13, any claim to recover the emoluments of any such office."

So far as the suit relates to the recovery of emoluments, it is prima facie barred by S. 21, unless the claim to those emoluments is excepted by prov. (ii), sub-S. (1) S. 13. But the proviso saves the jurisdiction of the civil Court only as regards recovery of land forming the emoluments of the office, and there is no prayer in the plaint for the recovery of any land as emoluments. So far therefore as the claim to emoluments is concerned, I think the civil Court has got no jurisdiction, and the lower Courts ought to have dismissed the suit so far as it relates to the claim for emoluments. Then coming to the suit so far as it relates to the two declarations (amalgamated into one in the plaint), namely, to the declaration (1) that the appointment by the Board of Revenue of defendant 3 is illegal, and to the declaration (2) that the plaintiff is the legally entitled headman of the new village, I think S. 21 does not apply to the claim for these two declarations. It has been held in *Mavoulu Seetharam Naidu* v. *Doddi Rami Naidu* (1) that S. 21 should be read along with S. 13 and that a suit in the civil Court is barred only where the relief claimed is such that the plaintiff could maintain a suit therefor before the Collector under S. 13. Under S. 13 a suit before the Collector can be brought only on the ground that the plaintiff is entitled to the village office on certain specified grounds. The claim in the present suit is not covered by those grounds and therefore the plaintiff is not entitled to bring any suit for these declaratory reliefs before the Collector, and hence S. 21 does not bar the maintainability of the present suit in the civil Court.

On another narrower ground also, S. 21 does not apply to the present suit, because S. 21 prohibits the civil Court from taking into consideration or deciding any claim to succeed to particular offices (which include the office now in dispute), but not any claim to be appointed in the first instance to any of those offices. I therefore agree with the lower Courts on the question of jurisdiction.

(1) [1910] 33 Mad 208=5 I.C. 137.

so far as the declaratory reliefs are concerned.

Coming to the merits, the newly created office of headman in the new revenue village falls, in my opinion, under both S. 9 and S. 15, Proprietary Estates Village Services Act, Madras Act 2 of 1894. I think that the two sections should be read together, where a question as regards the appointment to a new office created by the amalgamation or division of old villages has to be considered. The provisions of the two sections are not inconsistent with one another. Of course, Ss. 10 and 11 also should be read along with Ss. 9 and 15 so far as they can be made applicable to the new offices in a village newly created under S. 15. Reading the sections thus together, it is clear that the power of making an appointment to the newly created headman's office (which is the office now in question) vests in the first instance in the proprietrix, namely defendant 1 in this case. She appointed defendant 3 and reported her action to the Revenue Officer in charge of the Division in accordance with the last sentence of S. 15, in Cl. (1), Act 2 of 1894. Defendant 3, so appointed, was not disqualified under any of the five heads (a) to (e), sub S. (1), S. 10, Hence the Divisional Officer had no right to take any action under S. 11 of the Act. The only other provision empowering the revenue officer in charge of the division to interfere with an appointment made by the proprietrix is found in Cl. (3), S. 15. That clause says:

"If the propeictor fails to submit the report referred to in sub-Ss. (1) and (2) within six weeks of the creation of the new offices, etc,"

the powers vested in the proprietor by sub-Ss. 1 and 2 may be exercised by the revenue officer of the division. In this case, the proprietrix did not fail to submit the report and the Divisional Officer had therefore no right to exercise the powers of the proprietrix himself. No doubt. no special provision seems to have been made in the Act for a case in which the proprietrix in her report of appointment selects a person outside the families of the last holders of the offices which have been abolished, she being under an obligation by S. 15, Cl. (1), to select only such a person. It is argued that if a liberal construction is given to the language of Cl. (3), S. 15, that is, if the clause,

"if the proprietor fails to submit the report referred to in sub-Ss. (1) and (2), etc.,"

be held to include a case where the report under sub-S. (1) makes an appointment of a person which the proprietrix is prohibited from making the Divisional Officer obtains jurisdiction to exercise the powers of the proprietrix. I do not think that the language of Cl. (3) is capable of such extension, though I must admit that I have come to this conclusion after much hesitation. Assuming however that Cl. (3), S. 15, did empower the Divisional Officer to exercise the powers of the proprietrix, if her appointment was not made from among the families of the last holders of the abolished offices, Cl. (3), S. 15 vests such powers in the Divisional Officer alone, not in any higher authority. No appeal is provided for in the Act to the Collector or from the Collector to the Board of Revenue in respect of orders passed by the Divisional Officer when exercising the proprietrix's powers so vested in him. I am therefore of opinion that so far as the orders of the Collector and the Board of Revenue are concerned, they were passed wholly without jurisdiction. Then we have to consider the question whether the proprietrix in selecting defendant 3 selected a person who was not among the families of the last holders of the abolished offices, and whether consequently the Divisional Officer had a right to act under Cl (3), S. 15, assuming that clause applies.

Both the lower Courts have come to the conclusion that defendant 3 did hold the office of Nattamaigar (headman) in one of the old villages which has now ceased to exist. It is well known that the office of headman, though in the olden days held by one person, had been in several cases in more recent times held by more than one person, usually two, of whom one exercises some only of the several responsible duties which belong to the undivided headman's office and the other the other remaining duties. The police and magisterial functions were usually exercised by one, and the revenue duties and the exercise of authority over the talayari, mirganti and the other village servants, so far as their duties were connected with the collection of revenue, were exercised by the other.

In such a case. both the officials can be called "headmen." Though in the popular view, that one of the two headmen who exercised Police and Magisterial functions might be considered as the more important officer, it cannot be said that the other headman did not also hold the office of headman. I therefore think that defendant 3's appointment by the proprietrix as headman is not illegal by reason of the fact that he had not usually exercised police and magisterial functions which had been exercised usually by the other headman, and I would therefore on this ground also uphold the dismissal of the plaintiff's suit by the lower Courts. The second appeal is therefore dismissed with costs —two sets.

Napier, J.—It would, in my opinion, be sufficient for the disposal of this case to hold that there is a finding of fact as to the position occupied by defendant 3 in the village which we are not competent to interfere with, and that therefore the appointment of defendant 3 by the village proprietrix is in accordance with law, and the suit necessarily fails. But several other questions have been raised as to the powers of the Courts and of the Revenue Officers, and have been dealt with by my learned brother and I wish therefore to make a few observations on some of them. The first point raised is whether the suit is not cognizable by the civil Court. It is suggested that the suit is not cognizable, because S. 21, Act 3 of 1895 says :

" No civil Court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified in S 3 or any question as to the rate or amount of the emoluments of any such office, or, except as provided in proviso (ii). sub-S. 1, S. 13, any claim to recover the emoluments of any such office."

Now, with regard to the claim here, it does not appear to me to be a claim to succeed to any of the offices specified in S. 3, because the word "succession" is used in Act 3 of 1895 with reference to hereditary rights and no such right can be claimed. S. 11, Cl. (2), says as follows:

"The succession shall devolve in accordance with the law or custom applicable to the office in question at the date on which this Act comes into force,"

and the next clause says:

"Where the next heir is not qualified under sub-S. (1), the proprietor shall appoint the person next in order of succession who is so qualified, etc ,"

and Cl. 4 says:

"When the person who would otherwise be entitled to succeed to an office is a minor, etc."

Section 12 says:

"The succession to village offices forming Cl. (4) in S. 3 shall devolve in accordance with the law or custom, etc."

This appointment was made under S. 15 Act 2 of 1894, which provides that where there has been a re-grouping of villages, all the village offices shall cease to exist and new offices which shall be hereditary shall be created for the new village, and in choosing persons to fill such offices the proprietor should select the persons whom he may consider the best qualified from among the families of the last holders of the offices which have been abolished. Therefore no person can claim to be appointed under this section by virtue of a right of succession. So far as to the first part of S. 21, Act 3 of 1895. The next is, no civil Court shall have authority to take into consideration or decide any claim to recover the emoluments of such office, such office being an office specified in S. 3. The offices specified in S. 3 are, among others, hereditary village offices to which the Madras Proprietary Estates Village Services Act is extended, and other hereditary village offices in proprietary estates, except certain offices. Now it has been held by this Court in the case of *Movoulu Seetharam Naidu* v. *Doddi Rami Naidu* (1) that although there may be suits to recover emoluments which come within the language of S. 21 when read broadly, those suits unless they are such as could be filed in a Revenue Court under S. 13, are not excluded under S. 21. The suit in 33 *Mad.* 208 (1) was one to recover emoluments in the following circumstances:

"The plaintiffs case was that he was the Village Munsif of Balagudaba; that in the year Vilambi he leased to the defendant the suit lands which formed part of his Village Munsif's Akaram, for a cist of Rs. 40, and got akadapa executed in his favour; that after the expiration of the lease the defendant held possession of the land; that the plaintiff having made a demand on the defendant to pay the cist and to deliver possession of the land, the latter refused to do so."

So it was a claim to recover the emoluments of the office from a person who was holding them over after the expiry of the lease. Whether it would be neces-

sary to go to S. 13 to decide that such claim was not covered by S. 21, I am not quite clear. At present I am inclined to think that apart from S. 13, S. 21 could not have been held to cover the case, and I do not think it necessary in this case to decide whether the view taken by the Bench in that case that no claim which is not covered by S. 13 is covered by S. 21 is correct or not. The language of the earlier part of the section is certainly very wide: it is, "to take into consideration or decide any claim to succeed to any of the offices, etc.," and it may be that there are cases which are not covered by S. 13 which should properly be taken under S. 21, and I am not satisfied yet that this suit is not within the mischief of S. 21. The fact that otherwise there would be no Court to try such a suit does not weigh with me as much as it did with the learned Judges who decided that case; because I am satisfied that there is no right of suit. This is a suit to recover emoluments and the office by a person who cannot found any claim on any right under the statute or by any appointment under the statute. It may be that if he had been appointed by the zamindar and the appointment had been cancelled by the Revenue Court, he would have been entitled to bring a suit to recover the office. But he was not appointed by the zemindar and therefore he cannot base any claim on appointment. What he seeks to do is to have it declared that he is a person eligible under the Act and therefore that the appointment of another person who is not eligible under the Act is bad. In my opinion no such suit will lie. The fact that he is eligible does not entitle him. S. 15, Act 2 of 1894, is specific on the point. It says:

"In choosing persons to fill such new offices, the proprietor shall select the persons whom he may consider the best qualfiied from among the families of the last holders of the offices which have been abolished."

This obviously may give a very wide sphere of selection, because two or more villages may be amalgamated and one can well imagine a case where four villages were amalgamated in each of which there was a headman with a certain number of members of his family. There might be 50 or 60 persons eligible for the appointment, and it is undoubtedly at the discretion of the proprietor which of these 50 or 60 men to appoint. It is not a case of a person having a right to succeed, as being next in order of succession, provided that he has the necessary qualifications. The plaintiff in this case has no right whatsoever to be appointed, and as he has not been appointed his position is no higher than that of any member of the public. I am clearly of opinion that it is not open to a man who has no right and claim in himself, and does not bring the suit as a member of the public affected by the appointment, to ask for a declaration that the person appointed is not a person qualified to hold the office. I am therefore of opinion that the suit fails on that ground, as well as on the ground that the person appointed is one whom the village proprietor could appoint.

I agree with my learned brother in the views he has expressed as to the powers of the revenue officer, and am satisfied that the Board of Revenue had no jurisdiction to set aside the order of the Collector on appeal any more than the Collector or Divisional Officer had any power to make the appointment. That is a matter however which does not affect the decision of this case, and it is sufficient to say that the suit has been properly dismissed for the reasons which I have just stated.

S.N./R.K. *Appeal dismissed.*

A.I.R. 1919 Madras 316

SADASIVA AIYAR AND NAPIER, JJ.

Public Prosecutor—Appellant.

v.

Mahomed Sheriff Saheb and *others*—Accused.

Criminal Appeals Nos. 93 to 104 of 1918, Decided on 19th July 1918, against order of First Class Bench Judge, Madura, in Summary Cases Nos. 955, 956, 958, 959, 962, 964, 965, 966 and 967 of 1917 respectively

Madras District Municipalities Act (1884), S. 88 (1) (l)—Stable where one or more horses are kept — Livery-stable—Element of letting out on hire involved in use of places under S. 188 (1) (l)—Omission to take out license is offence.

Where the element of letting out on hire is involved in the use of the places indicated by the words in S. 188, Cl. (1) (l), a license should be taken out for keeping such a place and the omission to take out a licence is an offence.

A stable is a livery-stable within the meaning of S. 188, Cl. (1) (l), whether a single horse or more horses than one are kept there for hire.

[P 317 C 1]

Public Prosecutor—for the Crown.

Judgment.—The Bench Magistrates are no doubt right in saying that according to *Queen-Empress* v. *Ayyakannu Mudali* (1) the several words used in in Cl. (1) (l), S. 188, District Municipalities Act, "should be reasonably construed." But the reasonable construction indicated in the decision is that if the element of letting out on hire is involved in the use of places indicated by the words, the legislature intended that such places should fall under the section and a license ought to be taken out for keeping such a place and the omission to take out a license should be punished. The decision in *Public Prosecutor* v. *Maduvalath Gopalan* (2), Criminal Appeal No. 408 of 1902, reported in 1 *Weir* 737, is clearly applicable, the principle involved in that decision being, in our opinion, the same as that on which *Queen-Empress* v. *Ayyakannu Mudali* (1) was decided. Whether it is a single horse or more than one horse kept for hire in a stable, we think that the stable is a livery-stable: see also the definition of "livery horse" in Murray's New English Dectionary. We there set aside the acquittals in this case and in the connected cases, convict the accused under Cl. (1), S. 188, District Municipalities Act, and fine the accused each 8 annas.

S.N./R.K. *Acquittals set aside.*

(1) [1898] 21 Mad. 293
(2) 1 Weir. 737.

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* A. I. R. 1919 Madras 317

OLDFIELD AND SESHAGIRI AIYAR, JJ.

Rangasami Chetti — Plaintiff—Appellant.

v.

Thangavelu Chetti — Defendant—Respondent.

Second Appeal No. 1116 of 1918, Decided on 10th February 1919, against decree of Temporary Sub-Judge, Cuddalore, in A. S. No. 153 of 1916.

(a) Limitation Act (1908), S. 15—Attachment is not "injunction or order."

An attachment is not covered by the expression "an injunction or order" in S. 15: 8 *Mad.* 229, *Diss. from.* [P 318 C 2]

*** (b) Limitation Act (1908), Ss. 6, 7 and 8—Assignee of minor is not entitled to privilege of extension.**

The assignee of a minor cannot avail himself of the privilege of the extension of limitation given by S. 6. The exemption granted to the minor by the section is in the nature of a personal privilege which does not enure to a mere transferee. [P 320 C 1]

Per *Oldfield, J.*—S. 8 is ancillary to and restrictive of the concession granted in Ss. 6 and 7 and does not confer any substantial privilege. [P 318 C 1]

S. Subramanya—for Appellant.

Oldfield, J.—I have had the advantage of reading the judgment which my learned brother is about to deliver, and as I agree with his conclusion. I deal only with the one important question we have to decide: whether the appellant is entitled to the extension of time he claims as transferee from a minor. It does not appear material that his transfer was not voluntary, but was effected by attachment followed by a sale of the debt and an order vesting it in him as purchaser; and I assume that time did not begin to run before the minor's acquisition of the cause of action. Appellant's contention is that he is entitled to the full extension of time which the minor would have had if the cause of action had remained his property or, in the alternative, to three years from the date when his own ownership began.

This alternative contention can be dealt with shortly. It cannot be justified by any provision of the Limitation Act; for S. 6 (3) is as, will be shown, the only one extending time for a person other than the one disabled and it is inapplicable to appellant, a transferee during the latter's lifetime. In fact the argument in this form must rest solely on the tentative reasoning of Wilson, J., in *Rudra Kant Surma Sircar* v. *Nobo Kishore Surma Biswas* (1) that an alienation of the cause of action terminates the existing disability and on general principles carries with it the right to sue thereon which the alienor on such termination would acquire. But with all due deference although on general principles the transferor's right to sue may pass with the cause of action, that goes no way towards answering the question whether it does so, when the operation of those principles has been interrupted by the special law, with which we are dealing, and special considerations have been introduced; and it is still necessary to meet the argument of the majority of the Court that the disabled person's right to an extension is personal and does not necessarily remain alive after an alienation by him. Turning to appellant's argument in its wider form I need not repeat my learned brother's references to the cases. For although

(1) [1883] 9 Cal. 663.

the actual current of authority, whatever its tendency here and in Bombay, is in respondent's favour it is not strong enough to conclude the question. To turn then to the relevant provisions of the Limitation Act, their wording does not authorize appellant's contention and their intention, so far as it can be deduced is against it.

Firstly as to the wording, S. 6 (1) throughout refers to one person only, the person entitled to sue or apply for execution, and does not admit of the violent construction proposed by appellant, that, one person being referred to as disabled, that person or in the alternative his transferee, are referred to later in the clause as eligible for indulgence; and in my opinion the possibility of such construction is further negatived by the specification in Cl. (3) of one person, for whose benefit the right to indulgence inheres in a qualified form, the legal representative, to the exclusion of the transferees from the disabled person during his lifetime. Next S. 8 can, it is argued, be regarded as extending time in favour not only of the minor or idiot concerned, but also of the person indirectly disabled from suing, the transferee. But this interpretation of the reference to the person "affected by the disability" is inconsistent with the meaning of disablility in Ss. 6 and 7, which are explicitly referred to and in which "disability" is used of the particular disabilities mentioned in the former, not of the disability to sue; and in any case S. 8 is statedly ancillary to and restrictive of the concession granted in those sections and does not confer any substantive privilege. It has been suggested that the definition of "plaintiff" in S. 2, as including a person from or through whom the right to sue is derived, is relevant to the discussion. But it plainly is not so, since this part of the Act is throughout expressed, no doubt advisedly, with reference to the person entitled to sue.

We are on even firmer ground when the intention of these provisions is considered. I repectfully concur in the opinion of the majority of the Court in *Rudra Kant Surma Sircar* v. *Nobo Kishore Surma Biswas* (1) that the privilege is personal and cannot be transferred with property or a right of action. I add only that, if the contrary were the case S. 6 (3) would be superfluous and S. 7 an exception to the principle, for which no reason has been shown, since if the privilege of one of the persons jointly interested attaches to the cause of action, it must attach to it is a whole, and the ability of one of such persons to give a discharge will be immaterial. In fact however the appellant's contention has been supported here, as it commended itself to Wilson, J., and might perhaps have commended itself in *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai* (2), of a decision had been necessary, on grounds of convenience or in order to avoid anomaly. It is a sufficient answer that inconvenience and anomaly are almost inevitable, where the general law is overridden by personal privilege and natural expectations founded on the former are disappointed. It may be added that, where, as in England, the law is as appellant contends that it should be construed here, anomaly and inconvenience are nonetheless to be apprehended. Darby and Bosanquet, Statutes of Limitation, Edn. 2, p. 399. The appeal fails and is dismissed.

Seshagiri Aiyar, J.—Plaintiff's assignor obtained a decree against two persons. It was assigned to the plaintiff. In execution of the decree, he attached a book debt due to his judgment-debtors from the present defendant. That debt became due in August 1911. The attachment was made in November 1913. Plaintiff himself became the purchaser of the debt and a certificate was issued to him on 22nd February 1915. The present suit was brought on 15th March 1915. The question is whether the suit is in time. The first contention raised by the learned vakil for the appellant before us was that S. 15, Lim. Act, saved the bar because the attachment was pending between November 1913 and February 1915. This contention must be overruled. There is the direct decision of the Allahabad High Court in *Shib Singh* v. *Sita Ram* (3) to the effect that an attachment is not covered by the expression "an injunction or order" in S. 15, Lim Act. The Judicial Committee in *Beti Maharani* v. *Collector of Etawa* (4) held that in the case of an attachment

(2) [1894] 17 Mad 316.
(3) [1891] 13 All. 76.
(4) [1895] 17 All. 198=22 I. A. 31 (P.C.).

before judgment S. 15 will not save the bar. In that decision they expressly approve the principle enunciated in *Shib Singh* v. *Sita Ram* (3). In *Shunmugam* v. *Moidin* (5) it seems to have been suggested that the prohibitory order issued during the attachment would come within the meaning of S. 15. That dictum cannot be regarded as good law in the face of *Beti Maharani* v. *Collector of Etawah* (4). Therefore the first contention fails.

As regards the applicability of S. 14, it is enough to say that the attachment proceedings are not based on the same cause of action as the suit to recover money on the book debt. Another contention was that there was an acknowledgment which saved the limitation. Ex. B, which is relied on as containing the acknowledgment, does not acknowledge a subsisting liability. The deponent distinctly says: "I have discharged the debt." This is not covered by Expl. 1, S. 19. Following *Bollapragada Ramamurthy* v. *Thammanna Gopayya* (6) I hold that there is no acknowledgment of any subsisting liability. The more difficult question relates to the applicability of S. 6, Lim. Act. It would have been better if the Subordinate Judge had given a decision on the facts, as to whether the original creditor of the defendant was a major at the time of the suit. That would have saved the discussion of the question of limitation which was very elaborately argued by the learned vakil for the appellant. But as he has not done so, it is necessary to deal with the abstract question of law. The point is whether the assignee of a minor can avail himself of the privilege of the extension of limitation given by S. 6, Lim. Act. In *Rudra Kant Surma Sircar* v. *Nobo Kishore Surma Biswas* (1) the matter was considered very fully by a Bench of five Judges. Garth, C. J., said:

"It seems to me that the provisions in the Limitation Acts, which relieve minors and others under disability . . . . . are purely personal exemptions."

Mitter, J., McDonell, J., and Prinsep, J., were all of the same opinion. In the referring judgment no doubt, Wilson and Field, JJ., seemed inclined to take the opposite view. This Full Bench decision has been followed in Calcutta in a number of cases. In Bombay in the earlier cases ending with *Mahadev* v. *Babi* (7), the same view was taken. But in *Arjun Ramji* v. *Ramabai* (8), the learned Chief Justice and Heaton, J., were apparently inclined to reconsider the question. In the case before them it was the personal representative, not an assignee, that brought the suit. There is no direct decision in Madras. In *Subramanya Pandya Chokla Talavar* v. *Siva Subramanya Pillai* (2) doubt seems to have been thrown upon *Rudra Kant Surma Sircar* v. *Nobo Kishore Surma Biswas* (1). But there is no decision of the question. In *Ramanuja Ayyangar* v. *Sadagopa Ayyangar* (9) it was held that where for a debt due to a minor a bond was executed benami to the mother, the mother cannot avail herself of the extended period of limitation on the ground that the real owner was an infant. In this state of the authorities it is desirable to consider closely the history and the language of S. 6. In 3 and 4 Will. IV C 27, the disability section is S. 16. This was amended by 37 and 38 Vict. C 57, S. 3, and the amended S. 16 provides:

"If such person shall have been under any of the disabilities hereinafter mentioned, (that is to say) infancy, coverture, idiotcy, lunacy or unsoundness of mind, then such person or the person claiming through him, etc."

It must also be remembered that in both 3 and 4 Will. IV there was a definition of the term "person through whom another claimed," and it clearly included the assignee. With those statutes before them the Indian legislature advisedly omitted the words "or persons claiming through or under them." It may be mentioned that even under the English section it is considered doubtful whether the assignee can get the benefit of the extended period: see p. 399 of Darby and Bosanquet. But apart from that if we come to the Indian Act we find in S. 6, Cl. (1), it is only the minor, the insane or the idiot who are mentioned as entitled to the benefit. Cl. (2) speaks of successive disabilities to such persons. Cl. (3) says that, where the disability continues up to the death of such a person, his legal representative may institute the suit. The special provision in favour of legal representatives, and the provision that such a representative can in-

(5) [1885] 8 Mad. 229.
(6) [1916] 40 Mad. 701=35 I. C. 575.
(7) [1902] 26 Bom. 730.
(8) [1917] 40 Bom. 564=37 I. C. 221.
(9) [1905] 28 Mad. 205.

stitute the suit after the death of the person who was under disability, make it clear that an assignee was not within the contemplation of the legislature and that suits by such assignees during the lifetime of the disabled persons should not have the benefit of the extended period. Cl. (4) makes a similar provision in favour of the legal representative when there have been successive disabilities. It seems to me that on the principle *expressio unius personae vel rei, est exclusio alterius*, S. 6 should be regarded as not applicable to assignees from a minor. These considerations show that the legislature regarded that exceptions granted to minors were in the nature of personal privileges, which should not enure for the benefit of a bare transferee. In my opinion therefore the appeal fails and must be dismissed. I agree with the order of my learned brother.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 320

SESHAGIRI AIYAR AND NAPIER, JJ.

Govinda Menon and *others* — Defendants—Appellants.

v.

Kuppan Nambudripad and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1248 of 1916, Decided on 6th November 1917, against decree of Dist. Judge, South Malabar, in Appeal Suit No. 636 of 1915.

Malabar Law—Kanom—Kanomdar not inducted into possession—Still mortgagor can sue for redemption.

The mere fact that the kanomdar was not inducted into possession does not bar the mortgagor from suing for redemption. So long as the mortgage relationship is acknowledged by the mortgagee, the latter is estopped from questioning the mortgagor's title ; 12 *I. C.* 913, *Foll.*

[P 320 C 2]

K. Pandalai—for Appellants.

C. Madhavan Nair—for Respondents.

Judgment.—We agree with the reasoning and the conclusion of the learned District Judge. The plaintiff executed to defendant 2, as the karnavan of his tarwad, Ex. A, the deed of mortgage now sued on. The suit is for redemption. The plea is that, as the defendants were not let into possession by the plaintiff, it is open to them to plead that the plaintiff has no title to sue. Dr. Pandalai contended before us that the view taken by the Full Bench in *Venkata Chetty* v. *Aiyanna Gounden* (1) is not applicable to mortgagees. We must now take it as settled that a kanom is an anomalous mortgage, although, as pointed out in the earlier decisions, there is in a kanom a combination of a mortgage and of a lease. Assuming for the sake of argument that S. 116, Evidence Act, is not in terms applicable to kanoms, we think the principles enunciated in *Venkata Chetty* v. *Aiyanna Gounden* (1) govern this case. The basis of the law of estoppel is not that possession has been given by one party to the other, but that both parties have entered into a specific relationship on the understanding that the rights incident to that relationship do subsist. In the case of tenants, this Court held that not only letting into the possession but also the relationship acknowledged by the tenant estops him from disputing his landlord's title. In the same way, the relationship acknowledged by the mortgagee estops him from denying his mortgagor's title. There may be an additional fetter on him if he was also inducted into possession. It is true that the cases Dr. Pandalai has placed before us do not hold that in cases where the initial possession was not taken from the mortgagor, the mortgagee will be estopped.

But we fail to see why the non-letting into possession directly by the mortgagor should act to his prejudice, if his title is otherwise acknowledged. Possession is only one of the indices of ownership but not the sole one. In one case at least, *Hillaya Subbaya Hegde* v. *Narayanappa Timmaya* (2), the proposition is stated broadly enough to cover cases where no possession was given to the mortgagee. We follow this statement of the law and hold that the defendants are estopped from questioning the plaintiff's title. The District Judge is right and we dismiss the second appeal with costs. Time for redemption is extended by three months from this date.

S.N./R.K. *Appeal dismissed.*

(1) [1916] 40 Mad. 561=36 I. C. 817 (F.B.).
(2) [1911] 36 Bom. 185=12 I. C. 913.

A. I. R. 1919 Madras 321

WALLIS, C. J. AND NAPIER, J.

Corporation of Madras—Plaintiff—Appellant.

v.

P. M. Appasami Pillai and *others*—Defendants—Respondents.

City Civil Court Appeal No. 21 of 1917, Decided on 16th December 1918, against decree of City Civil Court, Madras, in Original Suit No. 57 of 1917.

(a) Madras City Municipal Act (1904), S. 224—"Latrine"—Meaning explained.

The expresslon "latrine" in S. 224, includes water closet and conveniences with water connexion. [P 321 C 2]

(b) Madras City Municipal Act (1904), S. 224—Person required to execute work within 14 days—14 days not reasonably sufficient—He is not liable for consequences of default.

A person who is required to execute a work or alterations within the 14 days mentioned in S. 224, is not liable for the consequences of his making default, if 14 days are not reasonably sufficient for the purpose. In such a case the notice is void and disobedience of it is neither an offence nor can form a ground of civil liability unless compliance is reasonably possible: *Bristol Corporation* v. *Sinnot*, (1918) 1 *Ch.* 62, *Foll.* [P 322 C 1]

(c) Madras City Municipal Act (1904), Ss. 224 (1) and 443—Failure to appeal against order under S. 224 (1) does not debar right to defend suit under S. 443.

Failure to appeal to the Standing Committee against an order under S. 224 (1) does not bar the party's right to defend a suit instituted against him under S. 443 of the Act. [P 322 C 1]

S. Srinivasa Aiyangar and *P. Doraiswami Aiyangar*—for Appellant.

Short, Bewes & Co.—for Respondents.

Wallis, C. J.—This is an appeal from a decree of the City Civil Court dismissing a suit brought by the Madras Corporation under S. 443, Madras City Municipal Act, 3 of 1904, to recover the costs of executing certain works which the defendants had been directed to execute. S. 224 requires the owner or occupier of any building within 14 days after receiving notice from the President to alter any existing latrine in accordance with such notice. The notice called on the defendants to alter the existing latrine into a flush but one of a design approved by the President. The plaint claimed to recover Rs. 1,647 paid to the contractor, Rs. 106-1-0 for connecting drains, Rupees 438-7-4 for supervision and Rs. 91-0-10 the costs of fixing a meter, and it was admitted that the Corporation took four months to execute the work. It was argued for the defendants that the word "latrine" did not include water closet and that the owner or occupier could not be required to convert a latrine into one. A reference to the New Oxford Dictionary shows that the word "latrine" is of Italian and French origin and found its way into Scotland in the seventeenth century. Like 'lavatory,' which has now acquired a similar meaning, it is derived from the Latin lavare, to wash. It appears to be wide enough to include conveniences with water connexions, and indeed to have been adopted in Municipal Acts as the most general descriptions of conveniences of the kind, and I am not prepared to hold that it does not include water closet. We are invited to hold that it did not with reference to the alleged history of drainage in this city, but, as pointed out by Lord Halsbury in *Vestry of St. John, Hampstead* v. *Cotton* (1), what has to be regarded is not the history of drainage in the locality but the words of the statute. Similarly I feel unable to hold that the addition of a water connexion to an existing latrine might not be such an alteration as is contemplated by the section if these words stood alone.

The great difficulty in the way of the Corporation arises, in my opinion from the provision in the section requiring the contemplated alteration to be made "within 14 days." This is a provision of an unusual character. In the English Public Health Acts works and alterations are required to be made within a time to be specified by the local authority, and in the present Act there is a general provision in S. 442 (1) that when anyone is required to execute a work, a reasonable time shall be named in the notice within which the work shall be executed. The importance of the time allowed in the notice in a case when the consequences of disobedience are so serious is illustrated by the recent decision of the Court of appeal that where the local authority is empowered by the statute to require the owner to execute certain works in a specified time, and the time specified in the notice is not reasonably sufficient for the execution of the works the notice is altogether void and the owner may disregard it with impunity: *Bristol Corporation* v. *Sinnott* (2), where

(1) [1887] 12 App. Cas. 1.
(2) [1918] 1 Ch. 62.

an action like this brought by the local authority to recover the cost of doing the work themselves was dismissed on this ground.

Here the notice provided for in S. 224 is a 14 days' notice, and I think the learned Judge was quite right in holding that this express provision excludes the operation of S. 442 (1), which requires a reasonable time to be named in the notice. Whether the retention of the provision as to 14 days' notice when the section was re-enacted without alteration from the earlier Act of 1884, was the result of accident or design, these words must I think, so long as they remain in the section, be taken as an indication that the alterations contemplated by the section must be such as could reasonably be completed within 14 days, having regard to the nature of the work and all the circumstances. This conclusion is little more than an application to this section of the principles applied by the Court of appeal in the case just cited. It must be taken that the legislature cannot have intended to make disobedience of the notice a penal offence and a ground of civil liability unless compliance was reasonably possible. This was so far from being the case in this instance that the Corporation did not issue the 14 days' notice required by the section, but issued instead 30 days' notice which they had no power to do. The figure "60" was first inserted in the notice but this was struck out and "30" substituted; and as I have already stated, the Corporation themselves took four months to execute the work. The work not being such as would reasonably be executed in 14 days, the notice, in my opinion was bad and the defendants were entitled to disregard it.

Reliance was also placed on the provisions of S. 427, which gives a right of appeal from an order under S. 224 (1) to the Standing Committee, whose decision is to be final, but this point is also governed by the case already cited which decided, with reference to appeals under S. 268, Public Health Act, that the filing of an appeal under that section did not prevent the defendants from defending a suit of this kind if the appeal was never decided. Here no appeal was filed. The result is the appeal fails and must be dismissed with costs. The whole question will no doubt receive attention in the new Municipal Bill which is now before the legislature.

Napier, J.—I agree.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 322

ABDUR RAHIM AND SESHAGIRI AIYAR, JJ.

Meenakshisundara Mudaliar and *another*—Defendants—Appellants.

v.

Rathnasami Pillai—Plaintiff—Respondent.

First Appeal No. 271 of 1917, Decided on 25th April 1918, against decree of Sub-Judge, Kumbakonam, in Original Suit No. 17 of 1917.

(a) Specific Relief Act (1877), S. 21—Document held to be agreement to execute mortgage and not agreement to execute lease and hence did not require registration—Creditor in pursuance of document paying certain sums as advance—Debtor refusing to execute deed—Suit for specific performance can be enforced if borrower is not willing immediately to return advance and if lender is ready to pay balance—Otherwise plaintiff should be assessed only at damages for breach of contract—Registration Act (1908), S. 17 (2) and (5).

A document executed by defendant 1 in plaintiff's favour recited that the former was to execute in the latter's favour a swamibogam for 20 years from 1st May 1915 on receiving from him Rs. 5,000, that the entire amount including the interest thereon should be realizsd by enjoyment of the swamibogam, that the plaintiff should pay to defendant 1, 100 kalams of paddy, Rs. 300 in cash and 300 bundles of straw every year and at the expiry of 20 years deliver the land to defendant 1. The document also stipulated that if there was a delay in payment, a sum of Rs. 750 was to be added to the amount payable and the plaintiff was to supply labour of 50 workmen every year. It concluded with a provision that if the Rs. 5,000 be paid at the end of 8 years, the plaintiff should receive it and give up possession of the properties and the deed was to be cancelled. Plaintiff paid certain sums as advance and sued for specific performance of the agreement as defendant 1 refused to execute the deed:

Held: (1) that the document was an agreement to execute a mortgage and not an agreement to execute a lease and did not therefore require registration. [P 324 C 2]

(2) that a suit for specific performance of the agreement could be enforced if the borrower was not willing to immediately return the advance received by him and if the lender was ready to pay the balance remaining unpaid; otherwise the plaintiff should be assessed only at damages for breach of contract by defendant 1. [P 326 C 1]

Per *Abdur Rahim J.*—To decide whether a document is to be treated as a mortgage or as a lease the intention of the parties should be looked to. That intention has to be gathered mainly from the internal evidence furnished by

the document itself, with such light as may be derived from the surrounding circumstances in which the document had its birth. The essential test to be applied to such cases is whether by the transaction in question the debt was secured or satisfied; if the former, it would be a mortgage, otherwise a lease. [P 324 C 1]

In India the general rule of English law is followed that Courts will not compel performance of contracts according to their tenor; on the other hand, the proper remedy for breach of a contract is compensation by way of damages for the loss arising from the breach. This is laid down in S. 21, Specific Relief Act. An ordinary contract to lend, or borrow, money whether on security or otherwise, comes within this category. Where on an agreement to execute a deed of mortgage money has already been advanced and the borrower refuses to execute a mortgage according to the agreement, the lender would be prejudiced if the loan were to remain without security and specific performance would be decreed if the lender offers to pay the amount of the loan or any amount remaining due under it. If the loan is liable to be repaid at once and the borrower offers to pay it off, there will be no object in decreeing specific performance. Ordinarily a party plaintiff is not entitled to claim specific performance of a contract to lend or borrow. If he comes into Court with such a specific prayer, and if there is nothing more in the plaint, the suit will be rightly dismissed. But where the prayer is strictly within the rights of the plaintiff, it is competent to the Court to annex conditions in the decree calculated to render justice between the parties. The domain of the rights of the parties is then passed and that of the functions of the Court comes into play. The Court, in the plenary powers it possesses of exercising discretion or of imposing suitable conditions in the interests of justice, being seised of the subject-matter of the suit, can proceed to annex or disannex conditions suo motu in order that complete justice may be rendered. [P 326 C 1]

(b) Registration Act (1908), S. 49—Unregistered document cannot be basis of specific performance—Specific Relief Act (1877), S. 21.

Per *Seshagiri Aiyar, J.*—It is settled law that a document requiring registration cannot be the basis of a suit for specific performance. [P328 C 1]

(c) Transfer of Property Act (1882), S. 77—Contract that definite portion of income shall be paid annually to mortgagor may find place in agreement to give deed of mortgage.

Section 77 contemplates a contract between the mortgagor and the mortgagee that the income of the property shall be appropriated in a particular manner. A contract that a definite portion of the income shall be paid annually to the mortgagor may find a place in a deed of mortgage or in an agreement to give such a deed. [P 329 C 1]

A. Krishnaswami Aiyar and *K. Balasubramania Aiyar*—for Appellants.

T. V. Muthukrishna Aiyar and *A. Swaminatha Aiyar*—for Respondents.

Abdur Rahim, J.—The defendants in the suit have appealed from a decree of the Subordinate Judge of Kumbakonam, by which he directed specific performance of an agreement (Ex. A) executed by defendant 1 on 31st October 1914 in favour of the plaintiff. The first point taken is that the transaction in question was an agreement to grant a lease and as it was not registered, it could not be specifically enforced. The second and alternative objection to the decree is that supposing it to be an agreement to execute a mortgage as found by the Subordinate Judge, even then all that the plaintiff will be entitled to would be damages and not a decree for specific performance. As regards the first question we have been referred to a number of decisions, some of which seem to be inconsistent with the others, but it is not necessary to discuss them in any detail.

In none of these cases, the question arose with reference to the application of the Registration Act. In most of them the nature of the transaction had to be considered in connexion with the provisions of the Stamp Act or the Limitation Act. That a transaction may combine the features partly of a lease and partly of a mortgage, does not admit of any dispute. That seems to be the nature of what is known as the *zar-i-peshgi* lease in Northern India or a *kanam* in Malabar: vide *Bengal Indigo Company* v. *Roghobur Das* (1), *Nellaya Variath Silapani* v. *Vadakipat Manakel Ashtamurti Nambudri* (2), *Gopalan Nair* v. *Kunhan Menon* (3). The Stamp Act contemplates and provides (a) for an instrument comprising or relating to several distinct matters (S. 5), and (b) for an instrument so framed as to come within two or more of the descriptions of transactions on which duty is payable under the Act. We are not concerned in this case with an instrument of the first class. The question is whether Ex. A is an agreement for the execution of an instrument which would fall within the definition both of a mortgage and a lease, or only of one of such transactions. Supposing it is the former if the question were as to the duty payable, the Stamp Act provides a simple answer. But the matter involves obvious difficulties when the question arises as to the application of the Limitation Act or the Registration Act, to such transactions. For then we have to find out the exact

(1) [1897] 24 Cal. 272=23 I. A. 158 (P.C.).
(2) [1881] 3 Mad. 382 (F.B.).
(3) [1907] 30 Mad. 300.

nature of the transaction taken as a whole before it can be ascertained which particular article of the Limitation Act is applicable or whether the document is compulsorily registrable or not. The solution, in my opinion, has to be sought in what was the intention of the parties, whether the transaction was intended to be a lease or a mortgage. This is the principle to be deduced from rulings. In *Nellaya Variyath Silapani* v. *Vadakipat Manakel Ashtamurti Nambudri* (2) a Full Bench of five Judges of this Court laid down that the question whether a kanom was to be regarded as a lease or a mortgage depended upon the object for which the tenure was created. There the question arose with reference to limitation. The learned Judges observed:

"In some cases it (that is, the kanam) may be a mere lease a sum being advanced as security for the rent or for proper cultivation to be repaid on the expiry of the term. In other cases, most frequently it is treated as a lease by way of mortgage to secure a loan advanced to the jenmi (proprietor) . . . The Limitation Act has no provision specially applicable to tenures of a mixed character. . . . For the purpose of limitation when as is alleged in the case before us it is intended as a mortgage, we must apply to it the law of limitation applicable to mortgages.

In *Tukaram* v. *Ramchand* (4) which was a Full Bench decision of the Bombay High Court, the question was raised with reference to a claim for redemption and the principle applied was, what was intended by the parties to the transaction. That intention has to be gathered mainly from the internal evidence furnished by the document itself with such light as may be derived from the surrrounding circumstances in which the transaction had its birth. The essential test to be applied to such cases is whether by the transaction in question the debt was secured or satisfied; if the former, it would be a mortgage, otherwise a lease. This seems to be the ratio decidendi of another Full Bench ruling of this Court in *Reference under Stamp Act, S.* 46 (5). Mr. A. Krishnaswami Aiyar the learned vakil for the appellants, relied upon a recent ruling of a Division Bench in *Kammara Peda Subbayya* v. *Kakerla Chennappa* (6). In that case the learned Judges accepted the principle laid down by the Full Bench in *Reference under Stamp Act, S.* 46 (5) and whether their interpretation of the particular documents which they had to consider was correct or not, that is not a matter with which we are concerned. The document in question in the present suit provides that defendant 1 is to execute in favour of the plaintiff a swamibogam for 20 years from 1st May 1915 on receiving from him Rs. 5,000, that the entire amount including the interest thereon shall be realized by enjoyment of the swamibogam and that the plaintiff should pay defendant 1, 100 kalams of paddy, Rs. 300 in cash and 300 bundles of straw every year and at the expiry of 20 years deliver the land to defendant 1. The document also stipulates that if there be a delay in payment, a sum of Rs. 750 is to be added to the amount payable and that the plaintiff is to supply labour of 50 workmen every year. It concludes with a provision that if the Rs. 5,000 be paid at the end of eight years, the plaintiff must receive it and give up possession of the properties and the deed will be cancelled. It was not suggested by any one at the Bar that in this case there were two distinct matters, a lease and a mortgage, embodied in one document. The transaction is either a lease or a mortgage and for purposes of the Registration Act must be treated as one document. In my opinion the intention of the parties was to secure a debt and not to satisfy it within the meaning of *Reference under Stamp Act, S.* 46, (5). No doubt there is a stipulation for the payment of a fixed quantity of paddy and money to defendant 1 but even here the word "rent" is not used. There is also a provision for the supply of labour which is an unusual term in a mortgage. But the rest of the provisions clearly show that the parties contemplated a security. The benefit to be derived by the plaintiff, is in so many words said to be by way of interest and the last clause of the document provides that defendant 1 may redeem the property by the payment of the amount borrowed at the end of 8 years. It has been argued that the transaction does not fall within the definition of a usufructuary mortgage as given in S. 58, T. P. Act, but the Act clearly contemplates mortgages other than those defined in the Act. I hold therefore that Ex. A is an agreement to grant a mortgage and as such does not require registration.

(4) [1902] 26 Bom. 252.
(5) [1884] 7 Mad. 203 (F.B.).
(6) [1915] 28 I. C. 842.

Then, was the lower Court right in decreeing specific performance of this agreement, or is the proper remedy of the plaintiff by way of damages? It is settled law that the Court will not specifically enforce an agreement to lend or to borrow money whether on security or not: see *Rogers* v. *Challi* (7), *Sichel* v. *Mosenthal* (8) and *Lanios* v. *Gurety* (9). But specific performance was ordered in *Ashton* v. *Corrigan* (10) and in *Hermann* v. *Hodges* (11), where the money had actually been advanced and all that remained to be done was the execution of the mortgage agreed upon. In *Ashton* v. *Corrigan* (10) Sir John Wickens, V. C., said:

"I doubt whether a contract to execute a mortgage, which the mortgagee may enforce by a sale the day after its execution, is one which the Court will specifically perform and I know of no reported case in which such relief has been given where the right to it has been contested. However on the authority of the cases cited from Seton on Decrees, I will make the decree."

In *Hermann* v. *Hodges* (11) where the defendant did not oppose the decree, Lord Selborne, L. C., said that he had no doubt of the propriety of making the decree asked for unless the defendant was prepared to pay off the advance at once. Both were cases in which, so far as one can gather, the entire amount had been advanced. That is also how the scope of the rulings is stated in Fry's Specific Performance (Edn. 5), S. 54, p. 24, and Halsbury's Laws of England, Vol. 27, S. 125, p. 73, and Vol. 21, S. 135, p. 75. The question then is whether specific performance can be decreed where only a part of the advance has been made. In the last reference it is stated in the foot-note that in an Irish case, *Hunter* v. *Langford* (12), specific performance was ordered of an agreement to grant a mortgage for an amount of £30,000 of which £1,000 was already advanced. But this report has not been available to me. In *Bass* v. *Chivley*, (13) where the plaintiff agreed to advance £3,000 and actually advanced £600 in part, the defendant apparently submitted to a decree for specific performance according to the terms of the contract. It cannot be said that the question, whether a contract to lend money on security can be specifically enforced if only part of the amount to be lent had been advanced, was considered and decided by the Master of the Rolls.

On the other hand, there is the decision of the Court of appeal of England: *South African Territories* v. *Wallington* (14) and the House of Lords in *South African Territories* v. *Wallington* (15), where the defendant had applied for and paid 10 per cent deposit on some debentures, it was held that the company was not entitled to a decree directing the defendant to pay the rest of the instalments according to agreement. In the Court of appeal, Chitty, J., observed:

"It is clear that no specific performance of a contract to lend and borrow money can be granted at the suit either of the proposed lender or the proposed borrower. It is immaterial whether the loan is to be on security or without security, or whether the loan is to be for a fixed period; and it can make no difference whether the loan is to be made in one sum or by instalments."

This view of the law was confirmed by the House of Lords. No doubt the decree passed by Wright, J., which was in question in the appeal was rather peculiar. It did not in so many words grant specific performance, but gave a decree for the entire amount unpaid, and one of the arguments advanced in support of the decree was that the contract was for purchase of debentures on certain terms. But Sir Robert Reid, afterwards Lord Loreburn, also argued that if the respondent had paid all the instalments and the debentures had been withheld, the respondent would be entitled to specific performance and the remedy must be mutual. The learned Lords however did not think that specific performance could be extended to a case like the one before them where only part of the advance had been made. The principle of the decision of the House of Lords in *South African Territories* v. *Wallington* (15) and the other English cases has been followed in this Court in *Rajagopala Aiyar* v. *Sheikh Davood Rowther* (16), to which I was a party, and in *Shaik Galim* v. *Sadarijan Bibi* (17). In all those cases however the suit was by the borrower. The general rule

(7) [1859] 27 Beav. 175.
(8) [1862] 30 Beav. 371.
(9) [1873] 5 P. C. 346
(10) [1872] 13 Eq. 76.
(11) [1873] 16 Eq. 18.
(12) [1828] 2 Mol. 272.
(13) [1829] Tamlyn 80=48 E. R. 33.
(14) [1897] 1 Q. B. 692=66 L. J. Q. B. 551.
(15) [1898] A. C. 309=67 L. J. Q. B. 470.
(16) [1918] 45 I. C. 161.
(17) [1915] 29 I. C. 621=43 Cal. 59.

of English Law, which in these cases is followed in India, is not that the Courts will compel performance of contracts according to their tenor; on the other hand, the proper remedy according to English Common Law for the breach of a contract is compensation by way of damages for the loss arising from the breach. The Courts of equity however assumed jurisdiction to compel the defaulting party to carry out the contract in its terms, in a class of cases where damages would not be an adequate remedy. Hence one of the conditions for the exercise of this equitable jurisdiction has always been that the Common law remedy should be inadequate. S. 21, Specific Relief Act, therefore says that a contract for the nonperformance of which compensation in money is an adequate relief, cannot be specifically enforced. An ordinary contract to lend or borrow money, whether on security or otherwise, comes within this category.

But supposing money has already been advanced and the borrower refuses to execute a mortgage according to the agreement, the lender would apparently be prejudiced if the loan were to remain without security, and it is difficult to see what difference it would make in this respect whether the entire loan had been advanced or only a portion, if in the latter case the lender has been ready and willing to advance the remaining sum according to the agreement. On the other hand if the loan was liable to be repaid at once and the borrower is willing to pay it off, there would be no object in decreeing specific performance in such a case. Hence it was that Lord Selbourne in *Hermann* v. *Hodges* (11) said that he would not decree specific performance of an agreement to borrow on a mortgage if the defendant was prepared to pay off the advance at once. If the loan was not repayable for a certain period, that would only affect the amount of damages and the method of calculation. The Courts of equity seem to be reluctant to force upon a man the position of a debtor if he is in a position to pay off the loan, though no doubt he will be made to compensate the other party for breach of the agreement. This seems to me to be the result of the authorities. Where however the borrower is not prepared to pay off the loan, to refuse specific performance in such a case of the agreement to execute a mortgage would be, as I have said, denying justice. In Halsbury's Laws of England, Vol. 21, p. 75, it is stated:

"In equity a mortgage is created by a contract to execute, when required, a legal mortgage, or by a contract that certain property shall stand as a security for a certain sum. The agreement may be enforced according to its terms even though the legal mortgage when executed will confer on the mortgagee an immediate power of sale."

This is supported by a number of decisions of the English Courts. The case however is to be distinguished where no money has actually been advanced, for there would be no question there of an equitable mortgage. In India except in the Presidency towns equitable mortgages are hardly recognized and it was argued by Mr. A. Krishnaswami Aiyar, that if we accepted the proposition laid down by the House of Lords in *South African Territories* v. *Wallington* (15) in cases where the suit is by the borrower, the doctrine of mutuality required that the rule should be equally followed where the suit is by the lender. The two cases do not stand on the same footing. In the last case the lender would have altered his position and his money may be lost if specfic performance were not decreed, while in the other case the only question would be one of damages. Besides, if the doctrine of mutuality were strictly applied to these cases, there could be no specific performance even when the entire amount had been advanced, but none of the learned Lords in their judgments in the abovementioned case suggested any doubt as to the decision in *Hermann* v. *Hodges* (11) and *Ashton* v. *Corrigan* (10) which were cited at the Bar, and the text writers mention these cases with apparent approval.

The plaintiff has already paid about Rs. 4,250 to defendant 1 out of the Rs. 5,000 which he agreed to advance, Mr. A. Krishnaswami Aiyar has offered on behalf of defendant 1 to pay up the amount though his client was not willing or prepared to do so in the Court of first instance. On payment by defendant 1 of this amount with profit thereon according to the terms of Ex. A to be ascetained by the lower Court within 4 months after the reopening of the said Court, the decree for specific performance will be set aside, and the lower Court will be directed to ascertain the

damages sustained by the plaintiff by reason of the breach of the contract and pass a decree accordingly. The plaintiff must either produce an acquittance in respect of the amount payable under the promissory note in favour of Krishna Mudaliar within the period specified above or execute a bond of indemnity in favour of defendant 1. Failing either, the amount payable under the above mentioned promissory note will be deducted from the amount payable to the plaintiff. In default of such payment, the decree of the Subordinate Judge will be confirmed and the appeal dismissed. The appellants must pay the costs of the respondent up till now in this Court and in the lower Court. Future costs, if any, will be disposed of by the Subordinate Judge.

Seshagiri Aiyar. J.—I have come to the same conclusion. On 31st October 1914 defendant 1 entered into an agreement with the plaintiff to execute a deed of swamibogam of the properties in suit, Rs. 250 was paid on that day and the balance of Rs. 4,750 was agreed to be paid on the execution of the document, which was to be on 15th April 1915. Subsequent to the agreement, at the request of the defendant, plaintiff agreed to pay a sum of Rs. 2,000 due from the defendant to one Hrishna Mudali. He also paid Rs. 655 on 29th January 1915 and a sum of Rs. 515-9-0 on 3rd April 1915 directly to the defendant. The plaintiff's case is that, notwithstanding the receipt of these moneys the defendant refused to execute the swamibogam deed, and that therefore he should be compelled to execute the document. Defendant 1 denied the payments above referred to and contended that the document on which the claim for specific performance was based was not receivable in evidence as it was not registered. The Subordinate Judge in a careful judgment found all the points in favour of the plaintiff, and passed a decree directing the execution of the deed on payment of Rs. 759-15-8. Defendant has appealed.

Before dealing with the main contentions in the case, I shall dispose of the minor points argued by Mr. Balasubramania Aiyar. It was suggested that the two sums of Rs. 515-9-0 and Rs. 655 were not independent payments, but were paid as rent due to the defendant in respect of the previous occupation of the properties by the plaintiff. In the day book of the plaintiff Exs. J-1 and J-2 these two payments are entered as advances to the defendant. There is no reason to doubt the accuracy or genuineness of these two documents. There is reliable evidence that the defendant was in need of money at this time and that he received the moneys not as being entitled to them as landlord, but only as borrower. I see no reason to differ from the Subordinate Judge in his appreciation of the evidence on these points.

As regards the sum of Rs. 2,000, the Subordinate Judge has dealt with it at some length in para. 9 of his judgment. Shortly put, the position of affairs was this. The defendant was indebted to Krishna Mudali in a sum of Rs. 2,000. Plaintiff was asked to discharge that debt. Two months after the date of the agreement in question, the plaintiff executed a promissory note for that amount to Krishna Mudali. Krishna Mudali thereupon endorsed payment on the original promissory note given by the defendant to him. It is thus clear that Krishna Mudali absolved defendant from liability and looked to plaintiff for payment. When the parties fell out, defendant 1, who is a relation of Krishna Mudali, induced another relation of his, defendant 2, to execute a fresh promissory note to Krishna Mudali, ignoring the endorsement upon the note which he executed and also the promissory-note executed by the plaintiff. It is said that a suit has been brought by Krishna Mudali for the sum due. I feel no hesitation in agreeing with the Subordinate Judge that Krishna Mudali and defendants 1 and 2 have colluded together and are acting in concert to make the Court believe that the liability of defendant 1 to Krishna Mudali has not yet been discharged. I accept the conclusion of the Subordinate Judge that the sum of Rs. 2,000 must be deemed to be a payment by the plaintiff to the defendant. The defendant, notwithstanding these payments has not delivered possession of the properties to the plaintiff. The Subordinate Judge was therefore right in calculating interest on the payments and in holding that the plaintiff had paid on the date of the suit a sum of over Rupees 4,000 to defendant 1.

Oneother small matter may be disposed of before proceeding further. In the

agreement there is a stipulation that if the defendant did not execute the document in time, the plaintiff would be entitled to add a sum of Rs. 750 to the Rs. 4,750 remaining due and to get a document executed as if he had paid Rs. 5,500. This is purely a penal provision, and I do not think that Courts will be justified in directing specific performance of an agreement with these penal terms. The Courts have a discretion to vary the terms of a contract and to delete so much of it as in their opinion is not equitable. Now I proceed to consider the main questions argued by Mr. Krishnaswami Aiyar for the appellants. The first contention was that the document in question is an agreement to lease and as it is not registered, it should not have been received in evidence in support of a claim for specific performance. It is settled law : see *Narayanan Chetty* v. *Muthiah Servai*'(18) that a document requiring registration cannot be the basis of a suit for specific performance. The question is whether Ex. A is an agreement to lease or an agreement to mortgage. If it is the latter, it does not require registration. If it is the former, it must be registered. An intermediate position is that the document may be construed as a combination of an agreement to lease and also to mortgage. In that case, the further question would be whether it should be registered.

On the construction of the document, various authorities were quoted by the learned vakil. Before dealing with them, I shall examine the provisions of the document. It says that (a) the defendant has agreed to give the plaintiff in swamibogam the nanja and punja properties for 20 years from 1st May 1915 ; (b) the consideration is stated to be Rs. 5,000, of which Rs. 250 was acknowledged to have been received on the date of the agreement ; (c) the balance of Rs. 4,750 was agreed to be paid within 15th April 1915 when the deed itself was to be executed by the defendant ; (d) the said Rs. 5,000 and the interest thereon were to be realized by the enjoyment of the properties for 20 years. There are provisions for payment of kist which I need not refer to now ; (e) the plaintiff agreed to pay the defendant 100 kalams of samba paddy, Rs. 300 in cash, 300 bundles of straw and also to procure 50 labourers for each year ; (f) it is stipulated that the land should be delivered after a period of 20 years ; (g) there is a penal provision for adding Rs. 750 more in case the defendant did not execute the deed on 15th April 1915, and lastly (h) the document provides for enjoyment of the properties for eight years certain, and for redemption by the defendant notwithstanding the fixed period of 20 years at any time after the eighth year on payment of Rs. 5,000. In my opinion, the document is a usufructuary mortgage, and falls strictly within the definition of the terms contained in S. 58, Cl. (d), T. P. Act. Mr. Krishnaswami Aiyar contended that the provision for the delivery of paddy, money and straw to the defendant took the document out of the category of usufructuary mortgages. I am inclined to think that the clause

"partly in lieu of interest and partly in payment of mortgage money"

in S. 58 (d) does not prevent the payment of a portion of the usufruct to the mortgagor. In my experience of the Southern Presidency, it is almost an ordinary term of a usufructuary mortgage to provide for the payment either of a consolidated sum or of an annual snm to the mortgagor ; and I am not satisfied that such a provision is obnoxious to S. 58, Cl. (d), T. P. Act. The clue to the interpretation of the definition may be gathered from Ss. 76 and 77, T. P. Act. Cl. (g), S. 76 provides for the mortgagee keeping clear and accurate accounts of all sums received and spent by him and also directs the mortgagee to give the mortgagor true copies of such accounts and of the vouchers by which they are supported ; Cl. (h) provides for the surplus of the usufruct being paid to the mortgagor under certain circumstances. S. 77 provides that nothing in Cls. (b), (d), (g) and (h) [(b) being a provision for the collection of rents and profits and (d) being a provision for repairs] applies to cases where there is a contract between the mortgagor and the mortgagee that the receipts from the mortgaged property shall be taken in lieu of interest on the principal money or in lieu of such interest and defined portions of the principal as may be agreed upon. As I understand this section, it means that ordinarily having regard to the fact that the relationship is that of debtor and creditor it

(18) [1910] 35 Mad. 63=8 I. C. 520 (F.B.).

is the duty of the mortgagee to keep proper accounts.

But this duty may be dispensed with where there is a contract between the parties that the usufruct, whatever it may amount to, shall be applied in a definite way towards the liquidation of the debt or of the interest on the debt. In other words, S. 77 contemplates a contract between the mortgagor and the mortgagee that the income of the property shall be appropriated in a particular manner. I fail to see why a contract that a definite portion of the income shall be paid annually to the mortgagor should not find a place in a deed of mortgage or in an agreement to give such a deed. Therefore without reference to the authorities, I am of opinion that the document in question is an agreement to give a usufructuary mortgage. No doubt the terms of S. 105, T. P. Act, are to a large extent complied with by this agreement. The Rs. 5,000 may be regarded as premium, and the annual payment may be regarded as rent. The insertion of a clause as to enjoyment during a specified period is also within that section : but in a lease simpliciter, there will be no provision for interest upon the amount ; and there will not be a provision for redemption as in the present document. I am therefore unable to hold that this is an agreement to lease.

There is no doubt a possibility of construing it as a combination of an agreement to mortgage and to lease. The elements which make up a mortgage are to be found in the provision relating to principal and interest and to the redemption of the property after a fixed period. It is also clear that the property is regarded as security for the moneys to be advanced. The supplementary provision regarding the annual payment is in the nature of a lease. Therefore, there is great force in the contention of the learned vakil that the document in question partakes of the character of a lease and of a mortgage. Even in that view, as I shall show presently, the document would not require registration ; but my inclination is to regard the document as purely a usufructuary mortgage, because a mortgage of that kind has many elements in common with a lease. Now I shall deal with the cases quoted at the Bar. The citations from Dr. Ghose's book on Mortgage, Vol. 1, pp. 95 and 96, only point to the difficulties attendant upon the construction of such documents. The learned author, after referring to the conflict of judicial opinion, inclines in favour of holding similar documents to be agreements to mortgage and not to give a lease. With one observation of his, I am in entire agreement, namely that the construction must be based upon the intention of the parties and not upon an academical discussion regarding the inapt words used in the instrument. In *Reference under Stamp Act, S.* 46 (5) the question for consideration before the Full Bench was as to the stamp to be affixed on the document. There were three instruments before them, but we are concerned only with the third of them. The learned Chief Justice who delivered the judgment of the Court says that :

" although the parties may have understood and described the transaction as a mortgage, it was in fact a sale of a term or a lease for 9 years with a reserved rent of Rs. 35, in consideration of Rs. 899-12-0, the amount of the debt and interest."

It is not shown that there was any provision for redemption in that case. This opinion of the Chief Justice may no doubt, be taken as suggesting that although interest may be payable upon the advance the document may still be regarded as a lease. I do not think that this case covers the present. In *Kammara Peda Subbayya* v. *Kakerla Chennappa* (6) the question related to limitation. There the document was completed. It was not an agreement that the learned Judges had to consider. Ex. B, which is given in full in the judgment, contains no stipulation for redemption as in the present case. Therefore this is not an authority which is conclusive on the point. On the other hand, the cases quoted by Mr. Muthukrishna Aiyar on behalf of the respondent show that documents like the present one should be construed as mortgages. *Mashook Ameen Suzzada* v. *Marem Reddy* (19) is a case in point. In *Reference under Stamp Act, S.* 46 (20) four Judges of this Court held that a provision for enjoyment of the property for a particular period coupled with a loan rendered the document a usufructuary mortgage. No doubt the opinion was given with reference to the amount of stamp duty payable. It is

(19) [1874-75] 8 M. H. C.R. 31.
(20) [1898] 21 Mad. 358 (F.B.).

also true that there was no provision for the payment of rent as such. I do not think that in the present case it can be said that there is a provision for payment of rent as such. Reference may also be made to *Mahmad Muse Umarji* v. *Bagas Amanji Umar* (21). I do not propose to consider the other cases quoted before us, as, in my opinion, the document in suit is strictly within the definition of the term "usufructuary mortgage" and the provision for redemption would be inconsistent with the parties having intended to treat it as an agreement to lease.

The intermediate view which I referred to, namely of regarding the document as a combination of mortgage and lease, derives its support from the decision of the Judicial Committee in *Bengal Indigo Company* v. *Roghobur Das* (1). The other decisions, *Reference under Stamp Act*, S. 46 (22), *Nellaya Variyath Silapani* v. *Vadakipat Manakel Ashtamurti Nambudri* (2), *Perlathail Subba Rau* v. *Mankude Narayana* (23), and *Gopalan Nair* v. *Kunhan Menon* (3), also regard documents more or less of a similar character as not wholly within the category of usufructuary mortgages. Granting that the document in question is not an agreement to mortgage, I am unable to agree with the contention that it should be registered under the Registration Act. Under S. 17, Registration Act, written instruments referred to in Cl. (1) sub-Cls. (a), (b) and (c), which would include sales, gifts and mortgages, should be registered, if the value exceeds Rs. 100. Sub-Cl. (5), Cl. (2) in terms excludes from this liability documents which, by themselves, do not create, declare, assign etc., rights in immovable property. That clause makes it clear that an agreement to sell or to mortgage need not be registered because Cl. (2) begins by saying that :

"nothing in Cls. (b) and (c), sub-S. (1) applies to the following instruments."

It is noticeable that sub-Cl. (d), Cl. 1 is not referred to in Cl. 2. Cl. 1 (d) says that :

"leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent should be registered."

As I said before an agreement to give a lease is not among the exempted documents in Cl. 2. Further the definition of the term "lease" in S. 2 includes an agreement to lease as well ; whereas, under the definition of the terms "mortgage" or "sale" as contained in the Transfer of Property Act, an agreement to mortgage or an agreement to sell would not be included. It is rather an anomalous position that an agreement to lease should be compulsorily registrable whereas an agreement to give a mortgage or to sell should be exempted from such a provision. However the legislature has chosen to impose such a liability upon agreements to lease alone, and we are bound to give effect to that intention. At the same time, it is clear that unless a document comes strictly within the four corners of the expression "lease" we would not be justified in holding that the document should be registered. The learned vakil for the respondent drew our attention to some decisions which have held that provisions relating to registration should be very strictly construed. *Amjed Ali* v. *Ala Buksh* (24) and *Jiwan Ali Beg* v. *Basa Mal* (25) have laid down this principle. I am in entire agreement with these decisions. In my opinion, any provision which has the effect of preventing parties from adducing in evidence a specified document for want of a technicality should be very strictly construed, and therefore unless a document is a lease, pure and simple, I see no reason for applying S. 17, Cl. 1 (d), Registration Act, to such instruments. If the term regarding the lease is only incidental to the main provisions of the document, I am prepared to hold that such a document need not be registered. I am also impressed by the argument for the respondent that, at best, the document in question is an anomalous mortgage as was held in *Raman Nair* v. *Vasudevan Namboodripad* (26) and *Kaderkutti* v. *Imbichi* (27). If it is a mortgage of that description my view is that it does not require to be registered, because it would come under Cl. 1 (b) and (c) and Cl. 2 (5), S. 17, Registration Act. In this view, it is unnecessary to consider the further point argued by Mr. Krishnaswami Aiyar that if there was a combination of a mortgage and lease, the unregistered

(21) [1908] 32 Bom. 569.
(22) [1882] 8 Cal. 254.
(23) [1882] 4 Mad. 113.
(24) [1868] 9 W. R. 537.
(25) [1887] 9 All. 108.
(26) [1904] 27 Mad. 26.
(27) A.I.R. 1914 Mad. 317=24 I. C. 127.

document cannot be looked at even for the purpose of enforcing the term relating to the mortgage.

The next important point is whether even if it is an agreement to give a usufructuary mortgage, a suit for specific performance is competent. The learned vakil for the appellants with his usual ability contended that, if the amount agreed upon was not fully paid, by asking for specific performance, the plaintiff would be compelling the defendant to accept the loan with reference to the balance remaining unpaid. In *South African Territories* v. *Wallington* (15), it is definitely laid down that a contract to lend cannot be specifically enforced, affirming the decision of the Court of appeal in *South African Territories* v. *Wallington* (14). That principle has been followed in this country in *Shaik Galim* v. *Sadarijan Bibi* (15). *Ramakrishna Pattar* v. *Narayana Patter* (28) also belongs to the same class. Mr. Krishnaswami Aiyar contended that an agreement to borrow stands on the same footing as an agreement to lend. It is not necessary for me to disagree with that contention, although I am not prepared to hold that the principle of mutuality as laid down in *Flight* v. *Bolland* (29) is of universal application. Without quoting many cases, I may refer to *Jones* v. *Tankerville* (*Earl*) (30) where the principle of mutuality has been departed from to some extent. The decision in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (31) does not say that such a principle is of universal application.

If in this suit, the only prayer was that the defendant should be compelled to accept the balance of the loan, I would have agreed that the suit should be dismissed. The principle of the English decisions followed in this country is that no person should compel another to accept a loan as he could very well advance it to another, and it would be unjust to compel the would-be borrower to accept it as he could in open market procure the loan easily. But in the present case, the object of the suit is not to compel the defendant to accept the loan. The aim is to obtain the security for the money already advanced and that security having been promised by the document, the defendant is bound to fulfil it. There is a decision of the Allahabad High Court in *Mayaram* v. *Prag Dat* (32) in which Mahmood, J., expresses a doubt whether, even when the whole of the money agreed upon has been paid, the plaintiff will be entitled to sue for specific performance The learned Judge is apparently of opinion that money compensation would meet the ends of justice in such cases. I am afraid that the learned Judge has not adverted to the fact that the securing of a security by a lender is far more important to him than the obtaining of a decree for money against the borrower.

This view of Mahmood, J., is opposed to two decisions of very eminent Judges in England in *Ashton* v. *Corrigan* (10) and *Hermann* v. *Hodges* (11). In 21 Halsbury 75 the law is thus summarised:

"In equity a mortgage is created by a contract to execute, when required, a legal mortgage, or by a contract that certain property shall stand as a security for a certain sum."

In Fry on Specific Performance, the same principle is enunciated. In S. 54 the law is thus stated:

"The Court will specifically enforce a contract to execute a mortgage, and that even with an immediate power of sale, where the money has been actually advanced either before or at the time of the contract."

I fail to see why these principles should not be followed in this country. Therefore I am of opinion that the suit as brought was rightly instituted. As regards the proper remedy to be given, there is room for considerable divergence of opinion. The Subordinate Judge has decreed specific performance of the entire contract on payment of the balance due. It was argued by Mr. Krishnaswami Aiyar that this provision in the decree indirectly compels the defendant to accept the balance of the loan. Speaking for myself, I do not think that this objection is well founded. What the House of Lords has laid down in the case already referred to is that a party plaintiff is not entitled to claim specific performance of a contract to lend or to borrow. If he comes into Court with such a specific prayer and if there is nothing more in the plaint, the suit will be rightly dismissed. But where the prayer is strictly within the rights of the plaintiff, it is com-

(28) A.I.R. 1915 Mad. 584=26 I.C. 883.
(29) [1828] 4 Russ. 298.
(30) [1909] 2 Ch. 440.
(31) [1912] 39 Cal. 232=39 I. A. 1=13 I. C. 331 (P.C.).
(32) [1883] 5 All. 44.

petent to the Court, to annex conditions in the decree calculated to render justice between the parties. The domain of the rights of the parties is then passed and that of the function of the Court comes into play. The Court, in the plenary powers it possesses of exercising discretion or of imposing suitable conditions in the interests of justice, being seised of the subject matter of the suit, can proceed to annex or disannex conditions sue moto in order that complete justice may be rendered. I do not think that the principle that there cannot be a suit for specific performance either to borrow or to lend has any application to the exercise of the Court's powers as above indicated. In my opinion therefore the view taken by the Subordinate Judge that specific performance should be decreed on payment of the balance was well within his jurisdiction.

There is authority for enforcing the contract in its entirety even though the full amount has not been paid. Mr. Muthukrishna Aiyar quoted *Bass* v. *Clively* (13), wherein Sir Johan Leach, the Master of the Rolls, decreed specific performance of a contract to mortgage even though the full amount had not been paid. This case is no doubt open to the construction put upon it by Mr. Krishnaswami Aiyar that the decree was by consent. But if the decree could not be passed, the Master of the Rolls would not have acted on the consent, therefore the procedure adopted must be taken to have been legal. I fail to see why the Courts should not do what the parties can agree to and impose a condition for the payment of the balance before specific performance is decreed. There is also a citation in 21 Halsbury at p. 75 under note (b) of an Irish case of *Hunter* v. *Langford* (12), in which specific performance was ordered of an agreement to grant a mortgage for a loan of £30,000 of which £1,000 alone had been already advanced. In my opinion therefore the decree of the Subordinate Judge is not wrong. My learned brother thinks that this is a case in which our discretion should be exercised by decreeing damages, rather than decreeing specific performance. I agree with the order proposed by my learned brother as to costs, damages and indemnity.

S.N./R.K. *Decree varied.*

A. I. R. 1919 Madras 332

SESHAGIRI AIYAR, J.

Marudai Muthirian — Defendant—Petitioner.

v.

Chinnakanu Muthirian — Plaintiff—Opposite Party.

Civil Revn. Petn. No. 67 of 1918, Decided on 10th October 1918, against decree of Small Cause Court Judge, Trichinopoly, in Suit No. 2804 of 1917.

(a) Limitation Act (9 of 1908), Art. 61—Joint mortgage bond—Payment in excess—Suit for contribution against co-mortgagor—Limitation commences from payment of last payment.

A suit to recover excess payments made by the plaintiff towards a joint mortgage bond executed by himself and the defendant, is a suit for contribution and must be brought within the period of limitation prescribed by Art. 61, Sch. 1 Lim. Act, the period counting from the date of the last payment made by the plaintiff: any payment made by the defendant subsequently thereto would be of no avail to the plaintiff. [P 333 C 1]

(b) Limitation Act (9 of 1908), S. 19—Acknowledgment of liability.

Where a plaintiff, who is about to get a mortgage bond assigned to himself, receives a notice from the defendant that "if you get an assignment, out of the sum of Rs. 100 that may still be due my liability will be only Rs. 50": the notice does not amount to an acknowledgment of liability to the plaintiff. It is only an acknowledgment of liability under the bond. [P 333 C 2]

(c) Civil P. C. (5 of 1908), O. 7, R. 6—Suit barred by limitation—Ground saving limitation must be specifically stated.

Where a suit is brought after the prescribed period of limitation, it is incumbent on the plaintiff, under O. 7, R. 6, to state explicitly the ground on which the bar is saved. [P 333 C 1]

T. V. Muthukrishna Ayyar—for Petitioner.

S. Venugopala Chettiar—for Opposite Party.

Judgment.—I am unable to agree with the learned Small Cause Court Judge on the question of limitation. The facts are not in dispute. The plaintiff and the defendant had jointly executed a deed of mortgage to one Appaniengar. The amount secured by the mortgage was Rs 300, which came to nearly Rs. 533 with interest thereon. The plaintiff paid admittedly Rs. 306 and the defendant only Rs. 227. This is a suit to recover from the defendant contribution for the amount which the plaintiff had paid in excess of the amount due from him. There were various pleas in the lower Court and I need not refer to all of them now. The only point is whether this suit was within time as one for contribu-

tion. The last payment by the plaintiff was made in January 1914 and the suit was instituted on 2nd July 1917. Prima facie it was more than three years since the accrual of the cause of action The learned Judge in the Court below was of opinion that as the defendant made payment under the bond in September 1914, the bar of limitation was saved. He is clearly wrong in this view. It is not the payment of the defendant that matters, but it is the payment by the plaintiff that gives him the right to sue, as the plaintiff's claim is in respect of the excess payment made by him. To such a suit, Art. 61, Lim. Act, is clearly applicable and under that article the suit must be brought within three years of the date of payment. If any authority were needed for this view, I may refer to the order of reference made by Bhashyam Ayyangar, J., in *Rajah of Vizianagram* v. *Rajah Setrucherla Somasekhararazu* (1). The learned vakil for the petitioner did not support the judgment of the lower Court on this point. What he contended was that the claim against the defendant was saved by the acknowledgment under Ex. 4. It was a registered notice sent on 26th July 1914, before the defendant had made the last payment. At that time, defendant heard that the plaintiff was about to get the mortgage bond assigned to himself and he sent this notice saying that:

"if you get an assignment, out of the sum of Rs. 100 that may be still due my liability will be only Rs. 50.."

This is not an acknowledgment of the liability to the plaintiff. It is only an acknowledgment of the liability under the bond. Apart from this there is another fatal objection to regarding Ex. 4 as an acknowledgment, because under O. 7, R. 6, it is incumbent upon the plaintiff who brings the suit after the prescribed period of limitation to state explicitly the ground on which the bar is saved. He has not stated that. There is no issue about it and there is no evidence connecting Ex. 4 with the liability which the defendant was under to the plaintiff. For all these reasons, Ex. 4 cannot be regarded as saving limitation. As I already mentioned, the suit was brought more than three years after the last payment made by the plaintiff and as such it is barred by limitation. The decree of the Subordinate Judge must be reversed and the suit dismissed with costs throughout.

S.N./R.K. *Appeal allowed.*

(1) [1903] 26 Mad. 686.

A. I. R. 1919 Madras 333

WALLIS, C. J. AND NAPIER, J.

Official Assignee of Madras—Petitioner—Appellant.

v.

T. B. Mehta and Sons—Respondents.

Original Side Appeal No. 4 of 1918. Decided on 4th December 1918, from judgment of Coutts-Trotter, J., D/- 13th December 1917.

(a) Presidency Towns Insolveney Act (1909), S. 56—It must be shown that transaction was entered into with dominant view of preferring particular creditor.

To bring a transaction within the scope of S. 56, Presidency Towns Insolvency Act it must be shown that it was entered into with the dominant view of preferring the particular creditor. [P 334 C 2]

(b) Presidency Towns Insolvency Act (1909), S. 56—"Fraudulent preference"—Test for determination—Chief intention or state of mind of person making transfer must be looked into.

The test for determining what is fraudulent preference within the meaning of the section is, not whether the effect of the particular transfer or payment is fraudulent or whether there has as a fact been a preference, but what was the chief intention or state of mind of the person making the transfer, and it is not sufficient to say that the natural consequence of the act being to prefer, the intention to prefer follows. [P 337 C 2]

(c) Presideney Towns Insolvency Act (1909), S. 56—"With a view to prefer" means with the view to prefer.

The words "with a view to prefer" in the section mean "with theview to prefer": 32 *I. C.* 795 *Diss. from*; *Lake, In re* (1901) and 1 *Q. B.* 710, *Exnl* and *Dist.* [P 334 C 2]

(d) Presidency Towns Insolvency Act (1909), Ss. 55 and 56—Transfer for full consideration and not amounting to act of insolvency—Purchaser having no notice of act of insolvency—Transfer is not void.

Where a transfer is made for full consideration and does not amount to an act of insolvency by reason of an intent to defeat or delay creditors or otherwise and the purchaser has no notice of an act of insolvency the transfer is not voidable under S. 55 of the Act. [P 335 C 1]

A person in insolvent circumstances in order to meet pressing claims, sold some of his diamonds, which were under pledge with various persons, to the respondents, who were one of his large creditors. The arrangement was that the latter should buy the diamonds at an agreed price, pay the amounts due on the pledges and credit the balance towards their accounts. The price settled was fair and by the sales not only were the pledges redeemed but a very large portion of the debt due to the garnishee was also discharged, while much heavier debts on promissory notes to othor creditors were left undis-

charged. The transferor was some time after adjudged an insolvent. On an application by the Official Assignee to declare the transfer void and under Ss. 55 and 56, Presidency Towns Insolvency Act :

Held : that the transfer was not voidable either as a fraudulent preference or as wanting in good faith under Ss. 55 and 56 of the Act. [P 335 C 2]

(c) Presidency Towns Insolvency Act (1909), S. 56—"Good faith"—Transaction should not be in fraud of bankruptcy laws.

Per *Napier, J.*—The words "in good faith" in S. 56 require that the transaction should not be in fraud of the bankruptcy laws. [P 338 C 1]

M. D. Devadoss, Short and Bewes—for Appellant.

Nugent Grant, Grant and *Greatorex*—for Opposite Parties.

Wallis, C. J.—This is an appeal from an order of Coutts-Trotter, J., dismissing the Official Assignee's application by notice of motion for a declaration that the sale of diamonds by the insolvent on and after 19th May 1917 to the garnishees, T. B. Mehta and Sons, was void as a fraudulent preference under S. 56, Presidency Towns Insolvency Act, or in the alternative under S. 55, as the sale was not bona fide and for valuable consideration. In my opinion, the decision of the learned Judge was right on both points. We are not now concerned with the propriety or morality of the insolvent's conduct in obtaining large quantities of diamonds on credit from various firms and pledging them for advances to Nattukottai Chetties and in persisting in this course when he was clearly in insolvent circumstances and had no prospect of paying for them. These are matters to be taken into consideration at another stage. In the middle of May 1917 the insolvent was in very embarrassed circumstances and was unable to meet his obligations as they fell due. He was indebted to the garnishees, Messrs. Mehta and Sons, a Madras firm, with whom he had had large transactions in Rs. 36,062 against which eight hundies were outstanding and also in Rs. 3,000 on general account. Two hundies which fell due on 19th were not presented at his request (Ex. 10, dated 14th May 1917), but a third hundi which fell due on the same day was not met and they began to press him. The insolvent then proposed that the garnishees who were diamond merchants should purchase from him diamonds which were under pledge to various Nattukottai Chetties and apply the surplus, after discharging the pledges, in satisfaction of the hundies.

The diamond market was then rising and Mehta accepted the offer and in the course of five transactions between 25th May and 12th June purchased diamonds to the extent of Rs. 28,000 and in this way obtained payment of the hundies. It is not now disputed that he paid a fair price for the diamonds. An examination of the pledgee's accounts in the course of the case revealed the fact that the purchases by the garnishees from the pledgees were larger than was necessary to pay them off out of the surpluses and that the insolvent was paid over Rs. 41,000 by the pledgees as a result of the transactions. The evidence is that this result was obtained by including in the sales, apparently without the garnishees' knowledge, other diamonds which were not under pledge. Any adverse inference that might arise from this fact is negatived by the evidence that between 25th May, the date of the first of these sales, and his arrest at the end of June, he made payments to the other creditors amounting to more than Rs. 71,000 to meet his more pressing obligations and at the same time put off other creditors. All this shows that he went on trading when in hopelessly insolvent circumstaances, not that he entered into the transactions now impugned with a view to prefer these particular creditors. The learned Judge has rightly held that to bring a transaction within the scope of S. 56 it must have been entered into with the dominant view of preferring the particular creditor.

That construction has recently been criticised in an unreported case in this Court as proceeding upon a consideration of cases decided before the section was enacted. Bowen, L. J., deprecated this mode of construction in *Griffith, Ex parte* (1) and *Hill, Ex parte* ; *Bird, In re* (2) and in the latter case expressed the opinion, on a careful consideration of the various ways in which the language of the section could be construed, that the words "with a view of giving a creditor preference over other creditors" must be read as equivalent to "with the view," the real, effectual, substantial view, of giving a preference to the creditor, the word "a" being equivalent to "the."

(1) [1883] 23 Ch. D. 69=52 L. J. Ch. 717.
(2) [1883] 23 Ch. D. 695=52 L. J. Ch. 903.

That construction was accepted and was approved by the House of Lords in *Sharp* v. *Jackson* (3) several years before that section was re-enacted in India in 1907 and again in 1909, and the Indian legislature must, in my opinion, have contemplated that that construction would be followed here. In the present case the evidence, in my opinion, does not show that the insolvent entered into these transactions with the dominant view of preferring the garnishees because, as is suggested, they were Madras creditors whereas most of the other creditors were in Bombay. The evidence rather shows, in my opinion, that he was acting throughout exclusively in his own interest and with a view to keep his business going which he could not do without satisfying the garnishees creditors' on the spot who were pressing him to meet his obligations and were not to be put off with excuses. As regards S. 55, the sales now in question were for full consideration and did not amount to an act of insolvency by reason of an intent to defeat or delay creditors or otherwise, and the purchaser had no notice of an act of insolvency. In these circumstances they must be held to have been made in good faith and for valuable consideration and not to be avoided under S. 55. The appeal fails and is dismissed with costs. Costs on the original side scale.

Napier, J.—This is an appeal from the judgment of Coutts-Trotter, J., on a motion on behalf of the Official Assignee for a declaration that certain sales of jewels by the insolvent, Muthiah Chetty, to the firm of T. B. Mehta and Sons are void as not being bona fide transactions and further as constituting a fraudulent preference of that firm in that the proceeds were largely utilized for discharging certain promissory notes given by the insolvent to the firm. The insolvent was a diamond merchant in a large way of business in Madras, purchasing diamonds here to a certain extent and to a much larger extent in Bombay. At the time of the sales he was in fact hopelessly insolvent. The sales covered a period between 25th May and 12th June 1917 and were completed in five transactions: on 25th May, 2nd June, 7th June, 8th June and 12th June. Nearly all the diamonds sold were under pledge to various lenders and the sales purported to be, according to the evidence of the garnishee, of those diamonds only, the garnishee buying the diamonds at an agreed price, paying the amount due on the pledge and crediting the balance as against promissory notes, with the result that the whole of the promissory notes and an amount due on a general account to the garnishee was discharged, while much heavier debts on promissory notes to other creditors were left undischarged. The learned Judge has found that the sales are not void nor fraudulent preference.

Mr. Devadoss has attacked these findings as being based on an erroneous view of the law and also contends that on the true view of the facts they cannot be upheld. His contention on the law was as follows: that every transaction by which a creditor is given a preference is presumably fraudulent and that there are only three conditions under which such transactions will be sustained, namely where the transaction is to recoup a breach of a trust, where the transaction is compelled by threats of legal proceedings and where the insolvent bona fide believed he could avoid bankruptcy and entered into the transaction for that purpose. In my opinion there is no warrant for this contention. All that Mr. Devadoss has been able to do is to invite our attention to cases in which these conditions have been held sufficient to establish that there was no fraudulent preference in the particular case. I entirely agree with what fell from the learned Chief Justice at the beginning of the argument that what we have to do is to construe the Act with the assistance of decisions of eminent Judges in England on similar words in the English statute. The learned trial Judge, although he does not refer to the language of the section, starts with this proposition that he has to consider what was the dominant motive of the insolvent in carrying through this transaction. I agree that this is real consideration in the case, but I think it advisable to state how this proposition is arrived at.

The Act to be construed is the Presidency Towns Insolvency Act 3 of 1909, and the important sections are S. 9 which defines an act of insolvency, S. 55 which avoids certain transactions made within two years of insolvency, S. 56 which declares certain transactions with-

(3) [1899] A. C. 419=68 L. J. Q. . 866.

in three months of the insolvency fraudulent and void, and S. 57 which protects certain transactions. The corresponding English Act is the Bahkruptcy Act of 1883 and the corresponding sections are Ss. 4, 47, 48 and 49. Dealing first with fraudulent preference, the words of S. 56 with which we are concerned are:

"Every transfer of property, every payment made, by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over other creditors, shall, if such person is adjudged insolvent, on a petition presented within three months after the date thereof be deemed fraudulent, and void as against the Official Assignee."

The language of S. 48 of the English Act is mutatis mutandis identical. The first thing to be noted about this section is that it does not say that every transfer of property or payment by such a person with the effect of giving the creditor preference is fraudulent and there can be no doubt that if the legislature had intended to avoid all transfers and payments in favour of a particular creditor without considering the motive or the object of the insolvent, it would have used some such words as the above or omitted the words "with a view," etc. We have therefore to construe the words " with a view giving that creditor a preference" as an essential requirement for a fraudulent preference. The learned Judge in the course of his judgment has referred with disapproval to an obiter dictum of a Judge of this Court in a case not reported in the authorized reports, but to be found in *Nalam Viswanatham* v. *Official Assignee of Madras* (4). I do not think that Coutts Trotter J's., criticizms are quite justified on the language of my learned brother, though I am not prepared to agree with some of the observations to be found in that language. I must say also that I think that the learned Judge's language is useful as drawing the attention to the fact that we have to construe a particular statute and not to apply principles founded on words which are not in the particular statute. The true rule of construction was laid down in 1891 by the House of Lords in the well-known case of the *Bank of England* v. *Vagliano* (5) and approved by the Privy Council in *Norindra Nath Sarcar* v. *Kamalbasini Dasi* (6). I am not certain that this rule has always been borne in mind in decisions on questions of fraudulent preference in cases in England, and I specially refer to a decision which was pressed on us by Mr. Grant, *Cheesebrough, In re* (7), from which, so far as the process of reasoning is concerned, I must respectfully dissent. We have however the guidance of very eminent Judges in England in cases where the language of the English statute was critically analysed and I propose to refer to a few of them.

The first case which is very much in point is in *Griffith, ex parte* (1) and especially the language of Bowen, L. J., at page 74*. He there refers to the fact that in judicial decisions since the Bankruptcy Act there has been a tendency among Courts to discuss the question whether the Act had altered the old law and introduced an entirely new law with the result that the Court has been drawn into questions of pressure and volition and into motive of a motive, whatever that may mean, and he lays down that the true method is to go back to the words of the statute and be guided by them. Here we have a very eminent Judge applying the principle which was subsequently laid down in *Bank of England* v. *Vagliano* (5). The next is *Hill, ex parte*; *Bird, In re* (2). In that case the same learned Judge speaking of S. 92 the corresponding section of the Bankruptcy Act, of 1869, says as follows:

"Whether that section has or has not altered the old law is not a matter that need be decided, though there is considerable authority for saying that it has not. But however that may be we have to look to the words of S. 92, and they are "with a view of giving such creditor a preference over other' creditors."

He then considers the meaning of the words "a view" and says:

"I should prefer keeping to the word 'view' instead of 'motive', though in nine cases out of ten the two words may come to the same thing."

He declines to accept the suggestion that the words "a view" mean "sole view" on the ground that if the legislature had so intended it would have used the word "sole". He is of opinion that the word "a" is equivalent to "the" and considers that "the view' means the dominant and substantial view.

These two cases were followed and applied by a Division Court in *Bell, In*

(4) [1916] 32 I. C. 795.
(5) [1891] A. C. 107=60 L. J. Q. B. 145.
(6) [1896] 23 Cal. 563=23 I. A. 18 (P. C.)
(7) [1871] 12 Eq. 358=40 L. J. Bk 79.
*Page of [1883] 28 Ch. D.—Ed.

re Official Receiver, Ex parte (8). That was a case where pressure was relied on as taking the case out of the Statute and Wright, J., laid down that in such a case it must be found that pressure was the substantial ground of the payment being made which is of course equivalent to saying that the intention to prefer would not be the substantial ground. Vaughan Williams, J., says:

"The law is well established now that one has to ascertain in each case what was the dominant motive which operated on the bankrupt's mind."

And in another part of the judgment "was the substantial, effectual or dominant view with which the debtor made the payment a preference of that creditor?"

The next case is the decision relied on by the learned Judge in *Sharp* v. *Jackson* (3). There the learned Lord Chancellor endorses the view of Lord Esher in the Court of appeal in the same case that the question depends not on the mere fact that there has been a preference but also on the state of mind of the person who made it and that it is not sufficient to say that the natural consequence of the act being to prefer, the intention to prefer follows. This decision is specially important as it has been treated in subsequent cases as endorsing the correctness of the decision in the Court of appeal in the same case. That is *sub nominee, New, Prance and Garrard's Trustee* v. *Hunting* (9). I have already referred to one extract from Lord Esher's judgments. Other passages are as follows:

"What had he obviously in view when he executed this deed? . . . . . It seems to me clear that he made this conveyance, not with the 'intention' or 'view' or 'object' or whatever it may be called, of preferirng these persons, but for the sole purpose of shielding himself. Under these circumstances what he did is not a fraudulent preference within the Act."

A. L. Smith, L. J., says:

"I have always understood that, to ascertain whether there has been a fraudulent preference, it is necessary to consider what the dominant or real motive of the person making the preference was; whether it was to defraud some creditors by preferring others, or for some other motive."

Chitty, L. J., says:

"I ask myself what was really the view which Prance had in making this conveyance. Was it to prefer these particular trust estates to other creditors? No; it was to protect himself against the charges hanging over him."

There can be no doubt that the Court of appeal in this case were applying the tests laid down in *Griffith, Ex parte* (1), *Hill, Ex parte*; *Bird In re* (2) and in consequence of this unanimity of the Court of appeal and its endorsement by the House of Lords, Wright, J., in *Buckley's* case (10) said as follows:

"Ever since the decision in *New, Prance & Garrard's Trustee* v. *Hunting* (9), which has since been affirmed by the House of Lords (*Sub-nom, Sharp* v. *Jackson* (3)) so little difficulty has been felt by gentlemen who practise in bankruptcy matters that questions of fraudulent preference comparatively seldom now arise."

It is clear on the authority of these cases that no hard and fast rule can be laid down as to what facts will take a particular case out of the statute and it is not open to us to hold, as Mr. Devadoss would wish us to do, that certain circumstances only have been accepted by the Courts for this purpose and no other circumstances will suffice. Mr. Devadoss relied on a decision in *Lake In re* (11), a breach of trust case. But this case is really against him, for there Wright, J., finding that there had been several breaches of trust of which only one was made good, held that there was a fraudulent preference. The Court of appeal, it is true, found on the facts that it was not. But the learned Judges did not lay down, and I venture to think, could not lay down, a definite rule that where there are breaches of trust and one is made good, there cannot be a fraudulent preference. Indeed, on these facts I would myself prefer the finding of Wright, J. [His Lordship then deals with the facts of the case.] I therefore agree with Courts Trotter, J., that these transaction did not amount to a fraudulent preference.

The remaining questions can be shortly disposed of. It follows from the above finding that the transfer was not an act of bankruptcy under S. 9, Cl. (b). With regard to S. 55, which invalidates transfers not made in good faith and for valuable consideration within two years of insolvency, it has been established by the evidence of an expert witness that the price paid by the garnishee for the jewels was only 4 per cent. less than the valuation he would put on them. It is hardly necessary to say that such a variation cannot indicate anything more than a difference of opinion. There is no evidence that the garnishee knew that the insol-

(8) [1893] 10 Morrell 15.
(9) [1897] 2 Q. B. 19=66 L. J. Q. B. 551.
(10) [1899] 2 Ch. 725=68 L. J. Ch. 764.
(11) [1901] 1 Q. B. 710.

vent was carrying through this transaction for any other purpose than that which he (the garnishee) thought namely discharging the liabiiity to him, or that he was getting more money than was required for discharge of the pledge. Indeed Mr. Devadoss conceded this. There was therefore no want of good faith within the ordinary meaning of the term. It is true that the words "in good faith" have been held both in England and in this Court to require that the transaction should not be in fraud of the bankruptcy laws. But, as there has been no fraudulent preference, it follows that there has been no fraud of the bankruptcy laws. In these circumstances I do not think it necessary to consider the case of *Shears* v. *Goddard* (12) and other English cases on the point. I therefore agree with the learned Chief Justice in dismissing the appeal with costs.

S.N./R.K. *Appeal dismissed.*

(12) [1896] 1 Q. B. 406=65 L. J. Q. B. 344.

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SESHAGIRI AIYAR AND PHILLIPS, JJ.

Chockalinga Nayakan—Defendant—Appellant.

v.

Arunachalam Chettiar and *others*—Plaintiffs—Respondents.

Second Appeal No. 1801 of 1917, Decided on 5th December 1918, against decree of Dist. Judge, Ramnad, in Appeal Suit No. 61 of 1916.

(a) Landlord and Tenant—Lease providing permanent rent—Absolute estate is conveyed—Reversion to waram not open.

Where a lease deed provided for a permanent rate of rent being paid by the lessee for ever and ever, and the same was coupled with words of inheritance, that the property shall descend to the heirs of the lessee:

Held: that the lease was not only for a fixed period, but conveyed an absolute estate, and that it was not open to the lessor or his assignee to revert to waram. [P 338 C 2]

(b) Deed—Construction—Grant—Nature of.

Prima facie, the terms of a document must be looked at to ascertain the nature of the estate granted by it, and it is only where there is any doubt about its import that other considerations, as the extent of the right possessed by the grantor, can be taken into consideration: *Boddington* v. *Robinson*, (1875) 10 *Ex.* 270, *Expl.* [P 338 C 2]

(c) Transfer of Property Act (4 of 1882), S. 8—S. 8. relates to effect of grant.

Section 8 is not a canon of construction but a rule relating to the legal effect of a grant. [P 338 C 2]

T. M. Krishnaswami Aiyar—for Appellant.

A. Krishnaswami Aiyar—for Respondents.

Judgment.—One Kolandaiswamy Devar obtained a lease for 30 years of the village in dispute from the Zamindar of Sivaganga in 1882. In 1886 he executed Ex. 1 to the defendant Ex. F is the muchilika from the defendant to Kolandaisawmy. In March 1887 the suit village and other villages were permanently assigned to Kolandaiswamy by the Zamindar. The right of the assignee was purchased in Court auction by the present plaintiff and he sues to recover arrears of rent from the defendant. The defendant pleaded that under Ex. 1 he was bound to pay only the rent provided in the document and that plaintiff was not entitled to demand waram. The main issue in the case was whether Ex. 1 conferred a permanent right on the defendant. Both the Courts below were of opinion that it was not a permanent patta and that it was open to the plaintiff to revert to waram. We are unable to agree with this conclusion. The document on the face of it fixes a permanent rate of rent for all time to come. The words "for ever and ever" occur in three places and are coupled further with words of inheritance, namely the property shall descend to heirs. We are unable to hold that Ex. 1 is merely a lease for a fixed period.

Mr. A. Krishnaswami Aiyar for the respondents referred to *Boddington* v. *Robinson* (1) and contended that the nature of the estate possessed by the grantor is a conclusive test of the nature of the grant made to the grantee. That decision does not support this extreme contention. No doubt, in considering the extent of the interest granted by a person, the nature of his right may be taken into account. Generally, if the language of the grant is ambiguous, such considerations may be of avail. But where the language is unambiguous and clear, we do not think in construing a grant the extent of the right possessed by the grantor should have any weight. S. 8, T. P. Act, was also relied on. That section lays down that the grantor must be deemed to have conveyed only what he was capable of conveying. It is not a canon of construction but a rule relating to the

(1) [1875] 10 Ex. 270.

legal effect of a grant. The observations of the Judicial Committee in *Radhakant Lal* v. *Mt. Nazama Begum* (2) support this view. For these reasons we are of opinion that prima facie the terms of a document must be looked at to ascertain the nature of the estate granted by it, and it is only where there is any doubt about its import that other considerations can be taken into account. In our opinion Ex. 1 conveyed an absolute estate. The further question is whether it is binding upon the plaintiff. On the one hand, Mr. T. M. Krishnaswami Aiyar for the defendant relied upon S. 43, T. P. Act, and upon S. 26, Estate Land Act. On the other hand, Mr. A. Krishnaswami Aiyar referred to the well-known principle enunciated in *Patman* v. *Harland* (3) by Jessel, M. R., that where a man has notice of the document, he must be deemed to have notice of the terms of the document and contended that as both parties were cognizant of all the facts, no question of estoppel either under S. 115 or S. 43, T. P. Act, can arise. Without expressing any opinion whether constructive notice of the contents of a document would disable a party from relying upon an actual representation, we think that further facts ought to be ascertained in this case before applying the law. In the first place, we must know whether the facts alleged in para. 7 of the written statement are true and also whether the defendant was otherwise actually aware of the nature of the estate which Kolandaiswamy had at the time of Ex. 1. Also before applying S. 26, Estates Land Act, Courts must know what was the state of the property at the time of Ex. 1 and why a permanently low rate of rent was fixed at the time of the grant. It is only on the ascertainment of these facts that the law can be applied. The issues that must be tried are:

(1). Whether the plaintiff made any representation as stated in para. 7 of the written statement. (2) Whether the defendant was aware that Kolaindaiswamy had only a limited estate. (3). Under what circumstances and why a favourable rate of rent was fixed in Ex. 1. (4). Whether by operation of S. 26, Estates Land Act or by the principle of estoppel enunciated in S. 43, T. P. Act, the plaintiff is precluded from reverting to waram? As the determination of these issues would involve the taking of further evidence and as the case was disposed of on a preliminary point, we think in the circumstances of the case, it is desirable that the decrees of both the Courts should be reversed and the case should be remanded to the Court of first instance for disposal in the light of the above observations. Parties may be permitted to file additional statements. The Court may also frame further issues, if necessary and give further opportunities to the parties for adducing evidence. We order refund of court-fee; costs to abide.

S.N./R.K. *Appeal allowed.*

(2) A. I. R. 1917 P. C. 128=45 Cal. 733=45 I.C. 806 (P.C.).

(3) [1881] 17 Ch. D. 353.

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ABDUR RAHIM AND PHILLIPS, JJ.

Vaniyankandi Thazha Kuniparambil Parkum and *others*—Defendants—Appellants.

v.

Thayithotta Thil Kuttiammoo and *another*—Plaintiffs—Respondents.

Second Appeal No. 368 of 1918, Decided on 21st January 1919. against decree of Temporary Sub-Judge, Tellicherry, in Appeal Suit No. 2 of 1917.

(a) Easements Act (1882), Ss. 15 and 16—Period of tenancy is to be deducted only if suit is brought within three years after termination of term—Fact that owner allowed tenant to hold over makes no difference.

Under S. 16 the time during which the servient premises have been in occupation of a tenant or lessee for any term of years is to be deducted in computing the period of enjoyment of the easement claimed, only if that claim is resisted within three years next after the termination of the term by the owner of the land. The fact that the owner did not determine the tenancy and allowed the tenant to hold over does not affect the question and the prescriptive right acquired by the dominant owner by enjoyment for 20 years becomes absolute within the meaning of S. 15. [P 341 C 2]

(b) Easements Act (1882), Ss. 15 and 16—Right to light and air by way of easement cannot be acquired for limited period.

Per *Abdur Rahim, J.*—Under the Easements Act a prescriptive right to light and air cannot be acquired by way of an easement for a limited period, such as during the occupation of the servient heritage by a lessee. [P 341 C 1]

(c) Easements Act (1882), Ss. 8 to 19—"Impose" in Ss 8 to 19 means creation of easement by voluntary Act.

Per *Abdur Rahim, J.*—The word "impose" in the sections in Ch. 2 means the creation of an easement by a voluntary act of the owner or lessee or of any other person having power to transfer an interest in the servient tenement. [P 340 C 2]

Per *Phillips, J.*—The word "impose" in Ss. 8 and 11, Easements Act does not necessarily mean imposition by some act such as a grant, but includes imposition by omission to take steps to prevent acquisition by prescription.

[P 343 C 1]

(d) Easements Act (1882), S. 7—"Owner" does not necessarily mean absolute owner.

Per *Phillips, J.*—The word "owner" in S. 7 cannot be interpreted as meaning necessarily absolute owner. The whole scheme of the Act seems to imply that easements can be acquired even against limited owners, as lessees or persons having a derivative interest in the property.

[P 343 C 1]

K. P. M. Menon and *B. Pocker*—for Appellants.

C. Kunhiraman—for Respondents.

Abdur Rahim, J.—The plaintiffs in this suit claimed an easement of light and air acquired by prescription over the premises in occupation of the defendants. The dominant tenement is a warehouse and the lower appellate Court has found that with respect to the windows 11 to 16 in the plan, Ex. B, the plaintiffs who are in the occupation of the warehouse had been in unobstructed enjoyment of light and air since the year 1877 until the defendants threatened to obstruct the access of such light and air by building a two storeyed warehouse on their land shortly before the institution of this suit in 1913. From 1877 to 1887 the land was in the possession of a tavazhi to whom the Orkatteri tarwad had made a grant of it for maintenance. In 1887 the defendants obtained the land from the tavazhi on a kanom of 12 years. On its expiry in 1899 they continued in possession without any lease until 1905, when they obtained a fresh kanom for another term of 12 years. Neither the tavazhi, the lessor of the defendants, nor the superior proprietor, the tarwad, has taken any steps to resist the plaintiffs' claims and the question is whether the defendants' possession since 1887 as tenants of the servient heritage is a bar to the maturing of the plaintiffs' prescriptive rights.

On the question whether a prescriptive right to access of light and air can be acquired in the nature of an easement for a limited period, for instance, during the time the servient tenement is in the occupation of a lessee for years, I am of opinion that it cannot. S. 15, Easements Act 5 of 1882, lays down that

"where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for 20 years . . . . . , the right to such access and use of light or air . . . . . shall be absolute;"

and S. 16 says:

"Provided that, when any land upon, over or from which any easement has been enjoyed . . . . . has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last mentioned period of 20 years, in case the claim is within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land."

These sections imply that by reason of a prescriptive easement the rights of the owner of the servient tenement are modified or restricted to that extent and not merely those of the lessee for the term of his lease. No doubt an easement may be permanent or for a limited period, as stated in S. 6. But the question is whether an easement for a limited period can be acquired by prescription. In Ch. 2 the imposition, acquisition and transfer of an easement are dealt with. Wherever an easement is spoken of as "imposed," the phrase is used to mean the creation of an easement by a voluntary act of the owner or lessee or of any other person having power to transfer an interest in the servient tenement. This will be apparent from Ss. 8, 9, 10, 11, 20, 28, 37 and 40 and the illustrations appended thereto, especially those to S. 9. They show that the imposition of an easement as contemplated is to be by such an act as a grant or a bequest of the owner or occupier of the servient heritage. That a lessee can create or impose an easement by a grant for the period of his term cannot be doubted. see S. 11. In contradiction to such "imposition" of an easement by the owner or lessee of a servient tenement, the legislature speaks of acquisition of an easement by the owner of the dominant heritage by prescription or custom, in Ss. 15, 16, 17, and 18 elsewhere. There are no express words in the Act providing for the acquisition of an easement for a limited time by prescription by the owner or occupier of the dominant heritage, though the Act in various places deals with the imposition of an easement by the owner or lessee of the servient tenement. And in my opinion without the intention of the legislature being in this con-

nexion expressed in so many words or capable of being inferred from any plain indications in the Act, we should not be justified in recognizing a prescriptive right to light and air by way of easement for a limited period, such as during the occupation of the servient heritage by a lessee, when it is clear that no such right has ever been recognized by the English law. The English law on the subject is clearly stated in *Wheaton* v. *Maple* (1) by Lindley, L. J., in the Court of appeal :

"The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt, by or with any one except an owner in fee. A right claimed by prescription must be claimed as appendant or appurtenant to land, and not as annexed to it for a term of years (p. 63);"

and further on after quoting the words of the English Prescription Act 2 and 3 William 4, C. 71,

"the expression 'absolute and indefeasible, as applied to easements of all kinds ..... shows that the easements dealt with were easements appendant or appurtenant to land, and which, when acquired, imposed a burden for ever on the servient tenement. This view of the statute was clearly expressed soon after it was passed in *Bright* v. *Walker* (2), and although some passages in Baron Parke's judgment in that case have been criticized, and even dissented from, the broad view which underlies the judgment has never been disapproved. That view, as I understand it, is that the Act has not created a class of easements which could not be gained by prescription at common law, or in other words, has not created an easement for a limited time only or available only against particular owners or occupiers of the servient tenement. Such easements can only be created since the Act as before the Act, viz., by grant or by an agreement enforceable in equity, which for most purposes is as efficacious as a deed under seal. Such a grant or agreement must moreover be proved as a fact and not be purely fictitious."

It will appear from Gale on Easements, Edn. 9 (pp. 210, 211 etc.), that this exposition of the law has been accepted without question or doubt in England. If the Indian legislature, which must be presumed to have been familiar with the English law on the subject, intended to alter it on this point, it would have plainly expressed or indicated such intention. But the plaintiffs have, in my opinion, nevertheless acquired an absolute title to light and air by prescription as claimed by them by reason of the fact that their claim was not resisted by the owner of the premises within three years of the termination of the period of the defendants' lease in 1899. The clear effect of S. 16 is that the time during which the servient premises have been in occupation for any term of years is to be deducted in computing the period of enjoyment of the easement claimed, only if that claim is resisted within 3 years next after the termination of the term by the owner of the land. The owner did not resist the plaintiffs' claim for 3 years and more after 1899 and it follows that the plaintiffs' right acquired by enjoyment for 20 years became absolute within the meaning of S. 15, Easements Act. The fact that the defendants continued in possession as tenants by holding over after the expiry of the lease for years cannot make any difference.

It was also argued on behalf of the appellants that the tavazhi, whose tenants the defendants were, held the servient premises for life within the meaning of S. 16. I have no doubt that the grant for maintenance of the tavazhi can never be called an interest for life as contemplated by the Act, unless it can be shown that it was intended for certain definite lives. We have no document to show what the terms of the grant were, supposing there was a grant, and as the Subordinate Judge finds, the arrangement, such as it was, was capable of being revoked at any time by the tarwad to whom the property belonged. The appeal therefore fails on all the points argued before us and must be dismissed with costs.

Phillips, J.—This suit is brought by the plaintiffs for an injunction restraining the defendants from obstructing the access of light and air to the plaintiffs' warehouse. The warehouse was built in 1877 and the land now in the possession of the defendants was in the possession of its owner from 1877 to 1887. In 1887 the land was demised on kanom for 12 years and was held over until 1905, when there was a fresh renewal for 12 years. The defendants' land belongs to the Orkatteri tarwad and was allotted to a tavazhi for maintenance. The kanom demises were granted by the tavazhi. Two questions arise for consideration in this appeal : (1) whether an easement right can be acquired by prescription against a tenant for the term of his tenancy, and (2) ; whether by virtue of S. 16, Easements Act, the owner of the

(1) [1893] 3 Cal. 48.
(2) [1834] 40 R. R. 536.

land is prevented from disputing the easement claimed, because he did not resist the easement within 3 years of the determination of the tenancy from 1887 to 1899. So far as the second question is concerned, it appears that the plaintiffs enjoyed this easement right from 1877 until the date of suit in 1913, which is a great deal longer than the statutory period of 20 years prescribed for the acquisition of an easement by prescription. For part of this period, namely, from 1887 to 1899, the land was in the possession of the defendants and their predecessors as tenants under the kanom granted to them for 12 years. This kanom expired in 1899 and it would therefore appear that unless the owner intervened within 3 years from 1899 the easement would become absolute. It is contended for the defendants that the term had not been determined by the landlord, and therefore S. 16 would not apply. S. 16, is however clear. It says :

"When any land ..... has been held ..... for any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such ..... term shall be excluded in the computation of the said lastmentioned period of twenty years, in case the claim is, within three years next after the determination of such .... term, resisted by the person entitled on such determination, to the said land."

The contention is that the determination of such term means the determination of the tenant's right, and it is argued that inasmuch as the tenants were allowed to hold over for 6 years and were then confirmed in their right by a renewal deed, there has been no determination of their right. The language of the section is however clear. In the words "determination of such term", "such term" means "any term of years exceeding three years from the granting thereof." In this case a term of 12 years was granted and when that term expired it must be held to be a determination of such term. The landlord did not take advantage of his right to intervene within 3 years of that date, and therefore the period of tenancy is not excluded in the computation of the period of 20 years. A further argument is put forward, namely, that the kanom was not granted by the owner but by the tavazhi, which itself had only a life-interest in the land. No evidence has been adduced as to the exact terms on which the tavazhi was in possession of the land but the kanom deed, Ex. 3, merely recites that the land has been set apart towards the expenses of the Orkatteri house. Even if there had been a grant to the tavazhi it would not be a grant of a life-interest, for there is no one life during which such interest could subsist and the interest would continue so long as the tavazhi existed. It is not however proved that there was any grant to the tavazhi, and I think it must be held that the tavazhi was allowed to enjoy this land under the tarwad and that its possession was nothing more than the possession of the tarwad. In that view the landlord was really the tarwad acting through its agent the karnavan of the tavazhi, and S. 16 would be applicable. In this case, I think that the plaintiffs have made their right absolute by more than 20 years' enjoyment and are entitled to a decree. The first question is one of greater difficulty, the contention for the appellants being that no easement right can be acquired by prescription against a tenant and this appears to be the principle recognized by the Common law of England; vide *Wheaton* v. *Maple* (1) and *Kilgour* v. *Gaddes* (3). In an earlier case apparently a contrary view was suggested: *Daniel* v. *Anderson* (4). and in two Irish cases this contrary view was adopted: *Beggan* v. *M'Donald* (5) and *Fahey* v. *Dwyer* (6). The question is whether the Common law principle has been embodied in the Indian statute, the Easements Act. It is not disputed that a tenant could grant an easement for the period of his tenancy even under English law. But the possibility of its acquisition by prescription is not recognized on the theory that there can be no presumed grant except from the owner. In the Easements Act we find in S. 6 that an easement may be for a term of years or for other limited period. In S. 4 it is defined as a right which the owner or occupier of certain land possesses as such. Again in S. 8:

"an easement may be imposed by anyone in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed."

Again in S. 11:

"No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take effect after the ex-

(3) [1904] 1 K. B. 457=73 L. J. K. B. 233.
(4) [1862] 31 L. J. Ch. 610.
(5) [1878] 2 L. R. Ir. 560.
(6) [1879] 4 L. R. Ir. 271.

piration of his own interest, or in derogation of the right of the lessor or the superior proprietor"

I do not think the word "impose" in these sections must necessarily mean impose by some act, such as a grant, but it will include "impose by omission to take steps to prevent acquisition by prescription." Similarly in Expl. I, S. 15:

"Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease."

Section 37 says:

"When, from a cause which preceded the imposition of an easement the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished."

All these provisions seem to imply the possibility of an easement being acquired against a lessee or other person having a derivative interest in the property, and the only section which throws some doubt is S. 7 which says:

"Easements are restrictions of one or other of the following rights, namely: (a) The exclusive right of every owner of immovable property . . to enjoy and dispose of the same . . . (b) The right of every owner of immovable property . . . to enjoy without disturbance by another the natural advantages arising from its situation."

This section seems to imply that easements can only be acquired against an owner of property. It does not say that the owner must be the absolute owner, and the following section (S. 8) is inconsistent with such interpretation of the word, for it says that an easement can be imposed to the extent to which any one may transfer his interest in the heritage, which obviously contemplates the existence of a lesser interest than absolute ownership. I think therefore that the word "owner" in S. 7 cannot be interpreted as meaning necessarily absolute owner. The whole scheme of the Act seems to imply that easements can be acquired even against limited owners. The Act undoubtedly goes further than the English law on the subject of prescription, for S. 8 of the English Act. (2 and 3 William 4, C. 71) which corresponds to S. 16, Easements Act, is restricted to rights of way and water, whereas S. 16 of the Indian Act is applicable to all kinds of easements. This is one instance wherein English law has not directly applied in India, and there being this one instance, it is not so difficult to hold that in other respects also the legislature did not wish to adopt all the provisions of the English Common law. If that be so there is no sericus objection to reading the sections, I have enumerated above in a natural meaning, and understanding them as referring to the acquisition of easements against owners who are not absolute. If that is so the easement has at any rate been acquired by the plaintiffs against the defendants, and for the purpose of this suit to which the owners of the land were not parties the plaintiffs would be entitled to an injunction.

I agree therefore that the appeal must be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1919 Madras 343

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Lakshumanan Chetty and *others* — Plaintiffs—Appellants.

v.

Chidambaram Chetty — Defendant—Respondent.

Civil Appeal No. 85 of 1917, Decided on 17th October 1918, against decree of Temporary Sub-Judge, Sivaganga, in O. S. No. 13 of 1914.

(a) Contract Act (9 of 1872), S. 196— Agent exceeding his authority— Full disclosure to principal— Objection not pressed— Ratification is to be presumed.

Where an agent enters into a transaction not authorized by his principal, if the agent fully and frankly discloses what he has done and the principal takes no objection or abstains from pressing his objection after hearing the agent's explanations, ratification may readily be presumed. [P 344 C 1, 2]

*** (b) Contract Act (9 of 1872), Ss. 196 and 211— Principal must notify his dissent to agent's unauthorized act within reasonable time —Absence of dissent gives presumption of ratification.**

Per *Wallis, C. J.* (*Seshagiri Aiyar J.*, dubitante).—It is the duty of the principal to notify his dissent to the agent within a reasonable time. He has no right to pause and wait the fluctuation of the market in order to ascertain whether the agent's unthorized act is likely to be beneficial or prejudicial; he is bound, if he dissents, to notify his determination in a reasonable time, provided he has an opportunity of doing so. Where the transaction impugned is reported to the principal and he allows it to stand in his accounts for some time without repudiation till the market fluctuates to his disadvantage, he should be deemed to have ratified the transaction and the agent is not liable for the loss : *Prince* v. *Clerk* (1823), 1 *B. & C.* 186, *Foll.* [P 344 C 2]

(c) Contract Act (1872), Ss. 196 and 211— Nattukottai Chetty firm— Agent's unautho-

sized advance against security —Ratification is not implied—Agent is liable for loss.

Per *Wallis, C. J.*—(*Obiter*)—When an agent, contrary to instructions, makes advances against security, the principal may realize the security and hold the agent liable for the balance. Such intermeddling will not amount to a ratification of the agent's act. [P 348 C 2]

Per *Seshagiri Aiyar, J.*—The application of principles governing the relationship of English agents to their principals should not be extended to Nattukottai Chetty agents in India. The position of an agent of a Chetty who lends out moneys on his own responsibility approximates to that of a trustee, though not in every detail of it. The whole subject requires reconsideration. [P 351 C 1]

K. Srinivasa Aiyangar and *K. V. Krishnaswami Aiyar*—for Appellants.

V. Krishnaswamy Aiyar and *M. Pantanjali Sastri*—for Respondent.

Wallis, C. J.—This is an appeal by the plaintiffs from the decree of the Subordinate Judge of Sivaganga in a suit for an account against their agent, the defendant, in so far as it dismisses the suit in respect of transactions with two persons, E. S. Attia and S. Clifford, which are the subject of issue 5. The Subordinate Judge found that in these transactions the agent exceeded his authority and that his action was not ratified expressly or impliedly by his principals, but held that the fact that the principals took over from the agent certain securities which he had obtained from these two debtors and dealt with some of them amounted to a ratification. Before us Mr. A. Krishnaswami Aiyar, who appeared for the respondent, endeavoured mainly to support the Subordinate Judge's finding on the ground that ratification was proved independently of the subsequent dealings with the securities, and this question has been most elaborately argued before us.

The principals are Nattukottai Chettis who have their permanent home where their families reside in the Madura District and carry on business mostly by agents in various places in India, Burma and the Near East. This is by no means the first case of the kind which has come before this Court. They not infrequently issue very stringent instructions to their agents as to the class of business they should undertake, and the agents not infrequently take an elastic view of the restrictions imposed upon them and embark from various motives on unauthorized transactions. In such cases, if the agent fully and frankly discloses what he has done, as it is his duty to do under his contract which is one of the utmost good faith, and if the principal takes no objection or abstains from pressing his objection after hearing the agent's explanations, ratification may readily be presumed. In *Prince* v. *Clerk* (1) Abbott, C. J., laid down that it was the duty of the principal to notify his dissent to the agent within a reasonable time and Holroyd, J., said that the question was whether the principal assented to the act done by the agent which might or might not be beneficial. And if the inference arising from the facts was that he decided to take the cargo on his own account or that he meant at least to take the chance of the market, that would be sufficient to discharge the agent. So too Bayley, J., observed that:

> "the principal . . . has no right to pause and wait the fluctuation of the market, in order to ascertain whether the purchase is likely to be beneficial or prejudicial; he is bound, if he dissents to notify his determination in a reasonable time, provided he has an opportunity of doing so."

The same principles, in my opinion, are applicable in the present case and if the principals decided not to press their objections but to wait and see how the transactions turned out, that would be sufficient to discharge the agent.

The question has to be decided mainly on the correspondence which is practically all of it, produced by the plaintiffs, as the defendant returned to his principals the letters he had received from them or left them behind at Rangoon with his successor. It is incomplete, and it was suggested to us that some of the plaintiff's own letters to the defendant had been kept back by them, or had even been rewritten. The Subordinate Judge found some of the letters exhibited not proved, but in view of the fact that they were not cross-examined too, we think the letters exhibited may be accepted as genuine; but, as will be pointed out there is some ground for thinking that they have been selected with a view to help the plaintiff's case. Further the plaintiffs have not produced the kurippus or monthly statements of transactions sent them by the defendant, of the Paredu or ledger which they admit having written up for a time from these kurippus as received. They no doubt say they afterwards discontinued this practice for no apparent reason; nor have they produced the

(1) [1823] 1 B. & C. 186=2 D. & R. 266.

aindugais or more detailed statements showing the state of each constituent's accounts which were forwarded to them. P. W. 3 in his evidence only complains that the defendant stopped sending this about a year before he returned from Rangoon, which was in 1911. Ex. 1 (b), dated 26th August 1909, shows an aindugai had just then been sent. Ex. J-24, dated 2nd January 1911, is the first complaint of the aindugai not being sent:

"In spite of your having been told for the last four or five months to send the aindugai you have not sent it."

This does not look as if no aindugai had been received since May 1910 which is the material date here, but I do not attach very much importance to this as I am not satisfied that the plaintiffs did not write up their paredu, which they have not produced, from the kurippus which were regularly sent them, and I have come to the conclusion that they knew more of the real state of the transactions than they are now willing to admit. No doubt, in Ex. J-24 in January 1911 they stated that they supposed the whole of the oil share transactions were then closed but I doubt if this was serious. They would thus appear to have suppressed some of their accounts and they have not put Alagappa Chetty, the agent who succeeded the defendant at Rangoon, into the box: and these facts must be taken seriously into account in considering whether or not the correspondence shows their assent. Again, to form a right conclusion on the correspondence it must be read consecutively and as a whole. Mere isolated sentences taken out of their context and used without reference to the date of the letter in which they occur may be very misleading. The main question is whether the plaintiffs assented to the defendant's advancing large sums to one Attia and one Clifford on the security of certain oil shares between November 1908 and May 1910. There were also large transactions with Mawer & Co. of the same kind which have not resulted in loss and as to which therefore no claim is made. Mawer who is best known to the public in connexion with the losses sustained by Indian depositors owing to failure of the Bank of Burma, half of which he owned according to one of the letters, was also largely interested, as was the bank, in certain oil companies which he had been instrumental in bringing out. Attia and Clifford are said by P. W. 3 to have been Mawer's partners. As already stated, there were large transactions with him, but the transactions now in question were entered into by Attia and Clifford on their individual accounts.

One of the earliest letters, Ex. J-28, dated 7th January 1908, from the senior partner of the plaintiffs' firm, now deceased, shows that the plaintiffs were fully alive to the risk involved in advancing money against shares. Many of the letters addressed to the defendant in 1908 were in the nature of general instructions rather than positive orders. Ex. 2 (e) tells the defendant not to lend on hundis without security. Ex. 2 (f) modifies this. Ex. J-21, dated 2nd September 1908, tells the defendant to confine himself mainly to getting in outstanding debts, and Ex. J-7, dated 3rd November 1908, is to the same effect. Ex. K-2, dated 11th November 1908, from plaintiff 3 complains of the defendant's disregard of their instructions and threatens that, if he lends in contravention of instructions, he shall answer for every pie. Ex. J-11 reports that Attia's hundis had been taken against a deposit of shares, as could be seen by the ledger, and that the defendant was making frequent inquiries about the value of the shares. If they fell, the money could be collected gradually. This put the plaintiffs on notice of the transaction so far. Ex. J 26, dated 14th December 1908, shows the plaintiff's attention had already been called to transactions with Attia as they directed that the money due from him should be called in. Ex. L, dated 24th December 1908, is a reply from the defendant urging that Attia was a good constituent and it would be better to go on dealing with him. In Ex. J-29, dated 11th January 1909, the plaintiffs' senior partner inquired why Attia had not paid interest for a long time.

Ex. J-2, dated 19th January 1909, is a general instruction to get in debts outstanding on simple bonds, shares and hundis. In Ex. J-12, dated 21st January 1909, which crossed it, the defendant reported that Attia's hundis were being renewed as his shares were of great value. The plaintiffs seem to have accepted the situation so far; but Ex. J-8, dated 30th March 1909, complained of the sale on

which the defendant was doing business and told him not to lend any more.

The next reference to Attia is Ex. K-4, dated 14th June 1909, when the plaintiff inquired why the defendant had to take up Attia's hundi if he was such a sound constituent. In Ex. J-13, dated 17th June 1909, the defendant gave his reasons for thinking Attia a sound constituent, and that it was advantageous to the plaintiffs to deal with him. In Ex. J-4, dated 29th June 1909, he was asked why Attia borrowed from them if as, the defendant stated, he could borrow at 6 per cent, from the bank. Ex. J-27, dated 26th July 1909, mentioned that people from Rangoon had been expressing alarm at the way the defendant was managing the business. In Ex. J-16, dated 29th July 1909, the defendant replied that it was going on well enough. Ex. J-18, dated 3rd August 1909, complained that he was going on lending and asks when was this to stop. We now come to 12th August 1909. The day-book, with which the monthly kurippus sent to the plaintiffs corresponded, shows that Attia's account was then balanced, but that this was partly effected by discounting his hundi with the bank; and the defendant in his evidence admits that he had to take it up on 23rd September 1909. It is in respect of the fresh commitments between this date and April 1910 that it has been endeavoured to make the agent responsible, and it is necessary to see in what circumstances these fresh advances were made. We are not so much concerned with the respective attitudes of the agents and the principals before this time, as with the question whether the transactions which followed between September 1909 and August 1910 were brought to the knowledge of the plaintiffs and assented to by them. There were fresh debts of Rupees 5,000 on 27th August and of Rs. 10,000 on 17th September in respect of which shares were deposited, and by 9th December the balance shown as due by Attia was Rs. 26,300, which rose by 7th April 1910 to Rs. 93,644-3-8.

Just at the most important period the correspondence produced by the plaintiffs becomes curiously meagre and incomplete. The only letters from September 1909 to February 1910 which have been exhibited are Exs. 2 (c), L-15, 3, 1 (c). They do not appear to contain any reference to Attia, whereas Ex. 1 (c) expressly prohibits advances to certain other persons. The next letter dealing with Attia and Mawer is Ex. J 17, dated 28th March 1910, from the defendant. It deals at length with the advances to Mawer and Attia, and urges various matters which it says the plaintiffs do not take into consideration. It is clearly in answer to a letter from the plaintiffs which the plaintiffs, who as I said, are in possession of the letters written by them to the defendant, have not chosen to produce. They were getting kurippus as usual from September to the end of March showing the transactions with Attia, and I have no doubt they were the subject of letters which have not been produced. Ex. 3 (a), dated 4th April 1910, in which the receipt of the kurippu sent on 11th March is acknowledged, is an answer to a letter not produced and inquires how they are to realize the shares deposited, which may be taken to include the shares, etc., deposited by Attia and Clifford as well as those deposited by Mawer. This is explained by the defendant in Ex. 1 (l), dated 15th April 1910. The answer to Ex. J.-17 is the 3rd plaintiff's letter Ex. K-5, dated 19th April 1910. After urging the defendant not to make fresh commitments as his successor would be coming and might not agree to take them over he concludes:

> "I have read all you have written about Mawer and E.S. Attia. People here say Attia is a cheat and Mawer a leaky vessel in many ways."

The defendant's answer is Ex. 1 (d), dated 29th April 1910. He says Mawer's and Attia's loans are secured and that it is necessary to oblige them with small loans and that if he refused they would not be prepared to leave such amply security. This letter certainly does not explain the large advance of Rs. 30,000 on 1st, April but we have to see what followed. On 1st April the debit balance stood at Rs. 93,644. The subsequent transactions were in the nature of renewals and the ultimate balance was Rupees 83,000 odd secured by a large number of shares. Ex. J-23, dated 27th Chittrai (9th May 1910), acknowledges the receipt of the kurippu for last month, that is of Panguni, the month preceding Chittrai, which must have included the Rs. 30,000 transactions just mentioned, and merely says it is not desirable to go on giving more and more. It also comments on the

fact that Attia had not been able to take up and pay from the thavanai hundi which was paid by the defendant and debited against him on 25th of the month, apparently the debit in the accounts of 14th April for the thavanai hundi of Rs. 2,000. In his reply, Ex. L 6, dated 19th May 1910, the defendant says that as Attia's securities were so much in excess it was necessary to cash his hundis. Exs. L-4 and L-5 again are letters from the defendant to the third plaintiff in reply to letters of 7th June and 19th July which the plaintiffs have not chosen to produce. The missing letters would be very material as to the firm's attitude with regard to the secured loans to Mawer and Attia. In Ex. L-4 the defendant merely says there is no reason for being nervous about the accounts, and in Ex. L-5 that the dealings with Mawer and Attia are going on regularly. Mawer, who had been alluded to as the leaky ship, he says, was paying cash, and the transactions with him were closed without any loss.

As I have said the transactions to which objection was taken in argument before us took place between September 1909 and April 1910. In the light of the correspondence which the plaintiffs have produced which moreover is incomplete and contains very significant omissions, I cannot find that the plaintiffs ever intimated up to end of the year 1910 that they were not prepared to be bound by the transactions which had been brought to their knowledge and I think they must be taken to have assented to them. The exact state of the accounts might have been ascertained by writing up the paredu from the kurippus sent to them. They admittedly used to do so. They have given no explanation why they ceased, and have not produced the paredu wich they admit having maintained for a time and I am not satisfied that they gave up the practice of writing up the Paredu as they now pretend. My impression is they were persuaded somewhat reluctantly to accept the policy of making advances against these oil shares. If this conclusion be not correct, I can only say that the plaintiffs have themselves to blame. The defendant cannot be considered to have been their only source of information as to their shares. There were plenty of other Nattukottai Chetties living near who carried on business through agents in Rangoon and this oil speculation must have been a source of frequent conversation among them and the state of the market must have been well known to the Chetties in Madura. No further correspondence between plaintiffs and defendant is produced about Attia till the end of the year 1910. There is a letter of 4th August 1910 from defendant to one Kandanur, who was apparently wanted to influence the defendant's successor as to the terms on which he should take over. It contains the false statement that all Attia's debt had been paid in cash. The plaintiffs apparently did not see this and certainly were not deceived by it. If Attia had cleared off his debt the credits in his favour would have appeared in the monthly kurippus, which were admittedly forwarded to the plaintiffs. The case would be altogether different if the defendant sent false kurippus suppressing these transactions but the plaintiffs might easily have proved this and established their case by producing the kurippus sent them. They have neither produced them nor accounted for their failure to do so and in these circumstances I cannot come to the conclusion that these transactions were kept back from them. There was further correspondence about defendant coming back Ex. 7, dated 28th October 1910 and Ex. 1 (f) dated 19th November 1910, but no further letters about Attia are produced though I cannot help thinking there must have been some. In Ex. 1 (f) the defendant writes that the withdrawal of Rs. 75,000 had occasioned difficulties and concludes:

"you are not to set up that all the moneys recovered were lent under your directions and that all that remains outstanding was lent on my responsibility."

Exhibit J-24, dated 2nd January 1911, complains that the plaintiffs had been asking for the aindugai for four months and observes: "I suppose no oil transactions are open." The monthly kurippus cannot have suggested this. Possibly they had heard that the oil shares were unsteady. Ex. F, dated 3rd February 1911, which is an answer to the defendant's letter Ex. 1 (f) dated 19th November 1910, answers the statement by the defendant in that letter that the profit and loss was theirs and says that every one knows that, so that at that time they were not thinking of holding the defend-

ant liable for his advances on the security of the oil shares. It also contains the first express allusion to the fall in the value of the shares and observes that the people:

"who owe us money on shares say they cannot realize as the shares are low and that they will sell and pay when the price is to their advantage."

This shows that the plaintiffs were following the market in Rangoon. There are more complaints of the failure to send the aindugai, and the plaintiffs' case is that owing to this failure they were kept in the dark as to the extent of the commitments but they had all along been receiving the monthly kurippus containing the entries of debits and credits and I cannot accept this contention especially in view of their failure to produce the kurippus sent them the paredu they admit having written up from it for a time and the incomplete state of the correspondence they have chosen to produce. The transactions questioned before us were between September 1909 and April 1910 and the plaintiffs must be taken to have been informed of them within a month or six weeks by the monthly kurippus. It was only after the shares had fallen and the defendant had reported the difficulty of getting Attia to pay in Ex. 1-J, dated 16th March 1911, and Ex. 1-k, dated 27th March 1911, that the plaintiffs in Ex. E on 12th April 1911 took occasion on the arrival of the aindugai to say that they did not know that Rs. 85,000 was due by Attia and Rs. 27,000 by Clifford. On the whole I cannot agree with the Subordinate Judge that the plaintiffs did not assent to the transactions between September 1909 and April 1910 which have been impeached before us. He has not dealt with the letters in chronological order in the light of the information which the plaintiffs must be taken to have had when writing nor has he noticed the significant lacunae.

The plaintiffs and the defendant are each anxious to escape the loss and their oral evidence is unreliable. Taking the correspondence which has been produced in the light of the information of which the plaintiffs were admittedly in possession and having regard to the fact that all the material letters which should be in the plaintiffs' custody are not before us and to the fact that they have kept back the kurippus and paredus I think the evidence is sufficient to warrant an inference from their silence for many months that they assented to the transactions in question. The loss appears to have resulted from the fall in the value of the shares at the beginning of 1911 and I am not satisfied that the defendant has been shown to have been guilty of subsequent neglect or misconduct as regards the recovery of the debts outstanding at this period. The evidence as to what happened in Rangoon before he returned and as to a certain portion of Attia's debt having been taken over by his successor Alagappa is incomplete and the plaintiffs have not called Alagappa.

On the foregoing grounds I think the appeal fails. If I had been able to accept the Subordinate Judge's finding that the transactions were not ratified expressly or impliedly until the plaintiffs intermeddled with the securities taken from Attia and Clifford I should have been unable to agree with the Subordinate Judge's conclusion that such intermeddling amounted to a ratification. Story says that when an agent contrary to instructions makes advances against security the principal may realize the security and hold the agent liable for the balance. The arguments addressed to us have altogether failed to persuade me that this is not good law as well as good sense but the point does not arise and it is unnecessary to discuss it further.

My conclusion on the main question rests on the conclusion to which I have been compelled to come in the present state of the evidence that the transactions which are now impugned were reported to the principals as they occurred in the monthly kurippus and that they were allowed to stand without repudiation in their accounts for many months until the shares began to fall. I quite appreciate what my learned brother has written about the difficulties of Nattukottai Chetties in dealing with their agents but the fact that they are very much in the hands of these agents and are afraid of offending them lest worse befall, affords no sufficient reason in my opinion for abstaining from applying to them the principles laid down by Lord Tenterden and other eminent Judges in *Prince* v. *Clark* (1). The present case appears to me to suggest two lessons for Nattukottai Chetties

in the position of the plaintiffs', one that they should promptly disavow transactions entered into on their behalf by their agents in excess of instructions and the other that if their case is that the agents have deceived and misled them by suppressing facts they should put the Court in a position to judge whether this was so or not by putting before the Court the documents containing the information actually supplied to them by the agents. The appeal is dismissed but without costs. The memorandum of objections is also dismissed.

Seshagiri Aiyar, J.—The correspondence relating to the case has been set out very fully in the judgment of the learned Chief Justice which I had the advantage of reading before writing mine. I do not propose to deal with the whole of it again. As in my opinion the conduct of the defendant has not been straightforward I propose to refer to the main features of the case although I do not differ from the conclusion arrived at by my Lord. The defendant was appointed agent in February 1907.

He had under his salary chit only three years to serve. His business was to take up the collection of the moneys lent by his predecessor the retiring agent and to lend out moneys to the best advantage of his principal. Ordinarily at the end of the three years the defendant was bound to have closed his accounts and after settling the valuation in the presence of mediators with the incoming agent to have handed over the balance sheet to the latter and to have come back to British India to render a full account of his stewardship. Therefore during the last year of his agency the outgoing agent is not expected to grant fresh loans to constituents. If this practice of agents transacting business is kept in mind, it will be seen that the defendant in this case did not act honestly in advancing fresh loans like the ones with which we are concerned. It is common ground that the dealings with Attia were originally closed in August 1909. By this time the defendants had been 2½ years in Rangoon, and in 6 months' time he was bound to return to Madras and to render an account. Even before August 1909 the defendant was warned that he should not lend to Attia on personal security. In Ex. J-26 written on 15th December 1908, referring to Attia the plaintiff 1 wrote:

"Collect in full from customer No 53 and let there be no balance. . . . . If you act without attending to instructions, it would amount to disobedience of written orders."

In reply to that the defendant wrote Ex. L on 24th December 1908, in which he said:

"The two persons (referring to Attia) are one and the same person. All that he owes to our two shops are covered by securities. He is a little slippery person. The security is worth much."

It is necessary to explain that there were two shops in Rangoon belonging to the principals, one known as Chinna Kadai and the other known as Peria Kadai. There is evidence that in Chinna Kadai the defendant had a share in addition to being an agent. In January 1909 the principal asked the defendant (Ex. J-29) why interest has not been paid by individual No. 53 for a long time. It also cautioned him against renewing Hundis. In Ex. J-12, dated 21st January 1909, the defendant replied saying that Attia's Hundis were being renewed because his securities were good. On 30th March 1909 plaintiff 3 wrote Ex. J-8 to the defendant that he should not lend any more money because

"it was his duty to make up his accounts and not embark on fresh transactions."

It must be mentioned that the plaintiffs had, from the outset, been very suspicious about the dealings of the defendant. As early as November 1908 plaintiff 3 wrote Ex. K-2 to the defendant in very strong terms against his reckless advances and informed him that he was bringing the name of the firm into disrepute. On 15th April 1909 plaintiff 3 again wrote to the defendant (Ex. J-22) in these terms:

"Moreover it is two and a quarter years since you went there. Heareafter you should engage yourself only in the work of collection, but if you were to be advancing more and more, things would get beyond control and our business would suffer."

The letter said further that the principals intended to send an agent even within the period of his agency, but "as the defendant had not got the business under control" they were delaying sending a new agent. On 23rd April 1909 the same principal wrote to the defendant (vide Ex. K-3):

"You should as strictly as possible collect from all constituents excepting the one constituent, namely the man of Kuthaya. In future you should not lend even a pie to constituents."

On 11th May 1909 plaintiff wrote Ex. J-3 in which he asked the defendant to close up his accounts as early as possible and make it possible for a new agent being sent out at once. On 11th May 1909 plaintiff 3 wrote Ex. J-9 in which he stated:

"People say that the securities on which you have lent out money are all weak and insufficient . . . . . It seems to us as if you do not care to follow our instructions."

On 8th June 1909 plaintiff 1 wrote Ex. K-1 in which he sarcastically referred to Attia's soundness of credit and asked the defendant not to honour his Hundis. To these various warnings against lending to Attia the defendant replied by Ex. J-13 on 17th June 1909 in which he stated.

"It is our good luck that E. S. Attia has come and joined us as our friend."

On 14th July 1909 plaintiff 3 wrote to the defendant (vide Ex. K-7);

"Although we may write to you ever so much it is very painful to us to see that although you receive them all you go on making further payments without recovering anything from Enams and keep sending Kurippu accounts."

On 29th July 1909 plaintiff 1 wrote to the defendant Ex. J-27 wherein he said :

"If you would from this moment not advance a pie to any constituent, but make all the necessary endeavours to collect and curtail and close business, there would on the whole be a good name for you and a good name for us too . . . . . The only request I make is that you should arrange to make collections soon before the substitute arrives."

At about the same time plaintiff 3 wrote [vide Ex. 7 (a)] :

"A bad report has spread here that your agency business is very extensive and that the transactions are very unsound. More than two years of your period has expired. In future you should curtail business and pay up dues and close accounts."

On 20th July the defendant wrote to plaintiff 3 (vide Ex. J-16) :

"We are carrying on our dealings here well enough. There is no confusion of any kind."

On 3rd August 1909 plaintiff 1 wrote (Ex. J-18): "You still continue to give loans on shares. It is not known when this is to stop." The correspondence to which I have referred shows that the plaintiffs were very anxious that the defendant should not grant fresh loans, that the defendant should wind up the business and that particularly he should have no further dealings with Attia. It is with full knowledge of this attitude of the plaintiff that the defendant began fresh transactions with Attia between September 1909 and April 1910. I shall refer to only a very few letters of this period as the learned Chief Justice has gone into the correspondence of this period at great length, and then state my conclusions ; in my opinion also the full correspondence of this period has not been placed before the Court and the blame for not having placed all the materials before the Court must rest on the plaintiffs. The general attitude of the plaintiffs may be gathered from Ex. K-5 written by plaintiff 3 on 20th April 1910 in which he stated :

"I have read all that is written about company and Attia. They say that Attia is a cheat and the company is a leaky vessel."

Prior to this letter the defendant had written on 28th March 1910 (Ex. J-17) in which he stated :

"Mawer & Co , Attia and Clifford and others have mortgaged shares to us . . . . . we should keep on the good side of them by frequently saying that they were given to us in trust . . . . . while the state of affairs here is like this, some one has spread a false rumour there."

Exhibit K-5 may be taken to be a reply to this. In Ex. L-1 the defendant assured the plaintiffs that the loans made to Mawer & Co. and others were on good security. On 29th April 1910 the defendant wrote Ex. I (d) :

"As E. S. Attia and Mawer & Co., and others hold share mortgages and as thavanai money is being received for the said hundis, we have to accommodate them when they apply for small loans If we refuse to give they would want to have the share mortgages. The securities are in excess."

We have further letters from the defendant Exs. L (3), L (6) and L (17), which were intended to assure the plaintiffs that everything was being properly done. In reply to Ex. 1 (d) plaintiff 1 wrote Ex. J-23 on 9th May 1910 :

"In the case of E. S. Attia, if you keep saying that the mortgage loans can be recovered sooner or later, when is it to be recovered ? It is not desirable to give more and more. . . . . you have represented him to be a person of a very high status. It does not appear that his credit will continue to the end."

To this the defendant replied in Ex. L (6) on 19th May 1910 :

"As the security of Attia is in excess of the sum of the hundis we do renew them occasionally."

In this way matters went on. The plaintiffs in their native place felt helpless against the defendant who was conducting business as he liked disregarding positive injunctions from the principals. It was said that the attitude of the plaintiffs was that of persons sitting on a

fence. It is difficult to see what could have been done; his instant dismissal coupled with the coming of a new agent might have been the correct procedure, but that would have precipitated matters or might have caused the plaintiffs' heavy loss. It must be said that Nattukottai Chetties do not clearly appreciate the duty they owe to themselves and to their agents. They repose the greatest confidence in the good faith of their agents and permit them to deal with their monies as if they were the owners and not simply agents. The idea that if they wanted to hold the agents liable they should at once repudiate the transaction has apparently not occurred to them yet. Moreover the transactions are not of such a simple nature as could easily be affirmed or disaffirmed.

The agents are expected to lend out monies to numerous constituents. They are not like ordinary agents whose cases have been considered in England in the various decisions quoted before us. These latter, generally speaking, were commissioned to conduct particular businesses. In such cases repudiation is easy. In my opinion, the application of principles governing the relationship of English agents to their principals should not be extended to Chetty agents in India. The agent of a Chetty is practically the principal. He lends out monies. He is entitled to sue to recover them. Under these circumstances the position of a Chetty agent approximates to that of a trustee. I do not say that every consideration relating to transactions between a trustee and the cestuique trust should apply. But I am doubtful whether it is desirable to import into questions of this nature rules governing the relationship of principal and agent in England. In *Ramasawy Chetty* v. *Karuppan Chetty* (2), such principles have been applied in the case of Chetty agents. I think the whole subject requires re-consideration. S. 211, Contract Act suggests that if the directions of the principal are disregarded the loss consequent upon such conduct must be made good by the agent to the principal.

Further, I feel convinced that the defendant has kept back information and has not acted towards his principal in a straightforward manner. The repeated requests of the principal that the aindugais should be sent have been ignored by the defendant. The last but one aindugai was sent on 15th August 1909. The final one was sent on 15th March 1911. Between these periods there is no excuse for the defendant not having sent the aindugais. In his evidence the defendant admitted that he did not send aindugais even after repeated requests. He says in one of his letters that it would have taken him a long time to make up the aindugai. When we remember that the defendant was a near relation of the plaintiffs and that the plaintiffs informed him that he should not take advantage of the relationship and should conduct himself as an agent and not as nephew, the conduct of the defendant in disobeying the express instructions and advancing new loans appears to be reprehensible. But for the fact that the plaintiffs have not produced all the kurippus sent to them and to the fact that they have kept back Alagappa Chetty from the witness box, I would have felt inclined, notwithstanding the decisions to the contrary, to hold that the defendant was guilty of gross negligence and that no ratification ought to be implied from the failure to expressly repudiate the transactions. Having regard to the view taken by the learned Chief Justice and to the authorities in this Court and in England, I do not propose to differ from the judgment just delivered. I hope that our conclusions would have the effect of opening the eyes of Chetty principals to the necessity of observing greater caution in their dealings with their agents, and to their exercising greater scrutiny over their doings. I agree, though not without hesitation, that the appeal should be dismissed. The memorandum of objections should also be dismissed.

S.N./R.K. *Appeal dismissed.*

(2) [1915] 31 I. C. 216.

A. I. R. 1919 Madras 351

ABDUR RAHIM AND NAPIER, JJ.

Koyittal Parambil Parkum and *others* —Plaintiffs—Appellants.

v.

Attimana Illeth Narayanan Nambudiri and *others*—Defendants—Respondents.

Second Appeal Nos. 46 and 47 of 1917 Decided on 16th December 1918 against decree of Dist. Judge., North Malabar in Appeal Suits Nos. 587 and 590 of 1915.

Malabar Law—**Kanom—Grant by one of two trustees without consent of other is invalid — Application of kanom amount to discharge liability on trust property—Kanomdar has charge.**

The grant of a kanom by one of two trustees without the consent of the other is invalid and inoperative 24 *Mad.* 296, *Appl.* [P 353 C 1]

Where however the kanom amount or any portion thereof has been applied towards the discharge of liability on the trust property the kanomdar will have a charge on the property for such amount. [P 353 C 1]

K. P M. Menon—for Appellants.

C. Madhavan Nair—for Respondents.

Judgment.—Before disposing of these appeals, we ought to have a clear finding from the lower appellate Court as to whether defendant 2 consented to the kanom being granted to the appellants although he did not join in its execution. Both parties will be allowed to adduce fresh evidence on this point. One month will be allowed for the submission of the finding and seven days for objections.

Finding.—I am directed by the High Court to submit a finding on the following issue, viz.:—

"Whether defendant 2 consented to the kanom being granted to the appellants although he did not join in its execution."

There appears to be a mistake in the wording of the issue. It is no one's case that any kanom was granted to appellants. The kanom in question is one granted by defendant 1 to appellants' assignor. I shall assume that the words "to the appellants" in the issue have been written by a slip for "to the appellants' assignor," and shall submit my finding on that assumption. No fresh evidence has been adduced for plaintiffs or for defendant 3. For defendant 2 only some documenary evidence has been produced to show that in other transactions defendant 1 acted without defendant 2. I do not think that this additional evidence is of any real help in the present case. What happened in respect of the transaction now in question must be decided on the oral evidence on record. After hearing arguments again on that evidence I see no reason to differ from my original conclusion that the evidence of defendants 1 and 4 must be accepted in preference to that of defendant 2. What the evidence of defendants 1 and 4 amounts to is that defendant 2 at first consented to the proposal that the money required should be raised by granting a kanom to defendant 4, but that before the date of execution he had changed his mind and was against it. According to the evidence of defendants 1 and 4 they were not even under the impression on the date of execution that defendant 2 still consented to the transaction. It is not their case that the kanom was executed with a subsisting consent from defendant 2, though he did not actually join in it. At the time of execution it is clear that there was no subsisting consent from defendant 2. And further the evidence of defendants 1 and 4 is that defendant 2 agreed to join in executing a kanom-deed in favour of defendant 4 for the purpose of raising the money required. But there is nothing to show that he ever consented to the details of the transaction. On the contrary defendant 1 says: "The Purappad, etc., were determined when the draft was being prepared," which was sometime after his last interview with defendant 2 before the date of execution and as he says, after he had learnt that defendent 2 was in collusion with defendant 3. So what we arrive at is that defendant 2 consented to the project of raising money from defendant 4 on a kanom but never consented to the details of the transaction and at the date of execution was no longer consenting to the project. My finding is that defendant 2 never consented to the particular kanom in question being granted to appellants' assignor and at the time when the kanom deed was executed was not consenting to any kanom being granted to appellants' assignor. I regret that I did not make the position clearer in my original judgment.

(After return of findings the Court delivered the following)

Judgment.—The learned District Judge has found that one of the co-uralans did not give his consent to the grant of the kanom in question. But it is argued that nevertheless the act of one trustee, if he has consulted the other trustee as to the grant of a mortgage or any similar transaction and that trustee wrongly refused to join in the act, was valid. There is no express authority dealing with the case of two trustees, though there are a number of cases in which it has been held that where there are a number of trustees the act of the majority will be binding and valid if they had given a proper opportunity to the other trustees to consider the

advisability of the act in question. But the decision are based on the principle that unless the act of the majority was upheld in many cases the trust estate would suffer. In the case of two trustees however this principle will not apply because there is no majority. That is what is practically indicated in *Savitri Antarjanam* v. *Raman Nambudri* (1). The decision in *Wilkinson* v. *Malin* (2), which is the leading case on the subject, bases it on the principle that the majority should have approved of the act. We do not think that we should be warranted in extending the principle to a case like the present where only one out of two trustees has exercised an act which ought to be done by both the trustees jointly.

But it is pointed out that the suit ought not to have been dismissed altogether and that the plaintiff should have a charge for the amount actually advanced by him as it went to discharge a liability on some of the trust properties including the property in the suit. We think there is force in this contention, and we therefore modify the decree of the lower Court by declaring a charge on the property in suit for the amount of Rs. 418-14-0. This appellants will bear the costs of this appeal.

S.N./R.K. *Decree varied.*

(1) [1901] 24 Mad. 296.
(2) [1832] 2 C. & J. 636.

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* A. I. R. 1919 Madras 353

ABDUR RAHIM AND NAPIER, JJ.

Krishna Ayyar—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal Nos. 661 and 687 of 1917 and Criminal Revn. Case No. 122 of 1918, (taken up No. 9 of 1918), Decided on 25th February 1918, against orders of Sess. Judge, Coimbatore, in Sess. Case No. 101 of 1917.

*** (a) Criminal P. C. (1898), S. 235 — Unlawful assemblies at different places—Each with different common object but all in pursuance of common purpose — Acts of all accused can be subject of one trial.**

Where there were three different unlawful assemblies at three different places, each with a different common object but all in pursuance of a common purpose or design, viz., to prevent police officers from searching a place, and the whole occurrence arose out of a common cause :

Held : that the acts of all the accused were parts of the same transaction and might be the subject of charge in one and the same trial. [P 356 C 1]

The evidence of the whole occurrence must be before the Court before it can come to a proper conclusion as to the nature of the offences committed by the different persons concerned in the occurrence : 5 *I. C.* 817 and 27 *Bom.* 135, *Expl.* [P 356 C 1]

(b) Criminal P. C. (1898), Ss. 165 and 166 —Person resisting police officer conducting unauthorized search outside limits of his station is not guilty under Penal Code (1860), S. 333.

An officer in charge of a police station has no power to make searches in places outside the limits of his station except in the mode provided by S. 166, Criminal P. C. [P 357 C 1]

A person therefore who resists a police officer conducting an unauthorized search outside the limits of his station is not guilty of an offence under S. 333, I. P. C. [P 357 C 1]

(c) Penal Code (1860), Ss. 147, 149, 323 and 325—Unlawful assembly with hurt for common object — Member convicted under S. 147 cannot also be convicted under S. 323 or S. 325 with S. 149 unless he himself causes hurt.

Where the object of an unlawful assembly is to cause hurt, a member of that assembly, if he is convicted under S. 147, cannot be convicted also under S. 323 or S. 325 read with S. 149, except that such of the accused as are proved themselves to have caused hurt in the riot, would be rightly convicted of the offence of hurt in addition to the offence of rioting. [P 357 C 1]

Swaminathan—for Appellants.

P. R. Narainswamy Aiyar and *E. R. Osborne*—for the Crown.

Judgment.—23 persons were convicted by the Sessions Judge of Coimbatore of the offences of rioting, grievous hurt and other allied offences. Of these, some have appealed to us and we will have to deal with the case of each of them separately. Information was given on 19th May last year at the Annur Police Station of a theft committed in the house of a Valayan. It appears that the police searched the houses of some persons within the limits of the police station and then on the 20th in the morning the Sub-Inspector, P.W.1, along with some constables and others came to a village called Molakalipalayam which is within the jurisdiction of the Sulur Police Station. Molakalipalayam is about two or three miles from Annur. There the houses of some of the Goundans were searched and in the house of accused 20, who, it may be mentioned, has not preferred any appeal, a cloth was found which was identified as part of the stolen property. The man was arrested and kept in custody. Some of the Goundans of that village and of a neighbouring village balled Valayapalayam are alleged to have remonstrated with the police

against searching Goundans' houses, but the Sub-Inspector would not listen to them. He apparently had some information about the stolen property and he was not to be deterred from what he considered his duty to search in those villages for the stolen property.

Accused 20 was kept at Molakalipalayam in the custody of two police constables and the Sub Inspector along with other policemen went on to Valayapalayam. There can be no doubt upon the evidence that his intention was to investigate the case and to search some houses where he had information that the stolen property was concealed. The Goundans of the locality, according to the evidence, were much excited. They raised strong objections to the police searching Goundans' houses. Accused 1, the Karnam of Mopperipalayam, and accused 21 the Village Magistrate of the same place, who were sent for, were present at Valayapalayam and they were appealed to by the police to help them in making the search. What their actual conduct on the occasion was, is one of the points for consideration in their case. The case for the prosecution is that they not only refused to render help to the police, but abetted the Goundan villagers in assaulting them and preventing them from carrying out any search in Valayapalayam. A large crowd of about 300 people gathered there. Accused 2 and 8, who are said to be prominent villagers, joined in the protest, and the mob did not allow the police to search any of the houses there. The police were attacked and beaten. They tried to frighten the mob by firing one or two shots in the air, but the mob was in a truculent mood and attacked and beat the police. The Sub-Inspector ran away to a place called Muthugoundanputhur, which is in the same direction as the Annur Station, from Valayapalayam. There he took shelter in a house, but the mob followed him, dragged him out of the house, put him in a jutka and having disabled the pony of the jutka, dragged the jutka with the Sub-Inspector to a temple at Valayapalayam and kept him there. On the way the mob seems to have tilted the Sub-Inspector out of the cart several times purposely as if he was, to use the language of the Sessions Judge, so much rubbish. One or two constables were also taken to the temple and kept there. That, broadly speaking, is the outline of the case for the prosecution. The policemen were all very severely handled and the Sub-Inspector was mercilessly beaten. One of his legs was broken. He had a number of injuries on his head and suffered apparently from concussion of the brain. He was nearly for three weeks in the hospital and was not able to speak rationaliy for some days. Some of the police constables also received severe beating. Some Valayans belonging to the complainant's party were also beaten and one of them bore a severe injury. Information being given as to what had happened, reinforcements came from the Annur Police Station and the injured policemen were rescued.

It ought also to be mentioned that on the same day, an old man called Sellappa Goundan was murdered. The evidence as to how and under what circumstances this man came to be murdered is not very full, and it is not possible, upon such evidence as there is, to find who was responsible for his death. It appears to have been suggested on behalf of the prosecution that the accused or their friends deliberately killed the old man in order to make out a case against the police. On the other hand, the defence seems to have suggested that Sellappa Goundan was attacked by a number of men, about 30 in number, probably belonging to the police party. The Sessions Judge was unable upon the evidence placed before him to fix the responsibility for the death of Sellappa Goundan on either party or on any of the persons concerned in this case. In his opinion it might have been an incident quite apart from the main riot or it might have been a deliberate act done by the accused in order to shift the blame for the occurrence on to the police; and we must say that we are unable to come to any more definite conclusion with respect to this most unfortunate incident. We do not even know what investigation was carried out and what attempts were made to find out who was responsible for this murder.

To come back to the case before us the defence of the accused on the merits apparently was that the police headed by the Sub-Inspector, P. W. 1, went on the night of the 19th to the village of Valayapalayam and looted the houses of some Valayans and committed

rioting. P. W. 1 is charged with having been drunk and in fact with having run amok. It is said that he repeated the same conduct on the 20th. But there cannot be any doubt that the finding of the Sessions Judge that this story is not made out by any evidence worth mentioning is correct. If there was truth in this defence one would have expected that abundant evidence would have been forthcoming to prove the charge which is a very serious charge, against P. W. 1 and the other policemen concerned. Some of the defence witnesses do give some vague evidence on the point but none of them profess to give any particulars upon which a definite finding could be based. Similarly in the cross-examination of the witnesses for the prosecution, this story was hardly put to them. One or two stray questions were asked some of the witnesses suggesting that the police were acting illegally and aggressively in the village of Valayápalayam. But the attempt to elicit any facts from the prosecution witnesses which would support the defence in this connexion is absolutely faint hearted and we cannot place the least reliance upon such evidence for the defence as has been adduced in this connexion. No doubt this was the story which accused 3 and 17 told the Village Magistrate of Mopperipalayam and got embodied in the report Ex. 13. But there also the statements are vague to the extreme and Ex. 13 bears internal testimony of this story being a concoction.

Before dealing with the evidence we ought to deal with the question of law which was raised in the case namely, whether there has been a misjoinder of charges. The charges are with reference to the occurrence at Valayapalayam and Muthugoundanputhur and also what happened in the afternoon at Molakalipalayam in the matter of the rescue of accused 20. There is no charge with respect to anything that was done by the accused persons at Molakalipalayam in the morning. The contention is that there were three separate occurrences and that they could not be the subject of charge in one and the same trial. The whole question rests on whether the occurrence on the 20th as alleged by the prosecution, amounted to one transaction within the meaning of S. 235, Criminal P. C., that is to say whether the series of acts charged against the accused were so connected together as to form the same transaction. If they formed one transaction there can be no doubt that the charges were rightly joined. As to the scope and interpretation of S. 235, the matter was considered recently by a Bench of this Court in *Choragudi Venkatadri* v. *Emperor* (1). There it is pointed out that it is hardly possible to lay down in abstract terms which would be any more definite than the language of the section itself what would amount to one and the same transaction. Each case must depend upon its own facts the general test being whether the acts charged were so connected together as to amount to one transaction. The connexion in some cases would have to be sought in a common purpose running through all the acts or in the nature of the occurrence having regard to the cause and the time and the place It is pointed out in *Choragudi Venkatadri* v. *Emperor* (1) that the effect of the decision on S. 235 is that at least in a certain class of cases —the case there under consideration being one of them—

"community of purpose or design and continuity of action are essential elements of the connexion necessary to link together different acts into one and the same transaction."

This proposition, be it noted, was not intended to cover all cases and this is expressly mentioned. Then it goes on:

"In such cases the acts alleged to be connected with each other must have been done in pursuance of a particular end in view and as accessory thereto or perhaps as suggested by the circumstances in which the acts in pursuance of the original design were done and in close proximity of time to those acts. But mere community of purpose is not sufficient; there must also be continuity of action."

It is laid down in *Emperor* v. *Sherufalli* (2), which was accepted in *Choragudi Venkatadri* v. *Emperor* (1) by this Court as enunciating the proper test:

"The real and substantial test then, for determining whether several offences are connected together so as to form the same transaction depends upon whether they are so related to one another in point of purpose, or as cause and effect, or as principal and subsidiary acts, as to constitute one continuous action."

Here the acts relied upon by the prosecution were undoubtedly such as to constitute one continuous action. It was argued that the objects of the unlawful assembly at the three different places were different, and it is pointed out that

(1) [1910] 33 Mad. 502=5 I. C. 847.
(2) [1903] 27 Bom. 135.

some of the accused persons took part in the occurrence at one place and some at another place. The fallacy running through the argument is that where there has been an occurrence of this nature, we must take the specific common object of each unlawful assembly mentioned in the charge as conclusive of the question whether, if there was more than one riot in the course of an occurrence, they could all be tried together. I do not think this is what was intended to be laid down either in *Choragudi* v. *Venkatadri* v. *Emperor* (1) or *Emperor* v. *Sherufalli* (2). Here the purpose which connects the occurrences in all the three villages was to prevent the police by force from searching the Goundan's houses and to punish them if they dared to do so. Whether in pursuance of such a purpose some of the rioters had in view one specific unlawful object at one place and some other of the rioters pursued a different object at another place would make no difference, so long as the different assemblies participated in the one purpose of preventing police officers from searching Goundans' houses in connexion with the theft of which they had information. It seems to us it could not have been the design of the legislature that where there has been an occurrence of this nature arising out of a common cause, we should separate what happened into different compartments, as it were, and try the cases relating to different acts done in the course of the same occurrence separately. The evidence of the whole occurrence must be before the Court before it can come to a proper conclusion as to the nature of the offences committed by the different persons concerned in the occurrence, and that is another test to be applied in this connexion.

We have considered the evidence carefully and there is no good reason to doubt that the case for the prosecution is true in all its substantial features. The Sub. Inspector of Police went to the villages to make investigation, and apart from the question of law as to whether he was entitled to conduct a search in those villages which are situated within the jurisdiction of another police station, there is no reason to doubt the bona fides of his action. The Goundans however did not want that any of their houses should be searched and took the law into their own hands. They not only obstructed the police in conducting the search, but beat them causing serious injuries. There can be no question of any right of private defence in a case of this character, as it could hardly be contended that the Sub-Inspector of Police was not acting in good faith in trying to search the houses where the stolen property was suspected to be concealed. [Their Lordships discussed the evidence as against accused 1, 2, 3, 4, 5, 6, 7, 8, 17, 21 and 23 and affirmed the conviction against all, but accused 1 and 21, who were acquitted.] As regards the rest of the appellants, they have been convicted among other offences of an offence under S. 333, I. P. C., that is, causing hurt to a public servant in the lawful discharge of his duty. We have been asked to consider whether P. W. 1 was lawfully discharging his duty as a public servant in making or attempting to make a search of houses at Molakalipalayam and Valayapalayam.

We have no doubt that the view of the law taken on this point by the Sessions Judge is wrong. Both these villages, as already stated, lie outside the police station of Annur, and the Sub-Inspector could not make any search in the villages of Molakalipalayam and Valayapalayam unless his action could be justified under Ss. 165, Cl. 4, and 166, Criminal P. C. Under S. 166 an officer in charge of a police station may, if he wishes, require an officer in charge of the station where the place sought to be searched is situated to cause a search to be made in that place and with his help he himself can make the search. S. 165, sub-Cl. 4, on which the learned pleader appearing for the Public Prosecutor relies, says that the provisions of the Code as to search warrants shall apply, as far as may be, to a search made under this section. The argument is that the section, by implication, authorizes police officers to make searches in a place outside their own jurisdiction in the same way as a Magistrate can issue a search warrant to search a place outside the limits of his jurisdiction.

But sub-Cl. 4, S. 165 requires that the search must be made under the provisions of that very section and that section only provides for search within the limits of the police station of which the officer is in charge. This is a conclusive answer to the argument on behalf of the

Crown. Further, we do not think that the legislature ever intended to confer on police officers in charge of a police station the power to make investigation outside the limits of their stations except in the mode provided by S. 166. Even where a Magistrate under Ss. 96 to 99 issues a search warrant for a place which is not within the local limits of his jurisdiction, the law requires that the warrant should be endorsed by the Magistrate who has jurisdiction over it or, in emergent cases, by the officer in charge of the police station within whose limits the place is. What sub-S. 4, S. 165 provides is that such of the provisions of the Code as lay down the mode in which a search is to be conducted, such as Ss. 102 and 103, should apply to searches by police officers; and it could not have been the intention of the legislature that any police officer in charge of a police station can, of his own will, search any place in the Presidency he chooses. We have not been referred to any sort of authority which would support the proposition put forward on behalf of the Crown, nor has the learned pleader appearing for the Public Prosecutor been able to refer to any rule in the Police Code which provides for a police officer searching houses in a place outside the limits of his own station. On the other hand, there is a ruling of the Allahabad High Court reported as *Madho Sonar* v. *Emperor* (3), which seems to us to be exactly in point and in favour of the view of the law which we have suggested. We therefore think that the convictions of all the appellants under S. 333, I. P. C., must be set aside.

We also find that several of the appellants have been convicted, in addition to an offence under S. 147, I. P. C., of offences under Ss. 323 and 325 read with S. 149, that is to say, they have been found constructively guilty of hurt, having been members of an unlawful assembly in course of which hurt was committed. Now, it has been well settled that where the object of an unlawful assembly is to cause hurt, then a member of that unlawful assembly, if he is convicted under S. 147, cannot be convicted also under S. 323 or S. 325 read with S. 149, except that such of the accused as are proved themselves to have caused hurt in the riot, would be rightly convicted of the offence of hurt in addition to the offence of rioting. In the result accused 2 will be convicted only of an offence under S. 147 and his convictions under Ss. 325 and 333 read with S. 149 will be set aside. Accused 3 is rightly convicted under Ss. 147 and 323, but his convictions under other sections will be set aside. Accused 4 will be convicted only under S. 147, and his conviction under other sections will be reversed. Accused 5 will be convicted under Ss. 147 and 323, bnt not under the other sections under which the Sessions Judge has convicted him. Accused 6 also will be convicted under Ss. 147 and 323, and his convictions under other sections will be set aside. The same applies to accused 7. We convict accused 8 under S. 147 only and set aside his convictions under the other sections. Accused 17 has been rightly convicted under Ss. 147 and 323, but his convictions under other sections will be reversed. The conviction of accused 23 under S. 147 will be upheld. His conviction under Ss. 323 and 325 read with S. 149 will be reversed.

As regards the sentences, the offence was of a serious nature and the Sessions Judge has rightly awarded severe sentences. But as we have set aside convictions under some of the sections of which the Sessions Judge wrongly found the accused persons guilty, we reduce the sentences in the case of accused 2, 4 and 23 to one year and nine months' rigorous imprisonment each and in the case of accused 3, 5, 6, 7 and 17 to two years and nine months' rigorous imprisonment each. In the case of accused 8, having regard to his old age we think simple imprisonment for one and a half years will sufficiently meet the ends of justice.

Having had all the evidence before us, we feel bound to consider the case of accused 20 who has been convicted under S. 224, I. P. C., although he has preferred no appeal to us. He was the person in whose honse a cloth alleged to be stolen property was found at Molakalipalayam and he was arrested and kept in the custody of two police constables while the Sub-Inspector went on to Valayapalayam. After the riot at Valayapalayam, when the Sub Inspector took shelter in Muthugoundanputhur, some of the mob at Molakalipalayam rescued accused 20. Accused 20 went away with the mob as the two policemen who were in charge of him had to flee on being at-

(3) A. I. R. 1915 All. 442=30 I. C. 141.

tacked by the mob. We think he was technically guilty of the offence under S. 224, that is, of escaping from lawful custody. But having regard to the facts of the case we cannot regard his act in a serious light as in the case of the other accused. He has already suffered imprisonment for more than three months, and that will be sufficient punishment in his case. We reduce his sentence to the term already suffered and he will be discharged from custody. The order regarding security bonds will be set aside in the case of accused 1, 21 and 20 and will stand in the case of the other accused. The bail bonds of accuseds 1 and 21 will be cancelled.

S.N./R.K. *Sentences altered.*

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SESHAGIRI AIYAR, J.

S. H. S. C. Matharasappa Chettiar—Petitioner.

v.

P. C. Muthu Chettiar—Opposite Party.

Civil Revn. Petn. Nos. 1192 and 1193 of 1917, Decided on 6th January 1919, from order of Dist. Judge, Madura, in Misc Appls. Nos. 10 and 11 of 1917.

(a) Civil P. C. (1908), S. 47—Auction-purchaser in money decree is representative of judgment-debtor.

An auction-purchaser under a money decree is the representative of the judgment-debtor within the meaning of S. 47: 44 *I. C.* 350, *Diss. from*, [P 359 C 1]

(b) Civil P. C. (1908), O. 21, R. 2—Person possessing right to property can apply to enter satisfaction of decree affecting property—Order disallowing petition is revisable under Civil P. C, S. 115.

A person who possesses a right to a property is within his rights in applying under O. 21, R. 2, for entering up satisfaction of a decree affecting the property which would otherwise endanger his right to it: 30 *Mad.* 537, *Foll.* [P 359 C 1]

Petitioner obtained a money decree against *S*, and in execution brought a certain property to sale and purchased it himself. While the application for sale was pending, a person to whom the property had been mortgaged obtained a decree against the judgment-debtor. Petitioner paid the mortgage decree amount and prayed that the satisfaction be entered. The Court refused the prayer holding that petitioner had no locus standi to apply under O. 21, R. 2, Civil P. C. On revision to the High Court.

Held: (1) that the petitioner had a right to apply under O 21, R. 2, as he must be regarded as the representative of the judgment-debtor; (2) that the petitioner had a right to apply to the High Court under S. 115, against the order disallowing his petition [P 358 C 2]

K. Jagannadha Aiyar—for Petitioner.

T. R. Venkatarama Sastri, S. Rangachariar and *S. Vaidyanatha Iyer*—for Opposite Party.

Judgment.—The petitioner before me obtained a money decree against one Seemia Pillai and his co-parceners. In execution of the decree he purchased the property in dispute subject to a mortgage right created by the judgment-debtors. During the pendency of the application for sale a suit was brought by the mortgagees against the common judgment-debtors and a decree was obtained. The present petitioner thereupon paid the money due under the mortgage decree and asked that satisfaction may be entered up. His application was resisted on the ground that he not being a representative of the judgment-debtors had no locus standi to apply under O. 21, R. 2. Both the Courts below have upheld this contention and rejected the application of the petitioner. Against that order this civil revision petition has been filed.

An objection was taken in limine on the ground that if the contention of the petitioner is right, his proper course was to have preferred a civil miscellaneous appeal against the order of the District Judge and not to file a revision petition, under S. 115, Civil P. C. The petitioner was justified in complaining against the mode in which the Courts below had dealt with his application and he was justified further in coming to this Court under S. 115. Even if the contention is well founded I think this is a fit case in which, following *Sridharavan Somayajipad* v. *Puramathan Somayajipad* (1). I feel inclined to convert the civil revision petition into a civil miscellaneous appeal.

On the merits my attention has been drawn to a very recent judgment of the learned Chief Justice and Kumaraswami Sastri, J., in which it was held after reviewing the earlier decisions that an auction-purchaser under a money decree is the representative of the judgment-debtor. The decision of Sadasiva Aiyar, J., and Napier, J., in *Kasthuri Aiyangar* v. *Arunachalam Chettiar* (2) is against this view. My own inclination is to agree with the more recent judgment of the learned Chief Justice and Kumaraswami

(1) [1900] 23 Mad. 101.
(2) [1916] 34 I. C. 350

Sastri, J., having regard to the fact that, during recent years, they judicially have been in favour of an expanded application of S 47 and have been impressing upon the Courts in India the necessity of disposing of such matters under the execution chapter rather than referring the parties to a regular suit. Moreover, as was pointed out in the latest judgment, the course of decisions in this Presidency strongly favours the view that an auction-purchaser under a money decree must be regarded as the representative of the judgment-debtor.

There is also the further fact, as pointed out in *Pandaranga Mudalar* v. *Vythilinga Reddi* (3) that the present petitioner has become the owner of the property and as such in his own right is entitled to see that his rights are not jeopardized by an adverse decree against the persons from whom he acquired title. O. 21, Rr. 1 and 2, do not in themselves law down as to who ought to make an application for entering up satisfaction. As was pointed out in *Panduranga Mudaliar* v. *Vythilinga Reddi* (3), a person who has got a right to the property can well be within his rights in applying for entering up satisfaction of the decree which would otherwise endanger his right to his property. I therefore hold that the Courts below are wrong in the view they have taken that the petitioner had no locus standi to come in under O. 21, R. 2. I reverse the orders of the Courts below and direct the Court of first instance to dispose of the application on the merits. Costs will abide.

S.N./R.K. *Order reversed.*

(3) [1907] 30 Mad. 537.

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OLDFIELD AND SADASIVA AIYAR, JJ.

Muhayadeen Alli Sahib and *others*—Defendants—Appellants.

v.

Syed Bacha Sahib and *others*—Plaintiffs and Defendants—Respondents.

Second Appels Nos. 1635 to 1637 of 1917, Decided on 26th April 1918, against the decree of Dist. Judge, Madura, in Appeal and Suits Nos 342, 343 and 344 of 1916

(a) Civil P. C. (1908), S. 11—Erroneous decision as to rights of parties is as much res judicata as just decree.

An erroneous decree establishing the rights of the parties is as much res judicata as a just decree. The decision as to a party's rights cannot be re-opened by showing that that right was declared wrongly by the Court owing to its own and the unsuccessful party's ignorance of a fact which, if it had been brought to its notice by the unsuccessful party, would have modified its decision. The question whether that fact is true or not may not be res judicata if the unsuccessful party relies on it in a subsequent litigation, provided he establishes that he could not be reasonably expected to have made it a ground of attack or defence (as the case may be) in the former suit. But the party's ignorance of a ground of plea during the former litigation and that ground itself, even if established, cannot be permitted to take away from the binding effect of the former decision so far as it established the then rights of the parties. If the fact referred to is sought to be proved in the sub-equent suit as to rights which should have been different, evidence as to such a fact is irrelevant as it could not affect such rights. Subsequent facts showing that the rights established by the former decree have been legally modified since can be alleged and proved in the subsequent suit. [P 360 C 2, P 361 C 1]

(b) Civil P. C. (1908), S 11—Co defendants—Rights and obligations inter se must be defined.

For an adjudication to have effect as res judicata between co-defendants, judgment in the suit must define the real rights and obligations of the defendants inter se. [P 362 C 2]

T. R. Ramchandra Aiyar and *K. S. Ramabadra Aiyar*—for Appellants.

K. V. Krishnaswami Aiyar—for Respondents.

Oldfield, J.—The dispute is between the plaintiffs in each suit, who claim their shares in 6/16ths of 1/5th of the income of a Durga, and the appellants (defendants), its manager and trustee and committee members, who allege that the 1/5th in question became payable to the Durga, when the branch of the family, to which plaintiffs belong and which had previously received it, became extinct. In Second Appeal No. 1635 of 1917 it has undoubtedly been contended throughout that this matter is res judicata in the plaintiff's favour by the decision of this Court in Second Appeal No. 1957 of 1908. There is no doubt that it was a decision as to plaintiffs right generally, not as to a particular year only; and the objection to its application has accordingly been that the manager, who represented the Durga in that litigation did not rely on certain documentary evidence, which the present manager defendant has discovered and which will entail a different conclusion. It has not been shown how this evidence, which admittedly has throughout been available in the Durga records, could not have been adduced, if ordinary diligence had been used. No adequate reason for allowing

the present manager to re-open the case on its merits having been shown, the lower appellate Court's decision against him must stand.

In Second Appeals Nos. 1636 and 1637 of 1917, the decision is more difficult. Firstly plaintiffs did not plead that their claim was res judicata, and secondly it is a question whether it is so, since they were not plaintiffs, but defendants 5 and 8, in the previous litigation. No doubt then, as now the dispute was regarding the right to the share in the income available for distribution, which would have fallen to the extinct branch. But the then defendants 5 and 8, after alleging their right to participate in it with the then plaintiff, demurred to the proportion in which he proposed to divide it, the former claiming a decree for his share on his own calculation, the latter reserving his claim for a separate suit; and they eventually agreed with the plaintiff as to his and their shares and took no further part in the proceedings. They were joined apparently because plaintiff had had some dispute in a former year with them as to their respective shares, although it had been settled amicably. There was in the judgment under consideration no decision as to their right, although there was no doubt incidentally to the decision as to plaintiff's right an adjudication on the question, in which they were interested, whether the fund, of which they alleged that were entitled to a share, belonged to the Durga. The important point seems to me to be that the suits were in no sense for partition and that the then plaintiffs neither statedly nor impliedly sued on behalf of any sharer except themselves and did not sue on behalf of the then defendants 5 and 8, the distinction being that drawn in *Hikmat Ali* v. *Wali-unnissa* (1) and *Assan* v. *Pathumma* (2). As the then plaintiffs did not sue on behalf of defendants 5 and 8, the test prescribed in *Somasundara Mudali* v. *Kulandaivelu Pillai* (3) is not fulfilled and S. 11, Civil P. C., cannot be applied. It is no doubt the case that if the former defendants 5 and 8, had wished to enforce their rights in the previous suit, they could have been joined as plaintiffs. That however is not because they and the then plaintiffs were suing on any common cause of action, but because with reference to O. 1, R. 1, Civil P. C., a common question would have arisen, and no authority has been shown us for holding that persons entitled to join as plaintiffs on that account in the language of S. 11, Expln. 4, "ought" to do so or to join in making a common matter a ground of attack. In *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry* (4), on facts very similar to those before us, the decision was against the plea of res judicata for reasons, which (so far as they are stated) are in no way inconsistent with the foregoing. In these circumstances I hold that in these two cases the plea of res judicata cannot be accepted and that there must be a remand.

The result is that Second Appeal No. 1635 of 1917 is dismissed with costs. In Second Appeals Nos. 1636 and 1637 of 1917, the lower Court's decisions are set aside and the suits are remanded to the District Munsif for re-admission and rehearing on their merits in the light of the foregoing. Costs to date will be costs in the cause and will be provided in the decree to be passed. Court fees will be refunded on application by appellants.

Sadasiva Aiyar, J.—The question of the exact fraction of the emoluments which the plaintiff in Second Appeal No. 1635 of 1917 was entitled to recover from the defendants in 1910 is clearly res judicata by the High Court decision in second appeal in the former suit.

That decision as to the plaintiff's said right cannot be reopened by showing that that right was declared wrongly by the Court owing to its and the unsuccessful party's having been ignorant of a fact which, if it had been brought to its notice by the unsuccessful party, would have modified its decision. The question whether that fact is true or not may not be res judicata if the unsuccessful party relies on it in a subsequent litigation, provided he establishes that he could not be reasonably expected to have made it a ground of attack or defence (as the case may be) in the former suit: see Maclean, C.J.'s opinion in *Kailash Mondul* v. *Baroda Sundari Dasi* (5). I express no decided opinion on the point. But a party's ignorance of a ground of plea during the

(1) [1890] 12 All. 506.
(2) [1899] 22 Mad. 494.
(3) [1905] 28 Mad. 457.
(4) [1886] 13 Cal. 352. (F. B.).
(5) [1897] 24 Cal. 711.

former litigation and that ground itself, even if established, could not be permitted to take away from the binding effect of the former decision so far as it established the then rights of the parties. If the fact referred to is sought to be proved in the subsequent suit for the purpose only of showing that the decision in the former suit as to rights should have been different, evidence as to such a fact is irrelevant as it could not affect such rights. Of course, subsequent facts showing that the rights established by the former decree have been legally modified since, can be alleged and proved in the subsequent suit. In the present case what the appellants (defendants 3 to 5), who are the committee members and the manager of the plaint Goripalayam Durga, state is that the committee members and the former manager were not aware during the former litigation that the plaintiff was not entitled to claim any portion of the 6/16ths share which belonged to an extinct family, that that 6/16ths share had been gifted away in 1881 and 1883 to the Durga itself by two petitions presented by Syed Hussain Saib (the surviving male member of that family) subject to his widow's life-interest, that the Durga had been enjoying the said 6/16th share as of right since the widow's death and that these facts were discovered in the year 1910. The appellants' contention is that though the High Court in the former litigation established the plaintiff's right to recover 23/96ths share in the third pangu of the annual income of the inam villages from the committee members and the manager (the 23/96ths including 7 and 3/8ths by 30 of the 6/16ths share) the Court's decision in the plaintiff's favour as regards the 7 and 3/8ths by 30 of the 6/16ths share was erroneous and is therefore not res judicata.

I think that an erroneous decree establishing rights is as much res judicata between the parties as a just decree and the lower Courts rightly held that the evidence offered on the defendants' side to prove that the former decision was erroneous was irrelevant. I would therefore dismiss Second Appeal No. 1635 with costs. Second Appeal Nos. 1636 and 1637 also involve a question of res judicata similar to the one involved in Second Appeal No. 1635 of 1917, but there is an important difference between the question as raised in No. 1635 and the question as raised in the other two second appeals. The facts are very complicated. Some of them have however to be set out in order to understand the question of law involved. In a former suit (Original Suit No. 571 of 1905) brought by the plaintiff in Second Appeal No. 1635 of 1917 for his share in the emoluments of the Durga under the management of the contesting defendants, he made the plaintiffs in Second Appeals Nos. 1636 and 1637 defendants 5 and 8 as they also had shares in the income of the Durga. The finding in that case was that the plaintiff and defendants 5 and 8 of that suit (who are the three plaintiffs respectively in the three suits out of which the connected Second Appeals Nos. 1636 and 1637 of 1917 have arisen) were entitled to 23/96, 23/96 and 9/32 respectively of 1/5 share of the income of the whole Durga inam lands. Decree however was passed in that suit only for the then plaintiff's 23/96ths share of the income for certain faslis. No decree was passed in favour of defendants 5 and 8 in that suit against the manager and committee members of the Durga, the contesting defendants. The short question is, whether, when defendants 5 and 8 bring their own suits as plaintiffs (as they have done now in the suits out of which the Second Appeals Nos. 1636 and 1637 of 1917 have arisen), the finding in their favour in the former suit is res judicata against the manager and committee members of the Durga or whether the latter are entitled to contend and prove that the shares of these plaintiffs are not 23/96ths and 9/32nd as claimed by them but some lesser fractions.

So far as Second Appeal No. 1635 was concerned, I had little hesitation in holding in the previous portion of this judgment that as the plaintiff got a decree in the former suit against the contesting defendants on the establishment of his right to 23/96ths share in the former suit, the contesting defendants cannot be allowed to allege and prove in the second suit brought by that same plaintiff that he was entitled to a lesser share in the income. But the difficulty in these two other connected suits is that the plaintiffs in these two suits were co-defendants with the contesting defendants in the former suit. It is no doubt true that the ground on which the contesting defendants contend that these plaintiffs are

entitled to get lesser shares now than the 23/96th and 9/32nd claimed by them is the same ground on which they (defendants) sought to show that the plaintiff in the former suit ought not to have been given in that suit a 23/96ths shares, but ought to have been given a lesser share. To put it in another way, the plaintiff in the former suit of 1905 got a decree for 23/96ths share because it was decided that he was entitled, in addition to what may be called his legitimate and admitted share to 7 and 3/8ths by 30 of the 6/16ths share of one Syed Husain Sahib, defendants 5 and 8 of that suit of 1905 (the plaintiffs of two of the three present suits) being also entitled as co-heirs with plaintiffs of the former suit to their due shares under the Mahomedan law in that 6/16ths share. It was necessary to find in the former suit what fraction of the 6/16th share of Syed Hussain Sahib the plaintiff in that suit was entitled to in order to give him the appropriate relief. In arriving at that finding one of the previous steps in the course of reasoning pursued by the Court was that the plaintiff and defendants 5 and 8 of that suit were cosharers in the inheritance left by Syed Hussain Sahib and inherited certain fractions of the inheritance. Does the common and connected conclusion in favour of the plaintiff and defendants 5 and 8 in that previous step of reasoning which led to the directly relevant conclusion as to the share of the plaintiffs alone in the former suit become res judicata in favour of defendants 5 and 8 also in the new suits brought by these defendants as plaintiffs?

I have found the question rather difficult to answer. In the leading case *Ramchandra Narayan* v. *Narayan Mahadev* (6), West, J., said:

"There must be a conflict of interests amongst the defendants and a judgment defining the real rights and obligation of the defendants inter so. Without necessity a judgment will not be res judicata amongst defendants."

In the former suit defendants 5 and 8 did not pray to the Court that any decree should be passed in their favour also against the contesting defendants and it was therefore not necessary to decide the rights of defendants 5 and 8 as against the contesting defendants, though it must be admitted that in deciding the rights of the plaintiffs as against the contesting defendants, it was necessary to find that the plaintiffs and defendants 5 and 8 owned in common a certain right as against the contesting defendants, of which common right the plaintiff's fraction was so much and the fractions of defendants 5 and 8 were so much respectively. In *Muhammad Kuni Rowthan* v. *Visvanathaiyar* (7) it was held that where the matter was not in issue in the former suit as between the defendants themselves but only between plaintiff and the respective defendants, the finding in the former suit as to the validity of certain mortgages in favour of one of the defendants in the former suit as against the plaintiff of that suit was not res judicata as against another defendant in the former suit when the latter brought his own suit to declare the said mortgages invalid. An analogus question was considered by Mookerjee, J., at pp. 213 and 214 of (*I. L. R.* 36 *Cal.*) of *Gurdeo Singh* v. *Chandrika Singh* (8), and that learned Judge also says that

"for an adjudication to have effect as res judicata between co-defendants, the judgment in the suit must define the real rights and obligations of the defendants inter se."

In *Balambhat* v. *Narayanbhat* (9) it was held that where one of the co-defendants was not a necessary party, the finding in the former suit as to his rights was not res judicata as against a co-defendant. But none of these decisions lays down a principle which gives a clear and direct lead to my mind in respect of the particular question arising on the facts of these two second appeals. In *Chandu* v. *Kunhamed* (10) it was expressly decided that, where one sharer, who sued under the Mahomedan law for his share making all the other cosharers party defendants, had succeeded in the first suit in obtaining a decree for his share of a certain property against a contesting defendant who denied that that particular property was divisible among the cosharers, a purchaser from an ex parte defendant in the former suit, who afterwards brought a suit for another share, could claim as against the same contesting defendant that the decision in the former suit as to the divisibility of that property was res judicata in favor of the plaintiff in the second suit also, the learned Judges relying upon Expln. 5,

(6) [1887] 11 Bom. 216.

(7) [1903] 26 Mad. 337.
(8) [1909] 36 Cal. 193=1 I. C. 913.
(9) [1901] 25 Bom. 74.
(10) [1891] 14 Mad. 324.

old Civil P. C., S. 3, (corresponding to Expln. 6, S. 11 of the present Code) in support of their decision. I confess that the inclination of my mind is also in favour of the view held in *Chandu* v. *Kunhamed* (10). But I find that in *Somasundara Mudali* v. *Kulandaivelu Pillai* (3) a Full Bench overruled the decision in *Chandu* v. *Kunhamed* (10) and it is interesting that Mr. Sankaran Nair, who as appellant's vakil succeeded in persuading the Court to the contrary view in *Chandu* v. *Kunhamed* (10), was one of the Judges of the Full Bench who decided *Somasundara Mudali* v. *Kulandaivelu Pillai* (3).

In the result I hold that the question as to the shares of the plaintiffs in Second Appeals Nos. 1636 and 1637 is not res judicata by the decision in the suit of 1905. I would therefore set aside the decisions of the lower Courts and remand the case to the Court of first instance for disposal according to law. Costs hitherto to abide. Court fees on second appeal memo to be refunded to appellants.

S.N./R.K. *Order accordingly.*

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* A. I. R. 1919 Madras 363

SADASIVA AIYAR AND SPENCER, JJ.

Gadiraju Somaraju and *others*—Plaintiffs—Appellants.

v.

Dandu Venkiah and *others*—Defendants—Respondents.

Second Appeal No. 1838 of 1917, Decided on 24th October 1918, against decree of Temporary Sub-Judge., Ellore, in Appeal Suit No. 106 of 1916.

(a) Limitation Act (9 of 1908), Art. 125—Suit for declaration by reversioners next and remote—There is only one cause of action for all—Failure to bring suit within period fixed by Art. 125—Suit is barred against all.

There is only one cause of action for a declaratory suit for all reversioners, next and remote, and when that cause of action once becomes barred under Art. 125 by the failure to bring a suit by any of the reversioners within the period fixed by that article, no reversioner, whether in existence or not at the date of the alienation, can afterwards bring such a suit. [P 364 C 2]

(b) Hindu Law — Alienation — Widow—Compromise of litigation by widow does not amount to alienation.

The compromise of a litigation entered into by a female owner, with right over property, her title to which is disputed by the opposite party, the compromise recognizing the disputant's title to the property, does not amount to an alienation of the property in the disputant's favour by her, and the disputant does not hold the property thereafter under any new title derived from, or created by her. [P 365 C 1]

*** (c) Limitation Act (9 of 1908), Art. 125—Alienation by Hindu widow — Suit to set aside alienation by daughter compromised—Compromise does not amount to fresh alienation-Fresh cause of action does not accrue.**

The daughter of a Hindu widow brought a suit to set aside an alienation by her mother and the suit was compromised. Subsequently, the reversioners brought a suit impeaching the same alienation.

Held: that the period of limitation for such a suit was that prescribed by Art. 125, Sch. 1, Lim. Act, and that as the compromise by the daughter did not amount to a fresh alienation, no fresh cause of action accrued to the reversioners. [P 365 C 2, P 366 C 1]

V. Rimesam—for Appellants.

P. Narayanamuthy—for Respondents.

Sadasiva Aiyar, J—The plaintiffs are the appellants. They and defendant 6 are the sons of defendant 7 who is the daughter of one Soma Raju, who died about 30 years ago leaving a widow Venkayya as his heir with the limited powers of a Hindu female heir. She died in 1901, having alienated the plaint properties in 1893 to one Chandra Raju, whose widow is defendant 1 under whom defendants 2 to 5 claim. The plaintiffs' mother (defendant 7), as the next reversionary heir, brought a suit in 1901 very soon after her mother's death to set aside the alienation by her mother in favour of Chandra Raju. She however compromised that suit by the compromise agreement set out in the decree, Ex. 1, dated August 1902. Under that compromise, Chandra Raju was to enjoy the alienated lands as of right (and there were other terms not necessary to be mentioned in detail), defendant 7 receiving Rs. 165 5-0 to compensate her for the costs of the suit and for giving up her claim to the possession of the lands.

This decree, as I said before, was in 1902, when one of defendant 7's sons (defendant 6) was about 20 years old, his younger brothers, the plaintiffs, being then minors. The present suit was brought in 1912 for two reliefs: (1) that the plaintiffs' maternal grandmother's (Venkayya's) alienation of the plaint properties to Chandra Raju in 1893 might be declared invalid against the plaintiffs' and defendant 6's reversionary rights; (2) that the plaintiffs' mother's (defendant 7's) alienation by the compromise, Ex. 1, of 1902 of the plaint propreties might also be declared not binding upon the plaintiffs and defendant 6.

The lower Courts dismissed the plaintiffs' suit, the lower appellate Court basing its decision solely on the point of limitation, which it decided against the plaintiffs on the ground that defendant 6 could and ought to have brought a suit of this nature on behalf of himself and the plaintiffs within 6 years from August 1902, when his mother (defendant 7) entered into the compromise, Ex. 1. He relied upon the decision in *Krishnier* v. *Lakshmiammal* (1) in support of this opinion. The learned Subordinate Judge's reference to 6 years as the period of limitation is probably based upon the dictum in *Narayana Aiyar* v. *Rama Aiyar* (2), where it was held that Art. 125 providing a limitation period of twelve years did not apply to a suit brought by a remoter presumptive reversioner after the death of the alienating female, his right to bring such a suit being based on the circumstance that the collusion or negligence of the next living female reversionary heir with limited interest had precluded the latter from bringing the suit. It was further held in that case that Art. 120 applied to such a suit and that the period of 6 years provided for in that article was to be calculated from when the next female reversioner precluded herself by her laches or conduct from herself bringing such a suit at the time when the remoter reversioner brought it.

But the view above propounded in *Narayana Aiyar* v. *Rama Aiyar* (2), following *Krishnier* v. *Lakshmiammal* (1), proceeds on the footing that each successive reversioner or set of reversioners has got a separate cause of action which arises when the preceding reversioner (or set of reversioners standing in the same degree) has (or have) lost his (or their) rights by laches or conduct to bring the suit. This view however, which was held until 1917; see *Venkata Row* v. *Tuljaram Row* (3) has now been overruled by the decision of the Full Bench of five Judges reported in *Challagundla Varamma* v. *Madala Gopaladasayya* (4). That Full Bench decision held that there is only one cause of action for a declaratory suit for all reversioners, next and remote, and that when that cause of action once becomes barred under Art. 125 by the failure to bring a suit by any of the reversioners within the period fixed by Art. 125, no reversioner (whether in existence or not at the date of the alienation) can afterwards bring such a suit. The Subordinate Judge should therefore have relied upon Art. 125, and not Art. 120 on the question of limitation, so far as the relief related to the declaration of the invalidity of the plaintiff's grandmother's alienation.

It is however argued by the learned vakil who appeared for the appellants that it is only the alienation by the plaintiffs' grandmother Venkayya in 1893 that could not be questioned by the plaintiffs because it was barred by limitation, but that they could question the alienation made by the plaintiffs' mother, defendant 7, through the compromise Ex. 1, that alienation being a new alienation of 1902 (though by way of confirmation of the alienation of 1893 made by plaintiffs' grandmother), and that they have got 12 years from the date of this fresh alienation, i. e., from 1902 to bring a suit to declare that alienation invalid as against the plaintiffs and defendant 6.

The question thus raised is rather a difficult one to decide. The appellants' vakil relied on the case reported in *Akkineri Sreeramulu* v. *Mullapudi Ramayya* (5) as in his favour. There the widow made the alienation in 1874. The daughters sued in 1892 to set aside that alienation, evidently during the widow's lifetime. They then withdrew that suit "on the ground that the alienation was valid." Their sons then brought the suit decided as *Akkineri Sreeramulu* v. *Mullapudi Ramayya* (5) in the year 1893 to declare that both the alienation of 1874 and what they called "the alienation made by way of confirmation," by their mothers (defendants 3 and 4 in the suit) in 1892 through their withdrawal of the suit of 1892 were not binding on the plaintiffs. The learned Judges (Bhashyam Aiyangar and Moore, JJ.) held that so far as the claim related to the relief of a declaration that the widow's alienation of 1874 was bad, the suit was barred, but that, in respect of the claim based on the withdrawal by the plaintiffs' mothers (defendants 3 and 4) of the suit of 1892 the suit brought in 1893 was not barred. The judgment of the learned

(1) [1908] 18 M L. J. 275.
(2) [1913] 38 Mad. 396=20 I. C. 625.
(3) [1917] 38 I. C. 270.
(4) [1918] 41 Mad. 659=46 I. C. 202.
(5) [1902] 25 Mad. 731.

Judges is (if I may say so with respect) rather too brief and hence, naturally there is some obscurity as to the precise propositions of law laid down therein. The judgment does not definitely state that the withdrawal of the plaintiffs' mother's suit is, in the eye of the law, a new alienation made by the plaintiffs' mother, as alleged by the plaintiffs. It merely recites the prayer in the plaint which treats such withdrawal as a substantive new alienation. At the end of the judgment, such withdrawal is referred to as "a confirmation of the alienation of 1874," and it is stated that such "confirmation gives a fresh cause of action" and hence the claim for the relief based on that cause of action was not barred.

As the suit was brought in 1893 (the next year after the so-called "confirmation"), the suit was rightly held not to be barred, but the learned Judges do not state what article of the Limitation Act applied to the claim for such relief. If the learned Judges really intended to lay down that the withdrawal of a declaratory suit brought by presumptive reversioners is, in the eye of the law, a substantive alienation by them of the properties already alienated by the widow, I dissent with great respect. In *Timmaji Amma Garu* v. *Subbaraju* (6), Miller and Munro, JJ., held that the compromise of a litigation enterel into by a female owner with limited rights in respect of a property, her title to which was disputed by the opposite party, the compromise recognizing the disputant's title to the property, did not amount to an alienation of the property in the disputant's favour by her and that the disputant did not hold the property thereafter under any new title derived from or created by her. Of course, such a compromise might be attacked in a proper suit brought by a person interested on the ground that it was fraudulent or collusive, but such a suit would not be a suit to set aside the alienation by a female owner with limited rights, to which Art. 125 would apply. The correctness of the decision in *Akkineri Sreeramulu* v. *Mullapudi Ramayya* (5) can of course be upheld, if it merely decided that the claim held in that decision not to be barred by limitation was a claim merely for declaring void as against the plaintiffs (by reason of fraud or collusion) the withdrawal of the previous suit brought by the plaintiff's mother in that case. In *Narayana Aiyar* v. *Rama Aiyar* (2) the opinion was expressed that the article of the Limitation Act applicable to such a suit by a reversioner who is not the next reversioner was six years under Art. 120, the term to be calculated from when the plaintiff's right accrued. In *Khunni Lal* v. *Gobind Krishna Narain* (7) their Lordships of the Privy Council state that a compromise which recognizes the title of the disputant does not confer a new distinct title on the disputant, but is merely an acknowledgment of and a definition of the disputant's title and does not therefore amount to a new alienation in favour of the disputant. The appellants' learned vakil however sought to distinguish these decisions on the ground that the terms of the compromise Ex. 1 in the present case indicated an abandonment by Chandra Raju of his title under the alienation of 1893 (made by the plaintiffs' grandmother) and the obtaining of a fresh title under a fresh alienation of 1902 (made by the plaintiffs' mother, defendant 7). After anxious consideration of the terms of Ex. 1, I have come to the conclusion that this contention cannot prevail. I can find no expression in Ex. 1 indicating that Chandra Raju relinquished his title obtained under the alienation of 1893 (which, according to his contention in that suit, was binding on the reversioners), nor anything to show that he acknowledged that the plaintiffs' mother was then entitled to make a fresh alienation ignoring the plaintiffs' grandmother's alienation or to give him fresh title in supersession of the title which he claimed to have obtained under the alienation of 1893.

The mere fact that he paid some money to obtain the acknowledgment by the plaintiffs' mother (defendant 7) of the validity of his title to the plaint lands and house created under the document of 1893 does not, in my opinion, amount to any such relinquishment of the title which he claimed in that suit under the document of 1893. The test to see whether the compromise itself amounted to an alienation is to find out whether the property alleged to have been alienated by the compromise was

(9) [1910] 33 Mad. 473=5 I. C. 640.

(7) [1911] 33 All. 356=38 I. A. 87=10 I. C. 477 (P. C.).

one not claimed by the disputant as held by him on an existing title created prior to the compromise, but was property to which he could have derived his title for the first time (according to the pleadings in the case or according to any admissions in the compromise itself) only under the compromise and on the date of the compromise. Several cases of the Allahabad and Patna High Courts were quoted by the appellants' learned vakil, but the decisions in most of them depended on the particular facts which were held to have shown an intention on the part of the female heir to make a first or fresh alienation through the instrumentality of a nominal compromise, a nominal arbitration or some such bogus proceeding. There are, no doubt, some cases in which language of a wider character has been employed apparently supporting the appellants' contention, but I feel myself bound by the decisions of this Court and of the Privy Council to apply the test, I have above indicated as the correct one; and, so applying that test, I am satisfied that there was no new alienation intended or effected under Ex. 1.

Even if the claim in the plaint in this suit to obtain the relief of a declaration as to the invalidity of this new alleged alienation of 1902 is amended as one to declare the compromise agreement invalid against the plaintiffs and the defendant 6 on the ground of fraud or coercion practised upon defendant 7 (see para. 7 of the plaint), the claim for such a relief is barred under the 6 years' rule. In the result the secand appeal fails and is dismissed with costs.

Spencer, J.— In *Bangarayudu* v. *Perayya Sastry* (8), to which decision I was a party, it was observed that, in some instances, compromises by the limited owner may amount to family settlements, while, in other cases, they cannot be placed on a higher footing than alienations, and a number of decisions were quoted to illustrate both classes of transactions No doubt it is true that there is no well-marked line of demarcation between the class of transactions which are compromises in the nature of family settlements and the class of compromises which are alienations. The recent Privy Council decision in *Amrit Narayan Singh* v. *Gaya Singh* (9) does not throw much light on the subject, as the compromise and the reference to arbitration during the widow's life in that case was made by the minor reversioner's father purporting to act on behalf of his wife and his infant son. In an earlier Privy Council case in *Khunni Lal* v. *Gobind Krishna Narain* (7) their Lordships applied the test, to a transaction challenged by reversioners as an alienation, of seeing whether the alienee derives title from the holder of the limited interest or not, and in *Ranga Rao* v. *Ranganayaki Ammal* (10) Phillips, J. on the same principle examined the facts to see whether the widow's action had, as a necessary result, the transfer of the property or whether she materially contributed by her action to the transfer, and he decided that the mere withdrawal of the defence in the suit would not amount to such an act of transfer. So in the present case, the plaintiffs' mother G. Venkayya, brought a suit to declare the alienation made by their grandmother A. Venkayya to be invalid. When the former withdrew her claim to the lands under the terms of the compromise, she did not purport to transfer any further interest in the suit property beyond what their grandmother A. Venkayya had already alienated. The decision in *Akkineri Sreeramulu* v. *Mullapudi Ramayya* (5) was strongly relied upon by the appellants' vakil as an authority for holding that a fresh cause of action would arise upon a compromise of the suit by the plaintiffs' mother G. Venkayya.

The learned Judges who decided that case did not expressly state what kind of action the withdrawal of the previous suit without leave to sue again would give rise to. If they had in contemplation a suit by the daughters' sons to set aside the decree in the former suit as having been arrived at by fraud and collusion on the part of their mothers, for which the limitation period would be 6 years under Art. 120, Lim. Act, the statement that the withdrawal of the suit of 1892 gave rise to a fresh cause of action and that the suit of 1893 was not barred by limitation is quite intelligible; and I think that this is what

(8) [1915] 30 I. C. 927.

(9) A. I. R. 1917 P. C. 95=45 Cal. 590=45 I.A. 35=44 I. C. 409 (P. C.).

(10) [1918] 47 I. C. 578.

was intended, as I find that one of the defences to the suit was a denial that there had been any collusion. But if it was intended that the second suit in that case should be treated as one governed by Art. 125, then I should be inclined to respectfully doubt the correctness of that decision, and I would follow the decision in *Timmaji Amma Garu* v. *Subbaraju* (6) which laid down that a widow entering into a compromise with a person, who disputes her right to property, when she merely undertakes to make no further claim to the property, does not thereby alienate the property and the property is not in consequence held under any title derived from her. In the case now before us, the suit was not instituted within six years of the compromise of the earlier suit.

I agree with my learned brother that the suit is time barred and that this second appeal must be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 367

ABDUR RAHIM AND SESHAGIRI AIYAR, JJ.

Komu Kutti—Defendant—Appellant.

v.

Kumara Menon and *others*—Plaintiffs—Respondents.

Appeal Suit No. 150 of 1917, Decided on 26th March 1918, against decree of Dist. Judge, South Malabar, in Original Suit No 6 of 1916.

Vendor and Purchaser — Covenant by vendee to pay outstanding debts out of sale consideration and to compensate vendor for breach — Breach of covenant — Suit by vendor to recover amount without proof of loss is maintainable—Contract Act (1872), S. 124.

Where on a sale of immovable property a portion of the consideration is left with the purchaser on his understaking to pay certain outstanding debts of the vendor and the purchaser further agrees to compensate the vendor in case of default in the payment of the debts, the vendor is entiled to sue the vendee on a breach of the covenant without proof of any loss sustained by him by such breach. The gist of the transaction is a mere contract to pay the purchase-money, providing for compensation in case of breach, and it does not amount to a contract of indemnity: 38 *I. C.* 188 and 12 *I. C.* 353, *Foll.*; 8 *I. C.* 793 (*P. C.*) *Dist.* [P 368 C 1]

Per *Abdur Rahim, J*—Where a property is sold subject to certain encumbrances charged on it, which the purchaser agrees to discharge out of the sale consideration, the law requires that the purchaser should discharge those encumbrances, if called on to do so, and if he does not, then he must indemnify the vendor against all loss. But where the debts are ordinary money debts and there is an unconditional contract by the purchaser that he would pay those debts with the greater part of the consideration, such a contract cannot be treated as a mere contract of indemnity simply because the document provides for compensation for any loss caused to the vendor by the breach of the contract. [P 369 C 1]

Per *Seshagiri Aiyar, J.*—Wherever there is a sale of property and the purchaser has to discharge encumbrances on the property, there is on the one hand, on the part of the vendor, a contract to indemnify the purchaser for any loss he may be put to, and on the other hand, there is a contract on the part of the purchaser that he would relieve the vendor from any personal liability to pay the mortgage amount subsisting on the property Subject to this reservation, ordinarily where there are agreements by the purchaser to pay off outstanding debts which are not charges on the property the purchaser becomes the agent of the seller and if he fails so to apply the money left in his hands, the purchaser has the right to call back the money so that he may himself apply it towards the discharge of the debts. In such cases a suit will be upon the covenant and not upon an express or implied contract of indemnity. [P 369 C 2]

C. V. Ananthakrishna Aiyar — for Appellant.

T. R. Ramchandra Aiyar and *A. S. Venku Aiyar*—for Respondents.

Abdur Rahim, J.—As regards the objection to the registration of the sale deed Ex. A on the ground that item 17, plot C, which was situated in the jurisdiction of the Sub-Registrar was not in fact sold, I do not think that there is any substance in this objection. The District Judge has found otherwise and that finding is prima facie correct. The next question depends primarily upon the interpretation of the sale deed Ex. A. It provides that as regards the purchase money

"the said sum of Rs. 10,237-8-0, as has been received by us by way of Rs. 9,086-2-10 reserved with you, it being settled that the kulicadan (encumbrance) Rs. 1,237-8-0 due to the aforesaid persons on properties items 10 to 16 should be paid by you and the properties should be recovered possession of and that the previous debts Rs. 7,848-10-10 which were incurred for our tarwad necessities .... should be paid off by you ..... and by way of the balance amount Rs 1,151-5-2 which was obtained by us in ready cash this day for the purpose of constructing a house, etc."

The document states later on:

"And it has hereby been agreed on karar that if without your paying in time, with future interest thereon from this day forwards, the Rs. 7,848-10-10, which as aforesaid is described in Sch. B and which was agreed to be paid off by you, and obtaining back the documents described in Sch. C, any occasion is given for any loss to be sustained by us consequent thereupon or for us to pay any amount, yourself and your

properties would be liable for all such losses and amounts, etc."

It is contended that these clauses amount merely to a contract of indemnity and therefore the respondents the vendors of the property, were not entitled to bring this suit, until any loss had been caused to them by the appellant, the vendee, failing to pay Rs. 7,848-10-10 as covenanted by him. Whether it is an absolute covenant to pay the purchase-money in the way agreed upon by the parties or a covenant merely by way of indemnity, must necessarily depend upon the construction of the document. As I read Ex. A, it provides that the greater part of the purchase-money should remain in the hands of the purchaser, he undertaking to pay the different creditors. These were all simple debts due on promissory notes, and none of them were charged upon the property. No doubt there is a contract by the vendee to compensate the vendors for any loss sustained by them by his default in paying the amount which he undertook to pay. But that in itself, would not make it a mere contract of indemnity. All that it means, reading it with the other clauses, is that if the vendee having the money of the vendors in his hands fails to pay according to the contract certain creditors of theirs then he must compensate the vendors for any loss that may be caused to them by such breach of contract. This is to my mind, a mere case of contract to pay the purchase money, providing for compensation in case of breach. It is just the case which is set out in the decision to which I was a party, viz., *Kaliyammal* v. *Kolandavela Goundar* (1). It is there stated:

"No doubt there are cases in which the gist of the transaction is that the vendor leaves part of the sale proceeds in the hands of the vendee with a direction that he shall pay the debts for which the vendor was liable. In such cases of absolute covenant it is open to the vendor to sue the vendee as soon as he fails to pay the debts as as they become due and the words of such a covenant may be inconsistent with a covenant to indemnify, properly so called."

There is another decision to which I was a party, *Raghunatha Chariar* v. *Sadagopa Chariar* (2). The head-note (36 *Mad.* 348), of that decision is in these words:

"*A* transfers his property to *B* in consideration of *B* agreeing to pay certain sums to third persons. *A* is himself entitled to sue *B* for the recovery of those sums as if they are due to him in case of *B's* failure to pay the third persons within a reasonable time; and *A* is not in such a case bound to show that he was in any way damnified by *B's* failure."

There was a previous decision of Subramania Aiyar and Moore, JJ., on the same subject in *Dorasinga Tevar* v. *Arunchalam Chetti* (3), which perhaps went further. There the agreement provided that if the defendant failed to discharge the debt, he should be liable to pay the plaintiff for any damage the latter might sustain. It was held that the agreement was not a mere contract of indemnity. There the learned Judges point out in support of their view that this provision could not detract from the absolute promise to pay contained in the beginning of the document. Here also there is an absoulute promise to pay, though the document further provides for compensation in default of payment It has been argued by Mr. C. V. Ananthakrishna Aiyar that the decision of the Privy Council in *Izzatunnisa Begam* v. *Kunwar Pertab Singh* (4) supports his contention and that the view of the law laid down especially in *Dorasinga Tevar* v. *Arunachalam Chetti* (3) requires reconsideration. In *Izzatunnisa Begam* v. *Kunwar Pertab Singh* (4) the equity of redemption in certain property was sold in auction and was bought by the decree-holder. The sale was subject to two prior mortgages. As it happened, those mortgages were found to be invalid, and the purchaser had nothing to pay on that account. The owner of the property sued afterwards to recover the amount of those mortgages from the purchaser. The Judicial Committee held that the purchaser of the equity of redemption was entitled to whatever benefit accrued to him by reason of the mortgages, which were supposed to exist on the property, being found to be inoperative. He had bought the equity of redemption and there was thus a contract implied by law that he would indemnify the owner of the property against encumbrances affecting it. As it happened, he had not to pay any of the supposed encumbrances. In those circumstances it was pointed out that the owner of the property had got what he bargained for and had nothing to complain of. There is one sentence in

(1) [1917] 38 I. C. 188.
(2) [1911] 36 Mad. 348=12 I. C. 353.
(3) [1900] 23 Mad. 441.
(4) [1905] 31 All. 583=3 I. C. 793=36 I.A. 203 (P. C.).

the judgment which is especially relied on by Mr. Ananthakrishna Aiyar and it is this :

"If the purchaser covenants with the vendor to pay the encumbrances, it is still nothing more than a contract of indemnity."

But reading that sentence in the light of the rest of the judgment, it means nothing more than this: that in a transaction of the nature under consideration in that case there was an implied contract of indemnity, and if the purchaser expressly covenanted with the vendor to pay the encumbrances, such a covenant as that without more having regard to the nature of the transaction, would in no way change the character of the contract which the law implied between the parties. It does not, in my opinion, countenance a general proposition that wherever there is a contract to pay compensation to the vendor for any loss caused to him by nonpayment, that must be treated as a mere contract of indemnity ; that is to say, that we must always in such a case disregard the express and unqualified covenant for payment and treat the transaction merely as a contract of indemnity. The gist of the transaction in this case was that the appellant constituted himself the agent of the respondents for the purpose of paying certain debts. In the case in the Privy Council there were debts charged upon the property, and as the property was sold subject to those encumbrances, the law required that the purchaser should discharge those encumbrances if called upon to do so; and if he did not, then he must indemnify the vendor against all loss. But here the debts were ordinary money debts, and there is an unconditional contract that with the greater part of the consideration money the appellant will pay these debts. It seems to me altogether unreasonable to treat such a contract as a mere contract of indemnity, simply because the document provides for compensation for any loss caused to the respondents by the breach of the contract. I therefore hold that the conclusion of the learned Judge on this point is right.

The memorandum of objections relates to the costs which have been disallowed to the respondents by the District Judge. These are the costs which they had to pay to the plaintiffs in certain suits brought to recover the debts which the appellant undertook to pay. I have no doubt that the appellant is liable for this amount. The result will be that the appeal is dismissed with costs. The memorandum of objections must be allowed with costs, and the decree will be modified by increasing the amount by Rs. 355-8-0. The time for payment of the decree amount will be extended by four months from this date.

Seshagiri Aiyar, J.—In a given case it may not be easy to determine whether a suit is upon a covenant or upon a contract of indemnity. We may take it that the decision of the Judicial Committee in *Izzatunnisa Begum* v. *Kunwar Pertab Singh* (4) establishes that wherever there is a sale of property subject to previous encumbrances, it must be regarded that there is a contract of indemnity by the purchaser as well. Although the Transfer of Property Act does not specifically refer to such an indemnity, from the decision of the Judicial Committee it seems to follow that whenever there is a sale of property and the purchaser has to discharge incumbrances upon the property, there is on the one hand on the part of the vendor a contract to indemnify the purchaser for any loss he may be put to, and on the other hand there is a contract on the part of the purchaser that he would relieve the vendor from any personal liability to pay the mortgage amount subsisting on the property. Subject to this reservation, ordinarily where there are agreements by the purchaser to pay off outstanding debts which are not charges on the property, they must be regarded as mere covenants or agreements and the suit would be generally upon the agreement which has been broken. In such cases, the purchaser must be regarded as the agent of the seller. It is the seller's money that he has, and the purchaser is bound to apply the money as directed by the seller. If he fails to apply, the seller can say:

"You have not discharged my debts as directed. Return the money left with you."

In these circumstances there will be a right on the part of the seller to call back the money so that he may himself apply it towards the discharge of the debts. In such cases, the suit will be upon the covenant, and not upon an implied or express contract of indemnity. In the present case, I feel no doubt that

the suit is brought upon the covenant. The two clauses in Ex. A to which Mr. Ananthakrishna Aiyar drew our attention refer to losses sustained by voluntary payments on the one hand and by involuntary payments on the other. The clauses contemplate that in some cases there may be a decree and the property of the vendor may have to be sold; in others there may be voluntary payments to avoid litigation. These are cases of covenants and not of indemnity. Following the decisions of this Court, to two of which my learned brother was a party, viz., *Kaliyammal* v. *Kolandavela Goundar* (1) and *Raghunatha Chariar* v. *Sadagopa Chariar* (2), I hold that this is a suit brought upon the covenant and that the decree was rightly given by the Court below. I agree that the decrees should be modified as suggested by my learned brother.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 370

SADASIVA AIYAR AND SPENCER, JJ.

Thankammal Vayamkar Amma and *others*—Defendants—Petitioners.

v.

Kunhamma and *others*—Plaintiffs and Defendants—Opposite Parties.

Civil Revn. Petn. No. 386 of 1918, Decided on 6th November 1918, from judgment and decree of Sub-Judge, South Malabar, D/- 10th January 1918, in Small Cause Suit No. 1046 of 1917.

(a) Malabar Law—Tavazhi—Debt contracted by manager—Junior members are liable—Decree can be passed against them.

The junior members of a tavazhi are liable for a debt on a pro-note executed by the karnavan for current tavazhi expenses. The creditor can sue both the karnavan and the other members of the tavazhi and obtain a decree against all: *A. I. R.* 1915 *Mad.* 618, *Dist.*; 33 *I. C.* 691; 38 *I. C* 329 and 28 *I. C.* 345, *Foll.* [P 371 C 1]

(b) Limitation Act (9 of 1908), Ss. 19 and 20—Acknowledgment and payment by manager though not expressly so stated saves limitation against junior members.

An acknowledgment or payment by the manager, though not expressly stated to have been made or signed as manager saves limitation also as against the junior members. [P 372 C 1]

(c) Limitation Act (9 of 1908), S. 19—Authority to sign acknowledgment need not be express.

The authority to sign an acknowledgment under S. 19 need not be expressly given by the parties sought to be made liable. The agency to sign can follow from the act of the Court or from rules of statutory or partnership law or the personal law of the parties. [P 372 C 1]

(d) Evidence Act (1 of 1872), S. 91—Pro note— Contemporaneous advance—Distinct causes of action do not vest in creditor

Per *Sadasiva Aiyar, J.*—When a promissory note is executed for money borrowed at the time of the execution of the note itself, the creditor cannot join two separate causes of action in the same suit on two independent heads of claim, namely, one based on the borrowing of the money the instant before the execution of the promissory-note and the other on the promissory note itself. Having regard to S. 91, two distinct causes of action do not vest in such cases in the creditor: *A. I. R.* 1914 *P. C* 132, *Expl.*; 35 *I. C.* 219, *not Appr.* [P 370 C 2]

(e) Malabar Law—Tarwad—Manager of joint family can acknowledge liability on behalf of members—Limitation Act (9 of 1908), S. 19.

Per *Spencer, J.*—On the pleadings in the case the suit was based on the liability for the debt as evidenced by the promissory-note. [P 372 C 2]

A manager of a joint family or tarwad can acknowledge liability on behalf of the members whom he represents so as to extend the period of limitation against them as well as against himself. [P 373 C 1]

K. Kutti Krishna Menon—for Petitioners.

P. S. Narayanaswami Aiyar—for Opposite Parties.

Sadasiva Aiyar, J.—Defendants 2, 3 and 4 are the petitioners in revision. They are junior members of a tavazhi, of which defendant 1 was the manager. As such manager, she borrowed Rs. 100 in cash for tavazhi expenses and executed a promissory note in her own handwriting to the plaintiff on 18th February 1914. A suit was brought against her and the other members of the tavazhi, the plaint alleging that the money was borrowed under the promissory-note for the necessities of the tavazhi. The Subordinate Judge on the Small Cause side gave a decree against defendant 1 and also against the other defendants to the extent of their interest in the tavazhi properties. Defendants 2 to 4 urge in their grounds of the revision petition: (1) that under the ruling in *Govindan Nair* v. *Nanu Menon* (1) the lower Court erred in giving a decree against the tavazhi as the suit was solely based on the promissory note, (2) that the lower Court has not found that the tavazhi had a necessity to borrow. (There are other grounds which raise questions of fact, which it is not usual in revision petitions to consider.)

As regards the first point, there was a preliminary argument addressed on the question whether when a promissory note is executed for money borrowed at

(1) A. I. R. 1915 Mad. 618=26 I. C. 750.

the time of the execution of the promissory-note itself, the creditor can bring two separate suits or put forward two separate causes of action in the same suit on two independent heads of claim, namely, one based on the borrowing of the money the instant before the execution of the promissory-note and the other on the promissory-note itself. In *Muthu Sastrigal* v *Viswanatha Pandara Sannadhi* (2) : see also the decision in *Ammalu Ammal* v. *Namagiri Ammal* (3). I expressed the opinion that having regard to S. 91, Evidence Act, two distinct causes of action did not vest in such cases in the creditor. In *Shanmuganatha Chettiar* v. *Srinivasa Aiyar* (4), Abdur Rahim, J., basing himself on the decision of the Privy Council in *Karmali Abdulla* v. *Bora Karimji* (5), held that the creditor has the right to put forward the two claims independently of one another.

With the greatest respect I venture to think that their Lordships of the Privy Council were not considering this question in *Karmali Abdulla* v. *Bora Karimji* (5), but a different question, namely, whether other partners were liable on bills drawn by one of the partners for debts incurred by him in the carrying on the partnership business of purchasing brown sugar at Mauritius for shipment to and sale at Hongkong. Their Lordships say expressly at pp. 274 and 275 (of 39 *Bom.*) that "the Contract Act" "rules parties in this case," and the question was " whether the transaction is or is not a partnership transaction " and that "it is erroneous to treat the question as purely a question of liability on the bills," just as it is erroneous in the present case to treat the suit as one solely on the promissory-note and not also on the Hindu law liability of the tavazhi for a promissory-note debt incurred by its manager in respect of a family transaction within her powers. I might add that in the decision in *Nachiappa Chetty* v. *Dakshinamurthy Servai* (6), a case decided after the decision of their Lordships of the Privy Council in *Karmali Abdulla* v. *Bora Karimji* (5) the learned Chief Justice has the following observation :

" This way of putting it does not take account of the decisions that where the debt and the promissory-note came into existence at one and the same time the maker must be sued on the promissory-note and not on the original cause of action."

This observation indicates that in the opinion of my Lord, the Chief Justice, there is only one cause of action after the promissory-note was executed (for a contemporaneous borrowing), on which a suit could be brought. I might also refer to the decisions of Coutts-Trotter, J., in *Ayyasamy Pillai* v. *Gurusami Naicken* (7) and of Ayling and Seshagiri Aiyar, JJ., in *Nataraja Naicken* v. *Ayyasami Pillai* (8), which indicate that the claim based on the rules of Hindu law and made against persons other than the maker of the promissory-note arises along with and as a result of the execution of the promissory-note by the managing member. So also in the Full Bench decision in *Krishna Ayyar* v. *Krishnasami Ayyar* (9) Subrahmania Aiyar, J., clearly bases his decision on the ground that the debt created by the promissory note itself ipso facto creates the obligation on the other members of the family under the Hindu law, and not that their obligation is created by any antecedent independent debt which existed before the promissory note was executed.

Then the next question is whether the decision in *Govindan Nair* v. *Nanu Menon* (1) precludes the Court from giving a decree against the other members of tha tavazhi even if the debt has been incurred by the karnavan for purposes binding on the tavazhi. This decision in *Govindan Nair* v. *Nanu Menon* (1) has been clearly explained by the learned Chief Justice, who was a party to it, in his judgment in *Nachiappa Chetty* v. *Dakshinamurthy Servai* (6). He there points out that the decision in *Govindan Nair* v. *Nanu Menon* (1) was based on the fact that the plaintiff in that case neither alleged in his plaint nor proved by his evidence facts indicating that, by the Marumakkathayam law, the other members of the tavazhi were bound by the debt of the manager. On the other hand, the decision in *Nachiappa Chetty* v. *Dakshinamurthy Servai* (6)

(2) A. I. R. 1914 Mad. 657=38 Mad. 660=21 I. C 861.
(3) [1918] 43 I. C. 760.
(4) [1916] 40 Mad. 727=35 I. C. 219.
(5) A. I. R. 1914 P. C. 132=39 Bom. 261=42 I. A. 481=26 I. C. 915 (P.C.).
(6) [1915] 28 I. C. 345.
(7) [1916] 33 I. C. 601.
(8) [1917] 38 I. C. 339.
(9) [1900] 23 Mad. 547.

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and the decisions in *Ayyasamy Pillai* v. *Gurusami Naicken* (7) and *Nataraja Naicken* v. *Ayyasami Pillai* (8) impose liability on the other members of the tarwad or the joint family on the promissory note executed by the karnavan or the manager (as the case may be) for proper debts.

The next point argued by Mr. Kutti Krishna Menon for the petitioners (though I do not find it raised in the grounds of the revision petition) was that the suit was barred by limitation as against the other members of the tavazhi, because the payment towards the principal and interest made by defendant 1 and endorsed on the promissory note in her writing and over her signature does not purport to be made by her as manager of the tavazhi. I think that the matter is concluded by the Full Bench decision in *Chinnaya Nayudu* v. *Gurunathan Chetti* (10), where it was held that the managing member has got a right to create debts and to make payment towards debts. Just as it is unnecessary that the document creating the original liability should purport to be signed by the executant as manager [see on this point the decision in *Padma Krishna Chettiar* v. *Nagamani Ammal* (11)], it is likewise unnecessary that the manager, when making payments or signing endorsements, should expressly state that he or she pays or signs as manager. If the decision in *Parakutty Amma* v. *Kunhi Krishnan Nair* (12) quoted by Mr. Kutti Krishnan Menon holds otherwise, I regret (with great respect) that I am unable to follow it. That the authority to sign an acknowledgment under S. 19, Limitation Act, need not be expressly given by the parties sought to be made liable and that the agency to sign can follow from the act of the Court or from rules of statutory or partnership law or the personal law of the defendant has been established by the case-law discussed fully in *Lakshumanan Chetty* v. *Padayappa Chetty* (13) in the judgment of Abdur Rahim, J.

Then on the question that there is no finding by the Subordinate Judge that there was necessity to borrow, I think that his finding that the debt was contracted for purposes of the tavazhi is only another way of saying that it was for the necessary expense of the tavazhi that the debt was incurred. I would therefore dismiss the revision petition with costs.

Spencer, J.—On the pleadings in the Small Cause suit, I am of opinion that the suit was based on the liability for the debt as evidenced by the promissory note of 18th February 1914 signed by defendant 1, the manager of the defendant's tavazhi. Para. 5 of the plaint and and para. 2 of the written statement raised the question whether the debt was contracted for the necessity of the members of the tavazhi, and the Subordinate Judge has decided the issue arising out of this question in the plaintiff's favour. The petitioners' vakil relies on the decision in *Govindan Nair* v. *Nanu Menon* (1) in support of his contention that the defendants' tavazhi is not liable. That suit was based solely upon the promissory note and not upon the original cause of action. It is expressly so stated in the judgment. I would distinguish that case from the present upon that ground. In *Nachiappa Chetty* v. *Dakshinamurthi Servai* (6) the learned Chief Justice, in following the decision in *Krishna Ayyar* v. *Krishnasami Ayyar* (9), found no difficulty in so distinguishing the decision in *Govindan Nair* v. *Nanu Menon* (1) to which he was a party. The decision of Coutts-Trotter, J., in *Ayyasamy Pillai* v. *Guruswami Naicken* (7), and the decision of a Bench in *Nataraja Naicken* v. *Ayyaswami Pillai* (8), in which his decision was confirmed, are exactly to the point on the question raised in this civil revision petition. The cases of partnership which have been quoted in the arguments have not, to my mind, much bearing upon this point as liabilities of partners are governed not by Hindu law but by Ss. 249 and 251, Contract Act.

On the question whether defendant 1's payment of Rs. 23 on 17th February 1917, which was certified over her signature, had the effect of extending the limitation as against the other defendants, I think that the decision in *Chinnaya Nayudu* v. *Gurunatham Chetti* (10) and that in *Saroda Charan*

(10) [1882] 5 Mad. 169 (F. B.).
(11) [1915] 39 Mad. 915=30 I. C. 574.
(12) S. A. No. 395 of 1917.
(13) [1918] 48 I. C. 179.

Chuckerbutty v. *Durga Ram De Sinha* (14) are conclusive as showing that a manager can acknowledge liability of the members of the family which he or she represen s so as to extend the period of limitation against them as well as against himself or herself.

I agree with my learned brother in holding that the civil revision petition shall be dismissed with costs.

S.N./R.K. *Pet tion dismissed.*

(14) [1910] 37 Cal. 461=5 I. C. 484.

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PHILLIPS AND KRISHNAN, JJ.

Sunkara Ratha Doss—Plaintiff—Appellant.

v.

Epari Kopils and *others*—Defendants—Respondents.

Second Appeal No. 673 of 1917, Decided on 8th March 1918, against decree of Dist. Judge, Ganjam, in Appeal Suit No. 531 of 1915.

(a) Partnership—Suit on pro-note executed by one partner in favour of another is maintainable if matter does not involve taking of general account.

A suit on a pro-note executed by one partner in favour of another is maintainable when the accounts or dealings between them on which it is based are in respect of a matter, which though arising out of the partnership business or connected with it, does not involve the general taking of accounts, but the suit will not be entertained in cases where the taking of partial accounts would work injustice : 1 *I. C.* 384, *Foll.* [P 373 C 1, 2]

(b) Negotiable Instruments Act (1881), S. 32—Fact that maker of pro-note is partner of payee is no defence unless pro-note can be treated as nullity.

The fact that the maker of a promissory note is a partner of the payee is no defence under the Negotiable Instruments Act, unless the instrument can be treated as an escrow or a nullity.

Per *Krishnan, J.*—Even apart from the note the plaintiff has a cause of action on the settlement itself on which the note is based ; the fact that there may be an unsettled account between the parties is insufficient to restrain a suit on that cause of action. [P 373 C 2]

V. Ramesam—for Appellant.

M. S. Ramanuja Ayyangar for *C. S. Venkatachariar*—for Respondents.

Phillips, J.—This is a suit on a pro-note executed by one partner (defendant 1) in favour of another partner (plaintiff), and it has been dismissed by the District Judge on the ground that the partnership is still subsisting and that the debt should be included when the accounts are finally settled. I think he is wrong in his view of the law, for the correct principle has been enunciated in *Karri Venkatareddi* v. *Kollu Narasayya* (1) that if the account sought is in respect of a matter which, though arising out of the partnership business or connected with it, does not involve the general taking of accounts the Court will as a rule give the relief sued for, and will now-a-days refuse to interfere only in those cases in which a partial settlement would work injustice to the other partner.

In the present case the business of the partnership has practically ceased, no transaction having taken place since the settlement of accounts which resulted in the plaint promissory note. All that is being done is the collection of outstandings. There can therefore be no injustice to defendant 1 in enforcing his liability for the suit amount, for there is nothing more due to him and his share of the stock-in-trade is in his hands. I therefore think that plaintiff is entitled to a decree upon the plaint note. Apart from this view of the case it is questionable whether defendant 1 can evade his liability under the negotiable instrument unless he can show that it is a nullity. In this second appeal plaintiff does not press his claim against defendants 2 to 4. He will therefore have a decree against defendant 1 and the family property of defendants 1 and 5 with costs throughout, but the second appeal is dismissed against defendants 2 to 4 with costs.

Krishnan, J.—I agree to the order proposed by my learned brother. This is a suit on a negotiable instrument and unless that instrument can be treated as an escrow or nullity, the maker is bound to pay according to its tenor, and the fact that the maker is a partner of the payee is no defence under the Negotiable Instruments Act 26 of 1881. There is no ground here to treat the loan as an escrow as it was executed for money found due on a settlement of account. Even apart from the note the plaintiff has a cause of action on the settlement itself ; the fact that there may be an unsettled account between the parties is insufficient to restrain a suit on that cause of action : see observations in *Ramnath Gagoi* v. *Pitambar Deb Gosawami* (2) and the English cases cited there. The rules governing such actions are laid down in *Karri Venkatareddi* v. *Kollu Nara-*

(1) [1909] 32 Mad. 76=1 I. C. 384.
(2) [1915] 43 Cal. 733=31 I. C. 430.

sayya (1). It is only if the taking of a partial account works an injustice that such partial accounts will be disallowed even when there is no settlement of account. In the present case there is no likelihood of the taking of any further accounts reducing in any way the liability of defendant 1 for the suit amount. In these circumstances it seems to me that the bare fact that the firm has not been formally dissolved yet is no answer to plaintiff's suit, even treating it as a suit on the settled account. The firm has stopped business and the parties have settled their liabilities inter se.

The note being found to be genuine and there being no ground that it was not for full consideration, plaintiff is entitled to a decree as sued for against defendant 1 and his family property. I would therefore reverse the decree of the lower Courts as against defendants 1 and 5 and give plaintiff a decree as sued for with costs throughout against defendant 1 and his family properties. Defendant 5, though not a maker of the note, is defendant 1's son and it was not urged that the family property in his hands was not liable. This second appeal is not argued against defendants 2 to 4 and I agree it should be dismissed with costs against them.

S.N./R.K. *Appeal dismissed.*

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ABDUR RAHIM AND OLDFIELD, JJ.

V. Subramania Iyer—Plaintiff—Appellant.

P. S. Kalyanasundaram Iyer and *others*—Defendants—Respondents.

Appeal No. 56 of 1918, Decided on 10th December 1918, against decree of Sub-Judge, Trichinopoly, in Original Suit No. 89 of 1916.

(a) Arbitration—Settlement of dispute—Person acting as mediator—Record of settlement agreed upon by parties is not award—Record binds only parties signing it.

Where a person is asked to act as mediator in the settlement of a dispute, and records a settlement agreed on by the parties, his act is not that of an arbitrator, and the record made by him is not an award; and if that record is at all operative, it is so only as a contract as between those who have signed it. It can have no operation whatever against a person who never joined in it: 22 All. 224, *Dist.*

[P 377 C 1]

(b) Specific performance—Contract for sale or exchange of land—Title unless completed by specific performance no decree for possession can be given.

Where there is a contract for sale or exchange of land no decree for possession can be given unless the title is completed by specific performance of the contract. [P 377 C 2]

(c) Civil P. C. (5 of 1908), O. 6, R 17—Suit for possession—Prayer for specific performance of contract can be added even by appellate Court.

A plaint in a suit for possession can be amended by the addition of a prayer for specific performance of the contract by the execution of a conveyance by the defendant.

The amendment can be followed by a Court of appeal if the evidence on which a decree can be passed on the plaint as amended, is before the Court or can be easily obtained and the defendant can be compensated by costs for any prejudice he may have sustained or may sustain.

[P 377 C 2]

(d) Specific Relief Act (1 of 1877), S. 6—Contract for sale—Parts of property owned along with others—Specific performance can be enforced against some portions only if claimed independently of remainder.

Where a number of persons combine to sell property, parts of which are owned by some of them with other persons individually, a claim by the vendee for enforcement of the contract as against some portions only of the property will be sustained if the portions claimed can reasonably be enjoyed independently of the remainder.

[P 378 C 1, 2]

Oldfield, J.—The judgment under appeal was pronounced irregularly during the Christmas holidays on the last day of the year, and it is easy to understand why it is obscure and ill-arranged. But the facts in dispute, taken in order, are fairly simple. The plaintiffs' allegations, which are traversed at each stage by his brothers, the defendants, are that in 1911 he and they and another brother, Sivaswami, became divided except as regards certain houses, which were retained in common for convenience. Plaintiff however found cultivation of the isolated plots he received difficult and induced the others, except Sivaswami, to agree to a re-adjustment of the various items by D. W. 3 who is described as an arbitrator and gave what is called an award, Ex. A, on 13th May 1913. This re-adjustment gave plaintiff the whole of his share in one village, Pachampet, subject to his paying Rs. 4,000 to defendants; and he took possession of the Pachampet land and paid Rs. 1,300 of this amount. Defendants however have subsequently ousted him and he therefore sues, offering to pay the balance due to recover the land with profits. The first matter on which the parties are at issue, the partition of 1911, can be dealt with shortly. Defendant 3 denied it in toto. Defendant 4 did not plead as to it explicitly, but put plaintiff to proof of all his allegations.

Defendants 1 and 2 said there was only an attempted partition which came to nothing after a document detailing each brother's share had been signed by them, Sivaswami and defendant 4, but not by plaintiff or defendant 3, and that common enjoyment continued until 1913, when Sivaswami insisted on enjoying what was intended to be his share separately, they and plaintiff continuing common enjoyment of the remainder, This is no doubt consistent with the evidence of plaintiff that the cultivation owing to the inconvenience of separate management was managed by defendant 2. He added however that the income was being divided and this agrees with the statement of P. W. 6, Sivaswami's brother-in-law, who alone besides the parties has given direct evidence on the point. But it is clear that plaintiff's account represents the truth. The evidence of D.W. 3 proceeds on the assumption that a re-adjustment of a previous division was in question. The preamble of Ex. A will be given in the sequel and, whatever the effect of that documents it involves that one partition had already taken place and, as defendants 1, 2 and 4 signed it, there can be no further question as regards them, the probability being, as the lower Court held, that the partition lists are with defendant 1. Sivaswami certainly accepts the partition of 1911 as completed. The evidence of defendant 3, like that of defendant 1, contains admissions, to which the lower Courts has referred at length, involving that they became divided in 1911. Defendant 3 no doubt says that he was absent in the course of his employment in the police and knew nothing of what was done. But he was only in the adjacent district, Madura, and in view of the considerations already referred to it is impossible to believe him.

The lower Court's finding that the family became divided in 1911 and that, although the land may have been managed by defendant 2 it was divided among the brothers, must in these circumstances be accepted. The occurrences in 1913 are more obscure. It is admitted by all concerned that plaintiff and defendants 1, 2 and 4 at least joined in the proceedings which resulted in Ex. A, and signed at the end of that document. The first question is whether it is, as plaintiff contends, a valid award by D. W. 3, as arbitrator between him and defendants 1, 2, 3 and 4. My conclusion is that it is not, because defendant 3 did not join in the proceedings at any stage and because it is not an award at all. On the first point we have no doubt the evidence of the plaintiff, that the allotment made in 1911 being found inconvenient, he says by defendants 1 and 2, he agreed at their request to a reference of the whole matter to D. W. 3 in order to re-adjustment, and that all the brothers, including defendant 3, but not Sivaswami, concurred therein, although there was no submission in writing. P. W. 2 said that about the end of April 1913, Ex. A being dated 13th May 1913 defendants 1 and 3 came to plaintiff's house and defendant 3 agreed with plaintiff that their dispute might be settled by D. W. 3. There is nothing definite against this witness. But he is uncorroborated; he was not mentioned by plaintiff and there is nothing in the latter's evidence which clearly refers to this conversation; plaintiff in fact only said generally that defendant 3 agreed to the reference, that no one else was present when he and defendants 1 and 3 made it and that they made it in his house in April—May 1913. But D. W. 3 spoke to no such interview or agreement and could not remember when he saw defendant 3 last, except casually, before July 1913.

After Ex. A was drawn up, he tried to obtain defendant 3's signature to it, but defendant 3 refused to look at it, and plaintiff on hearing of this said he would bring him round; and the remainder of the account given by D. W. 3, who is the only impartial witness regarding this part of the case, shows that in fact defendant 3's previous concurrence was unnecessary and need not be presumed to have been obtained for what actually was done. Another portion of the evidence, given by P. Ws. 5 and 6 is that defendant 3 asked the former who is father-in-law of plaintiff's son, whether he had paid plaintiff the varadakshinai of Rs 2 000 in connexion with that marriage, adding that plaintiff was expected to pay him and others out of it in connexion with the partition of their land. But both these witnesses are connected closely with plaintiff (though not with defendants) by marriage, and it would not be safe to base any conclusion on their report of a casual conversation to which

very little test by cross-examination can be applied. Defendant 1 admits that in fact he received Rs. 1,300 from plaintiff about this time, but not in connexion with the partition. P. W. 7, who was present, does not say on what account the money passed. There is in the circumstances no reason for preferring the evidence of plaintiff to that of defendant 1 on this point. It is possible that defendant 3 may, as plaintiff's second witness says, on some visit to Trichinopoly have expressed his general willingness to abide by decision of D. W. 3. But neither the evidence of that witness nor of P. Ws. 5 and 6 justifies the conclusion that he joined in any definite submission to him or in accepting its result. The alternative case that Ex. A was not a valid award has been argued first on the ground that there could be no such award without a valid submission and there could be none without a matter in difference between the parties, not merely as here a question, which they desired to have determined by a reference to another person. That is consistent with the decision in *Collins* v. *Collins* (1) and *Carus Wilson & Green, In re* (2) followed in *Chooney Money Dassee* v. *Ram Kinkur Dutt* (3), *Macnaghten* v. *Rameshwar Singh* (4). But the facts of this case afford clearer ground for a similar conclusion. For they are that there was not a submission and arbitration, but after discussion between D. W. 3 and plaintiff, a mere suggestion of a settlement which the others were always free to accept or reject.

It is clear from the foregoing that very little assistance can be looked for from the parties' statements, since it has been found impossible to act on plaintiff's as regards the division in 1911. The remaining evidence as to the origin of Ex. A, the alleged award, was given by the third defendant's witness. He is a Public Works Officer of some standing and a friend of the family, and his somewhat remote connexion by marriage with defendant 1 does not justify any belief that he would be inimical to plaintiff. His account, which is clear and consistent, may accordingly be accepted as substantially the truth. It is that he was asked by defendant 1 to settle the difference between the brothers and bring about a division between them, as the existing arrangement of shares was not convenient. He sounded plaintiff, who explained his views and asked him to effect a distribution in accordance with them offering to keep all the land in one village, Pachampet, and to pay Rs. 2—3,000 to the other defendants in order to equalize the shares. Third defence witness returned to 1st and 2nd defendants who objected to the exchange in itself and he then gave up the matter. Later plaintiff increased his offer to Rs. 4,000 and defendants 1 and 2, axccepting it all three asked 3rd defence witness to reduce these terms in writing in the form (here the difficulty arises) of an award and defendant 4, who came at this stage, also agreed. Accordingly 3rd defence witness put down the terms with a preamble, given him by defendant 1, a pleader, as follows :

"whereas you brothers (the five names are given) have requested me to settle some re-arrangement in the properties possessed and enjoyed by you as per a partition already arranged so as to secure mere profits, I award the following",

and to the whole clause, signed by those present was added

"all will sign in this document, if you accept these arrangements as irrevoacably binding on you all."

Lastly Ex. A (sic) containing a clearer and fuller statement of the provisions in Ex. A regarding the financing of a litigation then pending in connexion with the Pachampet land, was added subsequently by plaintiff and 3rd defence witness in consultation and signed separately by defendants 1, 2 and 4. If this evidence is accepted, as in the absence of better it must be, there was nothing determined or to be determined by 3rd defence witness as arbitrator. For although he said that he obtained the value of the lands from plaintiff and a relative, one Narayanaswamy Iyer, once it had been settled that one sharer was to have the Pachampet land, the only further question was how much he should pay the others; and that was settled not by any adjudication, but the acceptance of the last of plaintiff's successive offers. Third defence witness further said that he wanted to keep Ex. A until regular documents of exchange were executed and that there being no pretence of defendant 3's actual adhesion to Ex. A at the time he himself

(1) [1858] 26 Beav. 366.
(2) [1887] 18 Q. B. D. 7.
(3) [1901] 28 Cal. 155.
(4) [1903] 30 Cal. 831.

added the last clause. This clause is clearly inconsistent with the character of the document as an award. In favour of that character there is only the preamble and D. W. 3's signature. But for the former, defendant 1 and the other parties were responsible; and as regards the latter, its position, not where an arbitrator's signature naturally would be but at the left hand side the prominent place being taken by the signatures of plaintiff and defendants 1, 2 and 4, is significant.

Neither the use of the word "award" nor the signature can prevail to fix a lay-man, such as D. W. 3 with a quasi judicial character, which on his own showing he did not possess and with which the final clause cannot be reconciled. We have been pressed on these facts with *Gobardhan Das* v. *Jai Kishen Das* (5) in which an award was enforced, although it had been reached by the arbitrators without any judicial consideration of the matter in dispute and was merely an adoption of the settlement agreed on and brought to them by the parties. It is unnecessary to express an opinion as to the soundness of that decision, because it dealt with a regular submission to and appointment of arbitrators, whilst here there was none. The conclusion must be that D. W. 3 was a mediator not an arbitrator, and that Ex. A is operative, if at all, between plaintiff and defendants 1, 2 and 4 who signed its final clause, only as a contract, the terms of which are embodied in the prior portion. Against defendant 3, who never joined in it, it can have no operation whatever.

So far therefore as plaintiff's suit is founded on an award it must fail. But, although an award is referred to throughout the plaint and possession is claimed in pursuance of it, we have been asked to grant relief, after allowing any necessary amendments, on some other construction of the averments; and first on the basis that the claim is to a division of the property assigned to plaintiff and defendants 1, 2 and 4 in 1911. But plaintiff's own statement in para. 5 of the plaint is that a specific share was then assigned to each brother and no reunion has been alleged, in virtue of which any joint or common property can be available for division. Next the suggestion is that Ex. A series constitute a contract, either a completed transfer of property entitling plaintiff to an immediate decree for possession, or an agreement to transfer it, on which the suit lies against defendants 1, 2 and 4 for possession and specific performance. But, apart from other difficulties, the claim in the first of these forms is open to the objection that it depends on Ex. A which must for this purpose be read as creating a right to property of the value of more than Rs. 100 and, being unregistered cannot be proved, and the decision in *Kurri Veerareddi* v. *Kurri Bapireddi* (6), which after full consideration of *Mahomed Musa* v. *Aghore Kumar Ganguli* (7) and *Venkayyamma Rao* v. *Venkatanarasimha Appa Rao* (8) has been followed by a majority of a Full Bench of this Court in *Ramanathan Chetty* v. *Ranganathan Chetty* (9), entails that no decree for possession can be given unless the title is completed by one for specific performance. The claim therefore can be considered only in the 2nd form above referred to, Ex. A being regarded as covered by S. 17 (2) (v), Registration Act.

As was the case in *Kurri Veera Reddi* v. *Kurri Bapireddi* (6) plaintiff here alleges that he was in possession and was ousted by defendants; and no doubt his plaint, which at present asks only for possession, can easily be amended by the addition of a prayer for specific performance by execution of conveyance by the defendants concerned. In these circumstances, if the evidence, on which a decree can be passed on the plaint as amended, is before the Court or can easily be obtained and defendants can be compensated by costs for any prejudice they have sustained or may sustain, the proper course is clear. It is, however denied that these conditions are fulfilled as regards the defence based either on limitation or the merits. Turning to the merits the suit was filed against four persons for possession on the award and the proposed amendment will convert it into one against three of them each of whom is to exchange his land in Pachampet for that, which plaintiff received in other villages in 1911. The

(5) [1900] 22 All. 224.

(6) [1906] 29 Mad. 336 (F. B.).
(7) A. I. R. 1914 P. C. 27=28 I. C. 930=42 Cal. 801=42 I. A. 1 (P. C.).
(8) A. I. R. 1916 P. C. 9=34 I. C. 921=39 Mad. 509=43 I. A. 138 (P. C.).
(9) [1917] 40 Mad. 1134=43 I. C. 138.

first question which defendants 1, 2 and 4 will be able to raise will accordingly be whether Ex. A with their signature represents a completed agreement at all. For they may urge with reference to the absence of defendant 3's signature and even though the form of the final clause of the document does not support their contention directly, that

" the mere fact of execution by one does not bind him conclusively, when that has been done on the faith that all shall execute, and anyone shall refuse: *Latch* v. *Wedlake* (10)."

And if it is found that the agreement was formally completed, that will be only the beginning of the inadequacy of plaintiff's averments and of the necessity for fresh inquiry. Ex. A provides, as already stated, for the exchange of the land of defendants 1 to 4 and also for the payment by the plaintiff of Rs. 4,000 to the four in order to equalize his share with theirs. As regards this payment plaintiff has repeated here his offer made at the trial to pay this sum for the share of defendants 1, 2 and 4 only without abatement on account of that of defendant 3, which they cannot give him. But as regards their inability to perform the agreement as it was made by the conveyance of defendant 3's share with their own, he is constrained to rely on Ss. 15 and 16, Specific Relief Act. These two sections provide for distinct classes of cases in which part performance can be claimed. But the separate provision made for these classes does not entail that the defence implicitly referred to in S. 16, that the two parts of the contract are interdependent and must be performed together, if at all is not always available, and that is what defendants rely on here contending that they have had no opportunity to put it forward hitherto and should not be called on to make it after the interval which has elapsed.

This defence is relied on in its more peremptory form as resting on what is referred to in *Lumley* v. *Ravenscroft* (11) as the general rule that, when one person is jointly interested in an estate with another and purports to deal with the entirety, performance will not be granted against him as to his share and this is no doubt the basis of the decision in *Price* v. *Griffith* (12). But both these cases related to property enjoyed jointly or in common, the one to part of a London house and the other to a colliery whereas here defendant's position is much weaker, since they are to be treated merely as persons who have combined to sell land, parts of which each of them and another person own individually and both decisions must be read in the light of the observations of Farwell, J., in *Hexter* v. *Pearce* (13), with reference to the susceptibility of the different portions of the property of separate enjoyments. If the plainaiff is able to show that the portions of the property, which he now claims, can reasonably be enjoyed independently of the remainder he can succeed.

The decision on this question will involve not only further inquiry, but at least further pleading. Ex. A contemplates a surrender by plaintiff to all four defendants jointly of his land outside Pachampet since it includes no specification of the particular portion of it which each is to take. Plaintiff has not offered defendants 1, 2 and 4 more than a three-quarter share of that land; and it will first be necessary for him to show that, if there was a contract by the three at all, it was a contract to accept only this three-quarter share. It will next be necessary for him to specify the lands he offers as composing this three-quarter share; and when it has been ascertained that this share has been fixed fairly with reference to extent and quality it will still be necessary to inquire whether the fact that the plaintiff, and not defendant 3, holds the remaining quarter will so affect the enjoyment with reference to access, convenience of management and the like that the contract as to the remaining three quarterscan reasonabley be separately enforced.

The difficulty of the various inquiries, the necessity for which has been indicated, must necessarily be increased by their postponement; and their postponement is the consequence of plaintiff's unjustifiel attempt to secure defendant 3's share in the Pachampet land by improperly representing Ex. A as an award. In the circumstances defendants 1, 2 and 4 will be prejudiced substantially and in a manner for which costs cannot compensate them, if they are asked to submit to such inquiries at this stage; and the claim to an amendment, which would

(10) [1840] 11 A. & E. 959.
(11) [1895] 1 Q. B. 683.
(12) [1852] 1 De G. M. & G. 80.
(13) [1900] 1 Ch. 341.

entail them, or to a decree on the basis now proposed must therefore be rejected. The appeal fails and is dismissed with costs.

Abdur Rahim, J.—I agree in the judgment proposed by my learned brother.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 379

SPENCER AND KRISHNAN, JJ.

Kurupamaya Ananga Bhima Deo Kesari Gajapathy—Defendant—Petitioner.

v.

Seesil Kumar Lahiri—Plaintiff—Opposite Party.

Civil Misc. Petn. No. 181 of 1918, Decided on 31st July 1918.

(a) Ganjam and Vizagapatam Agency Rules R. 10 (2) — Agent has power to transfer part-heard case to Special Assistant Agent.

The power of the Governor's Agent to transfer suits to the Special Assistant Agent under R. 10 (2) is not limited to cases in which no proceedings have been taken before transfer. The rule empowers the transfer of a part-heard case after issues have been framed: 21 *All.* 230 and 23 *Mad.* 314, *Dist.* [P 381 C 2]

(b) Ganjam and Vizagapatam Agency Rules R. 20 — Agent transferring a part-heard case—High Court will not interfere.

The High Court will not, under R. 20, interfere with an order transferring a part-heard case by the Agent, as the order of transfer, however improper, is not vitiated by a want of jurisdiction. [P 384 C 1]

(c) Ganjam and Vizagapatam Agency Rules R. 20 — High Court—Jurisdiction—Technical grounds—No prejudice—Findings of fact—No interference.

The High Court will not interfere, under R. 20, on any technical ground or on account of errors which have not prejudiced the parties on the merits, and, where the application under the rule is in the nature of a second appeal, it will not ordinarily interfere with the lower Court's findings of fact. [P 382 C 1]

(d) Contract Act (9 of 1872), Ss. 39 and 73—Agreement to cut and take timber from forest of zamindar—Breach of contract—Suit for damages—Governor's Agent transferring part-heard case to Special Assistant Agent—Suit decreed—Decree confirmed by Agent in appeal—Application to High Court under R. 20, Ganjam and Vizagapatam Agency Rules, held not maintainable—Agreement not license but contract — Damages could be claimed—Agent held competent to transfer suit — Ganjam and Vizagapatam Agency Rules Rr. 10 and 20.

Plaintiff entered into a contract in writing and registered with the defendant, a zamindar, to cut and take timber for railway sleepers from the latter's forest for a period of four years on payment of a certain royalty. The girth of the trees to be felled was specified to be three feet at a foot above ground. The defendant, during the progress of the work, intimated to the plaintiff that the girth of the trees to be felled was altered from three feet at a foot above ground to four-and-a-half at breast height. The plaintiff rescinded the contract and brought the present suit for damages for breach of contract by the defendant. The suit was filed in the Court of the Governor's Agent who transferred it, after framing issues, to the file of the Special Assistant Agent. The latter decreed the plaintiff's claim and the decree was confirmed, in appeal, by the Agent. On an application to the High Court under R. 20, Ganjam and Vizagapatam Agency Rules:

Held: (1) that the agreement between the parties was not a mere license to the plaintiff, but an instrument conveying an interest in immovable property containing contractual relations for the mutual benefit of the parties: 20 *Mad.* 58 (*F B*) and 29 *Mad.* 353, *Dist*; (2) that as the defendant broke the contract, plaintiff was justified in rescinding it and claiming damages for the breach; (3) that plaintiff was entitled to damages even if his rights were no higher than those of a licensee; (4) that the Agent had power to transfer the suit under R. 10 (2) after he had framed issues; (5) that the High Court could not interfere, under R. 20, with the Agent's discretion to transfer suits under R. (2).

(e) Contract Act (1872), S. 73—Breach of part is breach of whole — Notice refusing performance can be treated as breach.

Per *Krishnan, J.*—A party to contract is entitled to have it performed in its entirety; a breach of a part is a breach of the contract and, unless the parties waive the breach, the contract is at an end. [P 382 C 2]

A party to a contract is not bound to ask for performance when he has notice from the opposite party that performance will be refused; he can treat the notice as a breach. [P 382 C 2]

K. Srinivasa Aiyangar—for Petitioner.

T. R. Venkatarama Sastriar—Opposite Party.

Spencer, J.—This is a petition under R. 20, Ganjam and Vizagapatam Agency Rules, requesting this Court to direct the Agent to review his judgment in a civil appeal. The suit was one brought against the Zamindar of Bodokimidi to obtain damages for breach of contract and was filed in the Court of the Agent to the Governor in Ganjam. The Agent, after settling issues, referred the suit for the decision of the Special Assistant Agent, Berhampore Division. From his decree in the plaintiff's favour there was an appeal to the Agent, who confirmed the Special Assistant's decision and dismissed the appeal with costs. The suit arose out of an agreement entered into by the parties in September 1915, whereby it was arranged that the plaintiff should cut and take timber for railway sleepers from the defendant's forests for a term of four years and pay royalty to the defendant upon the timber so removed

One of the conditions was that the defendant zamindar was to send a forest officer or other subordinate to mark such trees as might be pointed out by the plaintiff or his agent upon intimation of the plaintiff's intention to start work in any particular area. The object of this condition is stated, namely, that no delay should occur in starting felling in a forest area after finishing in an old area. Another condition was that no trees below three feet in girth at one foot from the ground should be cut. The plaintiff was to construct at his own cost the necessary tracks for removing the timber and was not to remove any wood that would not be useful for sleepers; but he might utilize third class wood for purposes of fuel and building huts for his men, provided that the buildings so constructed were to become the property of the defendant after the lease expired. A sum of Rs. 3,000 was to be deposited by the plaintiff as security for his cutting a sufficient quantity of timber to yield Rs. 32,600 royalty in each half of the whole period of contract, the deposit being returnable upon fulfilment of all the conditions of the agreement, After nine months of working, the parties came to a disagreement and the agreement was put an end to, and this suit was brought in consequence of that disagreement.

Now it has been argued before us: (1) that the plaintiff was not entitled to any damages, (a) because the agreement did not purport to transfer any right to the exclusive enjoyment of any particular property and so was not a lease but a license revocable at the pleasure of the grantor; (b) because the plaintiff himself signified his intention of breaking the contract in March 1916; (c) because the plaintiff failed to prove that he would have sustained a loss on the whole if he had accepted the new condition sought to be imposed by the defendant that no trees of less girth than 4½ feet at breast height should be felled; (2) that the Special Assistant Agent had no jurisdiction to try the suit as it was not transferred to his file before the commencement of the trial. A number of authorities have been cited on the subject of the leases and licenses and their respective revocability. It is sufficient to say that I am satisfied from a perusal of the terms of Ex. A, which describes itself as a deed of lease, that it is not a bare license, but an instrument creating certain contractual relations between the persons who were parties to it and intended to be for their mutual profit. It conveyed an interest in immovable property comparable to, though hedged about with more limitations than, the lease which formed the subject of *Seeni Chettiar* v. *Santhanathan Chettiar* (1). The case of *Mammikkutti* v. *Pushakkal Edum* (2), which was cited for the appellant, was decided upon a point of limitation. Certain dicta that occur in it as to the covenants for title and quiet enjoyment which are implied in a lease have little bearing on the present case, as those were not matters upon which the parties finally fell out here. Ex. A was registered and the parties to it were legally entitled to enforce all its terms as terms of a contract.

If either party to a contract breaks it, the party who suffers by such breach is entitled under S. 73, Contract Act, to receive from the party who has broken the contract compensation for any loss caused to him thereby. If either party to a contract rightfully rescinds it, he is entitled under S. 75 to compensation for any damage which he has sustained through its nonfulfilment. Having found that contractual obligations were established between the plaintiff and the defendant, we have only to see to the application of the law of contract to the existing facts as found by the lower Courts.

On issues 2 and 3 there are unanimous findings by both the lower Courts that the defendant imposed fresh terms on the plaintiff on 2nd March and 1st June, when he informed him in his letter, Ex. L, and at a personal interview that he would not hand over a fresh block of forest until the plaintiff remitted the royalty on the trees felled in blocks previously entered, and that he would not permit the plaintiff to continue to work the forest on the original terms of the lease so far as the girth of the trees to be cut was concerned. The Courts have also found that the plaintiff did not put an end to the contract in March, when in his letter, Ex. O, dated 24th March, he mentioned that he was placing all his papers in the hands of his lawyers, but that both parties treated the contract as

(1) [1897] 20 Mad. 58=6 M. L. J. 281.
(2) [1906] 29 Mad. 353.

subsisting till June After referring to the correspondence that has been exhibited on both sides and the oral evidence as defendant's 1st witness and Exs. L, M, O, Q, R, S. 3 and 4, I see no reason to doubt the correctness of these findings of fact. There can be no doubt that the alteration in the girth of the trees to be felled from three feet at a foot above ground to 4½ feet at breast height was a material alteration, which was calculated to seriously affect the plaintiff's prospects of working the forests at a profit. Under S. 39, Contract Act, when a party to a contract has refused to perform his promise in its entirety, the promisee may put an end to the contract. Accordingly in Ex. S the plaintiff, through his vakil, intimated to the defendant on 2nd September 1916 that he found it impossible to work according to the new terms which the defendant tried to import into the lease and that he would not treat it as any longer subsisting. I consider that he was fully justified in so doing.

On the question of damages, I consider it unnecessary to inquire whether the plaintiff might have continued to work the forests at a profit, seeing that he has only been awarded his out-of-pocket expenses and that he would be entitled to these even if his rights were no higher than those of a licensee: vide *Kesava Pillai* v. *Pedu Reddu* (3) and also *Prosonna Coomar Singha* v. *Ram Coomar Ghose* (4), where it was held that a licensee is entitled to damages if any contract is broken when his license is revoked. The special contention advanced at the hearing of this petition, that the plaintiff is, in any event, not entitled to get back the whole of his deposit of Rs. 3,000, is untenable. Even if this were a contract voidable at the option of the defendant and the defendant rescinded it, he would be bound under S. 64, Contract Act, to restore any benefits received by him under the contract. The penalty of forfeiture of the deposit was according to the terms of Ex. A one that could only occur after two years, and as the contract was dissolved before that period expired, it follows that the question of forfeiture never arose, and that being so, the money still belonged to the plaintiff.

There remains the question of jurisdiction. R. 10, Cl. 2, of the Agency Rules for Ganjam merely declares that suits exceeding Rs. 5,000 in value shall be instituted in the Court of the Agent who may however, when he thinks proper, refer any suit for the decision of the Divisional Assistant. The words "at any stage," which occur in S. 24, Civil P. C. of 1908, are not found in the rule. They seem to have been inserted in the present Code in consequence of the rulings in *Sita Ram* v. *Nanni Dulaiya* (5) and *Kamarasami Reddiar* v. *Subbaraya Reddiar* (6). *Kumarasami Reddiar* v. *Subbaraya Reddiar* (6) was a decision with regard to a District Judge's power under S. 13, Civil Courts Act, to transfer appeals, and *Sita Ram* v. *Nauni Dulaiya* (5) proceeded on the theory that a District Judge, after once having transferred a suit to his file from that of a subordinate Court, had exhausted his power of transfer and could not again remand it to the Subordinate Judge's Court when it came back on appeal to the High Court with a direction for a fresh hearing on the merits.

As the Civil Courts Act does not apply to the Ganjam Agency, and as *Kumarasami Reddiar* v. *Subbaraya Reddiar* (6) has been superseded by the law as it now stands, and as *Sita Ram* v. *Nauni Dulaiya* (5) relates to an entirely different matter, I do not think there is anything to preclude me from holding that the Agent's power to refer a suit to the Special Assistant Agent after framing issues and before decision is not affected by the absence of the words "pending" or "at any stage." The rule does not mention the word "trial." It speaks only of referring suits for decision. I do not find any ground for limiting the Agent's power of transfer to suits in which no proceedings have been taken at all before they are transferred. In *Sri Rajendra Singh Bahu Garu* v. *Sri Sri Sri Vikarama Deo Garu* (7) the agency rules were interpreted by a Bench of this Court strictly as they stood, and it was held that in the absence of any words of prohibition, an Agent could even hear appeals in suits referred by him to a Divisional Assistant for decision, although the value of such suits might be so great that only the Agent could entertain them in the first instance. The petition

(3) [1862 63] 1 M. H. C. R. 258.
(4) [1889] 16 Cal. 640.
(5) [1899] 21 All. 230.
(6) [1900] 23 Mad. 314.
(7) [1915] 30 I. C. 76.

therefore fails on all points and is dismissed with costs.

Krishnan J.—I agree with my learned brother that this application fails. The nature of the application and the terms of the arrangement between the parties and the circumstances which led to this suit are set out by him and need not be repeated. Before considering the arguments of the learned vakil for the zamindar I think it is necessary that we should see what exactly the scope of R. 20 is under which this application is made. No decided cases have been brought to our notice where this question has been considered. It will be observed from the wording of the rule that it does not give any right to parties by way of appeal or otherwise, as S. 96 and 100, Civil P. C., do. The rule gives us power to direct the Agent to revise his judgment on "special grounds." It seems to me we should not interfere under it on any technical grounds or on account of any errors which have not led to any prejudice on the merits and in cases where the application to us is in the nature of a second appeal we should not ordinarily interfere with the findings of facts. Bearing this in mind I shall consider the arguments addressed to us by the learned vakil for the zamindar. He urges in the first instance that the transaction evidenced by Ex. A was not a lease but a license and that the Agent was wrong in holding it to be a lease. Ex. A calls itself a lease of the forest and the parties went to trial on the footing that it was a lease, both the plaint and the written statement calling it a lease; and no question was raised about its nature in the first Court. If we are however to consider its legal character it may be difficult to hold it to be a lease, as it does not purport to give possession of the forest to the plaintiff and the cutting of the trees is itself contingent on their being marked by defendant's men in advance (vide para. 6, Ex. A). The requirements of a lease were considered by Subramania Aiyar, J., in his judgment in the Full Bench case in *Seeni Chettiar* v. *Santhanathan Chettiar* (1). His view was followed in *Mammikkutti* v. *Puzhakkal Edom* (2). The latter case was one similar to the present where an arrangement to cut trees from a forest for a period of six years on payment of kuttikonam was held to be a license and not a lease. Assuming the present case to be one of a license, it is still not a bare license but one coupled with a contract to continue the license for a period of four years on certain conditions. That being so, the party committing a breach of that contract is liable in damages: see *Kerrison* v. *Smith* (3) and *Prosonna Coomar Singha* v. *Ram Koomar Ghose* (4). As the present decree is one for damages and as the error committed by the lower Court in holding the transaction to be a lease is not shown to have affected its decree, it is not a point on which we should interfere under R. 20.

It was next argued that nothing was proved to have been done by the defendant which would amount to a revocation of the license under Ex. A and that the question of defendant's proprietary right to the forest was irrelevant so long as he was ready to perform his part of the contract. Under paras. 6 and 7 of Ex. A defendant was bound to mark and allow plaintiff to cut all Sall and Paisal trees of a girth of three feet and more. It is now found by the lower Court that after the receipt of Ex. 1 from the Agent to the Governor, the zamindar told the plaintiff in June 1916 that it was not possible for him to continue work according to the original terms so far as girth of trees was concerned; that is, he could not allow trees of a smaller girth than $4\frac{1}{2}$ feet to be cut. We must accept this finding as it is based on the zamindar's own admission in cross-examination.

That, of course, was a clear breach of contract and amounted to a revocation of the original arrangement. It was said that was only a partial revocation and did not justify the plaintiff in throwing up the whole contract. Plaintiff was entitled to have his contract performed in its entirety; a breach of the part is a breach of the contract and unless the parties waive the breach, the contract is at an end. As a licensee plaintiff was not bound to continue under altered conditions. It was then said that plaintiff was not actually stopped from cutting any trees under $4\frac{1}{2}$ feet girth and therefore his action in treating the arrangement as at an end was premature. I do not think a person is bound to ask for performance when he has notice from the opposite party that performance will be

(3) [1897] 2 Q. B. 445=66 L. J. Q. B. 762.

refused; he can treat the notice as a breach. It was next suggested that plaintiff really terminated the arrangement by Ex. O in March 1916 or by Ex. Q in April 1916 and that anything done by the zamindar subsequently, even if it was against the terms of Ex. A, was immaterial and that to get damages plaintiff should justify his action under those letters. But, as found by the lower Courts, plaintiff did not in fact terminate the contract till June. Ex L would have been a justification for him if he had terminated it on receipt of that letter. Ex. N does not amonnt to a withdrawal of the improper demand for payment in Ex. L. But plaintiff did not rescind the contract then, whatever his intentions may have been. It was also argued that plaintiff's letter Ex. M, when it said:

"I express my inability, as I hereby do, to pay the royalty before I remove the timber from the forest to the Railway station or any other place outside the forest,"

contained a statement opposed to the terms of Ex. A and that would have justified the defendant in revoking the license and therefore he was not liable in damages. But the statement seems to be quite in accord with the provision in para. 12, Ex. A. Under it plaintiff has only to pay before removing the timber from the forest and not earlier. It was perhaps for this reason that the point was not taken in the lower Courts. Considering that it was the defendant's own case in his written statement that the above-mentioned letters were mere misunderstandings that were going to be cleared up and they did not in any way terminate the lease, his present argument is inconsistent with it and untenable. The question of defendant's title to the forest is no doubt irrelevant in this case and it was therefore rightly ignored by the appellate Court. It is clear for the above reasons that the defendant is liable in damages to the plaintiff. The next point raised by the learned vakil for the zamindar was that the measure of damagos adopted by the lower Courts was entirely erroneous and that plaintiff was not entitled to his out of pocket expenses in any event. It may be that the proper measure of damages under S. 73, Contract Act, is the profit that plaintiff would have made if the terms of the contract had been carried out.

It was however pointed out by the respondent's vakil that in a case where a license was revoked this Court allowed it to be done only on payment of the expenses the licensee was led to incur in connexion with it: see *Kesava Pillai* v. *Pedu Reddi* (3). No doubt the out of pocket expenses had been incurred before the breach occurred but by the breach plaintiff lost the opportunity of recouping the moneys spent by him. As there is no reason to suppose and there is no evidence to suggest that plaintiff would not have recouped himself the amounts spent by him by carrying on the contract, we may well treat an amount equal to it as included in the loss caused by the breach. In fact it is defendant's own case that even if the contract had been worked under the altered condition of cutting only trees of 4½ feet girth plaintiff would have suffered no manner of loss. It is so stated in paras. 7 and 10 of his written statement and in his lawyer's notice Ex. T. The defendant's contention in the first Court also seems to have been that plaintiff was not entitled to claim any profits at all and his objection was upheld and plaintiff's claim for damages of Rs. 4,500 was disallowed. Plaintiff did not appeal from the Assistant Agent's decree and we need not consider whether he should not have an opportunity to prove his damages in full. As regards the Rs. 3,000 deposit it is clear, as shown by my learned brother, that the defendant is bound to refund it, not as plaintiff's money in his hands. There does not seem to be any substance in the defendant's objections to the amount decreed, for even if we direct a fresh trial to ascertain the profits plaintiff would have made if the contract had been carried out, there is no likelihood of the amount now decreed being in any way reduced. It is suggested that this is all speculation but considering the defendant's case in the first Court and the course of the trial, I am not prepared to act under R. 20 in defendant's favour and direct a review of judgment on the point.

The last point taken is as to the jurisdiction of the Special Assistant Agent to try this case. The case was filed in the Agent's Court as required by R. 10, Cl. (2), the claim being above Rs. 5,000. That rule gives the power to the Agent to transfer any such suit for the decision of his Assistant and the transfer in this case was made under that provision. It is

argued that the power to transfer can be exercised only before the first hearing and not after a case is part-heard and as issues had been framed by the Agent in this case, the transfer to the Assistant Agent was ultra vires and the latter had no jurisdiction to try the case. I do not think the question is one of jurisdiction at all. The rule does not in terms restrict the power of transfer to a stage before the first hearing. It is more a question of the impropriety of the order than of want of jurisdiction when the Agent transferred a part-heard case to his Assistant. Ordinarily the Agent should not so transfer as the appeal from the decree has to be heard by him, when objections may be raised to any part of the trial. But the question is only one of an irregularity if he does so transfer. In the present case no objection was taken by the defendant before the trial Court to the course adopted but he awaited the decision of that Court on the merits, he must therefore be taken to have waived all objections. The point, though taken in appeal, does not seem to have been argued even in the appellate Court as there is no reference to it in its judgment. It is not shown that defendant has been in any way prejudiced by the procedure adopted. I think therefore this is not a point which we ought to consider under R. 20 of the Agency Rules as the objection seems to be a purely technical one. In an analogous matter the High Court of North-Western Provinces refused to allow a similar point to be taken for the first time in appeal: see *Yakoob Ali* v. *Luchmun Dass* (9). I therefore agree that this petition should be dismissed with costs.

S.N./R.K. *Petition dismissed.*

(9) [1874] 6 N. W, P. H. C. R. 80.

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ABDUR RAHIM, OLDFIELD AND COUTTS-TROTTER, JJ.

T. R. Ramachandra Iyer and *another* —Plaintiffs—Appellants.

v.

P. A Parameswaran Munbu and *others*—Defendants—Respondents.

Letters Patent Appeal No. 4 of 1918, Decided on 21st November 1918, against decree of Wallis, C.J., and Kumaraswami Sastri, J., D/- 14th November 1914, in Appeal No. 116 of 1916.

Civil P. C. (1908), S. 92—(Per *Oldfield and Coutts-Trotter, JJ.*)—**Definition of interest in S. 15, Religious Endowments Act, should not be imported in S. 92—Right to worship in temple is not such interest as will give worshippers right to sue under S. 92—Religious Endowments Act (1863) Ss. 14 and 15—** (*Abdur Rahim, J.*, dissenting.)

Per *Oldfield and Coutts-Trotter, JJ.*, (*Abdur Rahim, J.*, dissenting)—The right to worship in a temple is not such an "interest" as will give the worshipper a right to sue under S. 92, Civil P. C. The interest required in the relator must be a clear or a present and substantial and not a remote, fictitious or purely illusory interest; it must be an existing interest and not a mere contingency. The question whether any given person has or has not an interest as so defined is a pure question of fact which the Court should decide on a consideration of the particular circumstances of each case. [P 396 C 1]

The definition of "interest" in S. 15, Religious Endowments Act, should not be imported into S. 92, Civil P C.: 24 *Cal.* 418; 8 *Cal.* 32; 7 *All.* 178 (*F.B*); 12 *Bom* 247; *Bedford Charity, In re* (1819) 2 *Swanst.* 470; 15 *Bom.* 612; 26 *I. C.* 7 and 20 *Cal.* 810, *Ref. and Cons.* [P 393 C 1]

Per *Oldfield, J.*—S. 92, Civil P C., and Ss. 14 and 15, Religious Endowments Act, are not in pari materia and the one cannot be used as an aid to the interpretation of the other.

The "interest" which is required of a person wishing to sue under S. 92, Civil P. C., must be a substantial and not a sentimental or a remote interest. [P 392 C 1]

Per *Abdur Rahim, J.*—The words "having an interest in the trust" in S. 92, Civil P. C., include, in the case of a temple or a mosque, all persons having a right to perform worship or say their prayers therein. The "interest" required need not be pecuniary, direct or immediate, or in any way different from that required by Ss. 14 and 15, Religious Endowments Act, for purposes of suits relating to Hindu temples and Mahomedan mosques. [P 387 C 2]

Persons belonging to that section of the public for whose benefit a public trust has been created are in the position of beneficiaries and must, as such, be held to possess a sufficient interest to support a suit under S. 92, Civil P. C. In the case of a temple or a mosque, persons entitled to attend there for purposes of worship and devotion are presumably the beneficiaries intended by the founder. [P 389 C 1, P 389 C 2]

P. R. Ganapathy Aiyar and *K. Srinivasa Aiyangar*—for Appellants.

K. P. M. Menon and *C. Madhavan Nair*—for Respondents.

Abdur Rahim, J.—The sole question for determination in this Letters Patent Appeal is whether the suit in which it has arisen and which was instituted under S. 92, Civil P. C., with respect to a temple in North Malabar is maintainable the point being whether Mr. T. R. Ramachandra Aiyar, one of the plaintiffs, has an interest within the meaning of that section in the temple concerned. Mr. T. R. Ramachandra Aiyar, who is a leading

practitioner of this Court and a Brahmin resides in Madras while the temple is situate in Tellicherry. It is an ancient temple of some celebrity and is dedicated to the deity Sri Rama. Mr. T. R. Ramachandra Aiyar is a member of the Dharma Rakshana Sabha, among whose objects is included institution of suits for the protection and due application of Hindu religious endowments. It also appears that when on one or two occasions in the exercise of his profession he went to Tellicherry, he attended this temple and worshipped there, and it was further stated that he was likely to do so if he again went to Tellicherry. But the interest of Mr. T. R. Ramachandra Aiyar in this temple within the meaning of the Code is not supported on any of these facts but on his right as a Hindu to perform worship therein.

The question is one of considerable importance, and having given my best consideration to it, I have come to the conclusion that the view of the law expressed in the judgment of Kumaraswami Sastri, J., is right. I think that the history of legislation on the subject makes it sufficiently clear that the legislature intended by the words "having an interest in the trust" to include in the case of a temple or a mosque all persons having a right to perform worship or to say their prayers therein. It is not necessary to go back further than Act 20 of 1863, an Act which is expressly referred to in S. 92, Civil P. C., itself and is still in force. That Act, as is well known, was passed primarily to enable Government to divest itself of the direct management of Hindu and Mahomedan religious endowments which they had assumed under certain regulations. It also contains provisions for suits to secure the due administration of religious trusts by the trustees, managers or members of committees. By S 14 such right of suit is conferred on persons "interested" in any mosque, temple or religious establishment. S 15 then explains that: "the interest required in order to entitle a person to sue under the last preceding section need not be a pecuniary or a direct or immediate interest or such an interest as would entitle the person suing to take any part in the management or superintendence of trusts. Any person having a right of attendance, or having been in the habit of attending at the performance of the worship or service of any mosque, temple or religious establishment, or of partaking in the benefit of any distribution of alms shall be deemed to be a person interested within the meaning of the last preceding section."

It is probable that this elaborate explanation of what would be deemed to be sufficient interest to maintain a suit under Act 20 of 1863 was considered necessary on account of the decisions under Romilly's Act, such as in *Bedford Charity, In re* (1). Also it is clear that the Indian Legislature in 1863 did not think it would lead to undue harassment of trustees of religious foundations or to the institution of frivolous and vexatious suits, if persons entitled to worship in a temple or to say prayers in a mosque were vested with the right to institute suits to secure their proper management. Act 20 of 1863, however applied only to religious foundations and the legislature deemed it advisable in the Civil Procedure Code of 1877 for the first time to make a specific provision for suits instituted for the purpose of remedying abuses relating to the administration of public charities generally.

But by S 529 of that Code only two or more persons having a "direct" interest in the trust were given the right to sue, provided they obtained sanction of the Advocate-General or the Collector for the purpose. The words "direct interest" were repeated in the Code of 1882, Act 14 of 1882. This probably indicates that the legislature in 1877 and 1882 in providing for suits relating to public trusts intended to assimilate the law to that of England as expounded by Lord Chancellor Eldon in *Bedford Charity, In re* (1) and in *Ludlow Corporation* v. *Greenhouse* (2), though it does not follow that it intended any difference in the nature of the interest required to sustain an action with respect to the administration of religious foundations deemed to be sufficient under Act 20 of 1863. Sir Samuel Romilly's Act, 52 George 3. Ch. 101, which provided a summary remedy in cases of breaches of trust created for charitable purposes and for their proper administratfon gave to "any two or more persons" the right to present a petition for the purpose. But it was nevertheless ruled by the Lord Chancellor that only persons having a direct or clear interest in the trust were competent to present a petition under Act. In *Bedford Charity, In re* (1) certain Jewe

(1) [1819] 2 Swans. 470=19 R.R. 107.
(2) [1827] 1 Bligh 17=4 E. R. 780.

who were attending a synagogue in London, were held not to be persons who could present such a petition with respect to the Bedford Charities merely because being Jews they were interested on that account in obtaining a decision as to whether the poor Jews of Bedford were entitled to the benefit of the Charities which were founded for the education and relief of the poor inhabitants of Bedford. I do not find that any proposition can be deduced from the decision or observation of the Lord Chancellor in the above case or in the case of *Ludlow Corporation* v. *Greenhouse* (2), from which it can be properly inferred that persons having a right to attend a religious foundation for purposes of divine worship have not a sufficient interest to maintain an action for its proper administration.

The interpretation of the phrase "direct interest," however, led to a considerable conflict of decisions in the High Courts of the country. It is not necessary to go through them all. For our present purpose they are divisible into two groups, some supported the view that worshippers at a temple or a mosque were not persons having a direct interest while others held that they had such interest within the meaning of the Code. The case of *Jan Ali* v. *Ram Nath Mundul* (3) was a leading decision of the former class. It ruled that worshippers or persons accustomed to say their prayers in a mosque were not within the purview of S. 539 as persons having a direct interest in the foundation. This ruling was followed by this High Court in *Narasimha* v. *Ayyan Chetti* (4). The learned Judges here in fact went further, holding that even the fact of the plaintiffs being managers of the temple in suit did not bring them within the provisions of S. 539.

The Allahabad High Court [in the case of *Jawahra* v. *Akbar Husain* (5)] dissented from *Jan Ali's* case (3) holding that every Mahomedan having a right to use a mosque for purposes of devotion was entitled to remedy; if the exercise of such right was interfered with, and that it was not even necessary for him to come under the provisions of S. 30, Civil P. C. which deals with the right of suit by persons interested in obtaining relief, or under S. 539, Civil P. C. Mahmood. J., added that even if S. 539 applied, Mahomedan worshippers who were entitled and accustomed to use it had the most direct interest in the foundation and were thus comprised within the purview of S. 539. It has been pointed out on behalf of the respondent that Mahmood, J., was speaking of worshippers that were accustomed to use the mosque. But Petheram, C. J., who delivered the judgment of the Full Court relied entirely on a Mahomedan's right to attend a mosque in supporting the plaintiff's locus standi in that case and I feel sure that Mahmood. J., did not want to add any qualication to Petheram, C. J.'s statement of the law. It is also suggested in the judgment of the learned Chief Justice in this case that the decision in *Jawahra* v. *Akbar Husain* (5) proceeded on the provisions of Mahomedan law. But with all respect in order to ascertain whether a Mahomedan or a Hinduhas an interest in a religious foundation, it is the Mahomedan or the Hindu law that must be primarily looked into and I have not heard any suggestion at the Bar that under the provisions of Hindu law a Hindu having a right of attendance and worship at a temple has not an interest in that temple similar to what a Mahomedan has in a mosque. In the Bombay High Court Sargent. C, J., and Nanabhai Haridas, J., in *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (6) expressed their dissent from *Jan Ali* v. *Ram Nath Mundul* (3) and held that the legislature did not intend by the expression "direct interest" an interest of a different nature from that which the worshippers and the devotees of a deity naturally have in the proper management of the temple (p. 623 *of I. L. R.* 15 *Bom.*) That was also the trend of view of West and Birdwood, JJ., in *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (7).

At this stage the legislature intervened to settle the controversy by removing the word 'direct' by the amending Act, Act 7 of 1888, S. 44. The effect of this amendment was fully considered by the Calcutta High Court in 1897 in the well-known case of *Sajedur Raja Choudhuri* v. *Gour Mohun Das Baishnav* (8), where it was laid down:

(3) [1882] 8 Cal. 32.
(4) [1889] 12 Mad 157.
(5) [1885] 7 All. 178 (F. B.).

(6) [1891] I5 Bom. 612.
(7) [1888] 12 Bom. 247.
(8) [1897] 24 Cal. 418.

"The inference therefore is that the legislature intended to allow persons having the same sort of interest that is sufficient under S. 14, Act 20 of 1863, to maintain a suit under S. 539; and this change in the law is, in our opinion, sufficient to distinguish the present case from that of *Jan Ali* v. *Ram Nath Mundul* (3), which was decided before S. 539 had been amended by the omission of the word 'direct.'"

This was a clear and explicit ruling that a person having a right of attendance and worship at a temple or a mosque had thereby an interest within the meaning of S. 539 in the Code of 1882 as amended by Act 7 of 1888. The significance of that ruling cannot be whittled away by pointing out that the plaintiffs in that case had not only a right to worship at the temple concerned but were as a matter of fact also in the habit of performing worship there. I may also refer to a decision of this Court in *Ganapathi Ayyan* v. *Savithri Ammal* (9). There it was held that two Brahmin residents of the neighbourhood who had obtained leave under S. 30 of the Code were entitled to maintain a suit, as representing the Brahmin community at large, for the removal of the trustee for the time being of a choultry founded for the benefit of the Brahmins. In this judgment, Shephard, J., observed:

"It has been repeatedly held in this country that such a suit as the present may be instituted by any member of the class intended to be benefited by the charity for the support and preservation of which the aid of the Courts is invoked. According to the document which evidences the institution of the charity the class for which it was intended comprised Brahmins generally."

It cannot be said that the interest of a person as member of a large and indefinite class entitled to the benefit of a charity, if sufficient for the purpose of a suit under the provision of S. 30, will not be equally competent for a suit under S. 539. We have not been referred to any decision in which the ruling in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (8) was dissented from or doubted, and, so far as I am aware, it has always been understood to contain a correct exposition of the law. When therefore the Civil Procedure Code was re-drafted in 1908, the legislature must be taken to have been aware of the interpretation that had been put on the words 'having an interest in the trust.' If that interpretation did not commend itself to the legislature and if it intended to narrow the class of persons that could institute suits with respect to religious foundations, it would have given some indication of its intention. On the other hand, it is, in my opinion, a fair and clear inference that the legislature in retaining the same expression intended to confirm the view expressed in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (8) that the interest required need not be pecuniary, direct or immediate or in any way different from that required by Ss. 14 and 15, Religious Endowments Act, for purposes of suits relating to Hindu temples and Mahomedan mosques.

Considerable stress has been laid in support of the respondents' possession on considerations of convenience, and such arguments were sought to be reinforced by a general reference to the law relating to the English Church though no authority at all supporting the respondents' position was cited.

In my opinion considerations of convenience are a very unsafe guide to the interpretation of a statute, especially so in the case of an enactment like the one we are dealing with. At all events, regard must in this connexion be had to the provisions of Hindu law and to customs and usages relating to Hindu temples, the nature of these foundations and the character of the worship and the services carried on there, the class of persons that resort to them, what special interests, if any, do the residents of the place, in which the temples are situated, have and to what extent persons residing in other parts of the Presidency or India generally are interested in their maintenance. What I mean will be made clear by briefly contrasting the constitution and the laws relating to the Church of England with those relating to religious foundations of Hindus and Mahomedans. The English Church has a regular and highly elaborate constitution. It is connected with the State and its administration is secured by an organization of a fixed and permanent character, governed by well-defined rules and usages, enforcible in Courts specially constituted for the purpose. Thers is one peculiarity of English Ecclesiastical law which alone would forbid the application of English notions in the determination of questions relating to a temple or a mosque.

(9) [1898] 21 Mad. 10.

A Protestant Church is a parish church. It is intended primarily for the spiritual benefit of the parishioners. The parish is a well-defined ecclesiastical area and the parishioners have distinct rights and duties with respect to the parish church. They have a preferential right to accommodation during divine service and, generally speaking, they alone are entitled to the services of the incumbent for the administration of Holy Communion, for solemnisation of marriages, to burial in the churchyard and for the baptism of their children. The Church wardens and the members of the vestry are selected from the parishioners. The parishioners are bound to pay tithes or rather the rent charges into which they have been commuted. They contribute to the church rates and are bound to pay fees for marriages, churchings and burials and to contribute offerings during Easter. They are looked to for repair of the church building and its fittings and under the Ecclesiastical law they are even bound to attend divine worship on holy days. The Rector is the incumbent of the parish. His remuneration consists of income derived from his benefice, ordinarily consisting of the tithes, glee-bland, parsonage house, Easter offerings and fees. The whole system in fact is parochial. Even most cathedral or collegiate churches belong in the Ecclesiastical law to a parish. On the other hand, the Indian Government as such has no duties or obligations in connexion with the maintenance of Hindu temples and Mahomedan mosques. There is no ecclesiastical constitution or organization for the administration of Hindu and Mahomedan religious establishments in any way analogous to that of the English church.

A Hindu temple or a Mahomedan mosque is not ordinarily intended, if ever, for the use of the residents of a particular village or town. The idea of anything like a parish or parishioners, is entirely alien to, and has no meaning in connexion with, these places of worship. A temple or a mosque is founded in order to enable Hindus or Mahomedans generally or of a particular sect or persuasion to carry on worship or to say their prayers therein. They are maintained out of the income of the endowments, if any, and from free offerings and gifts or presents made by followers of the Hindu or Mahomedan religion not confined to any particular locality. No religious ordinance enjoining the attendance of Hindus or Mahomedans at their respective places of worship could be enforced by any recognized authority. I am not aware, and it has not been suggested, that Hindus or Mahomedans residing in the vicinity of a temple or a mosque have any higher rights or any special duties connected with it different from those of their fellow Hindus and Mahomedans or members of the same sect, residing in any part of the Prssidency or elsewhere. In the case of at least the larger temples in this Presidency, offerings, sometimes of a very valuable nature, are sent from all parts of the Presidency as well as from outside. The making of offerings is an important mode of worship in all Hindu temples and such offerings often are made by persons living at a distance. As regards a mosque, as its use consists in the saying of prayers therein, it can only be used by persons in a position to attend the mosque in person. But there are shrines in connexion with tombs of Mahomedan saints which in this connexion bear analogy to Hindu temples. To these shrines offerings are sent by persons from all parts of India and the temples and shrines which receive offerings from distant places are not a few but numerous. The famous temples at Tirupati, Rameswaram, Srirangam and Madura in this Presidency and the temples at Benares and other sacred places of the Hindus attract pilgrims in large numbers from the most distant places at stated festivals in the year.

The well-known Mahomedan shrines such as at Ajmere, Agra, Delhi and at Nagore in this Presidency are similarly resorted to by numerous Mahomedan pilgrims from all parts of the country. It is, to my mind, palpably repugnant to Hindu and Mahomedan religious consciousness that residents of the locality should alone be considered to have an interest sufficient to sustain a suit for the proper management of a temple or a mosque and none else and the utter untenability of such a notion becomes still more vivid to one's mind in the case of the more important institutions. I think the legislature of the country must have been persuaded of this fact when it gave the right to institute actions to secure proper administration of temples and mosques and their endowments by Act 20

of 1863 to all persons who have a right of attendance and worship at these religious foundations, and I cannot conceive that it intended by S. 539 of the Code or S. 92 of the present Code to circumscribe within narrower limits the class of persons authorized to institute such suits. The provisions of the Code of Civil Procedure are not confined to purely religious institutions but cover all cases of religious and charitable trusts, and it was urged that if we construed them in the way contended for on behalf of the plaintiffs, the results would be startling. For instance, if there is a dispensary in a village in this Presidency for the relief of sick persons generally, we should be compelled to hold that any two persons resident at Peshawar would be entitled to sue for administration of that charity under S. 92. That no doubt is a possibility, but they would have to obtain the sanction of the Advocate-General and that officer might be relied on not to grant leave except in a proper case.

On the other hand from the history of the legislation in this connexion, it seems to me clear that the legislature must have thought that as in India no authoritative organization or machinery existed for enforcing a due and proper administration of public trusts, the withholding of the right of suit from persons having an interest in the trust in the wide sense as defined in Act 20 of 1863 with respect to religious foundations would be detrimental to numerous religious foundations and charities of the country. It was pointed out by way of answer that the Advocate-General can institute suits in cases where people of the locality are apathetic and indifferent. But it is common knowledge that most of such suits are in fact instituted by private persons and those instituted by the Advocate-General are rare and must necessarily be so in the present conditions of things. On the other hand the trustees are, in my opinion, sufficiently protected from vexatious suits by the safeguards provided by the section. Whether the interest of the plaintiffs in a particular foundation or public trust is sufficient to support an action under S. 92, may to some extent depend upon the facts of each case. But it must, in my opinion, be conceded as a sound general proposition that persons belonging to that section of the public for whose benefit a public trust has been created are in the position of beneficiaries and must as such be held to possess a sufficient interest to support a suit under the Code. In the case of a temple or a mosque persons entitled to attend there for purposes of worship and devotion are presumably the beneficiaries intended by the founder: see Sadasiva Aiyar, J., in *Gopala Mooppanar* v. *Subramania Iyer* (10), and if such persons have not an interest in the institution within the meaning of law it is difficult to conceive who has. It is argued however that the interest contemplated by S. 92 must not be merely contingent or only a possibility, as laid down in *Mohiuddin* v. *Sayiduddin* (11).

But in that case the learned Judges were considering the position of a person who had only a chance of succession to the office of the spiritual head of an institution, while in this case Mr. T. R. Ramachandra Aiyar in maintaining the suit relies on the right of attendance and worship already vested in him. The possibility that he may not often or ever actually worship at the temple in question cannot, in my opinion make any difference. On the other hand, if a person is not entitled to worship at a particular temple, he cannot by the mere fact of having actually worshipped there in the past on several or many occasions acquire a locus standi under S. 92. If the right of attendance and worship be not sufficient in itself, the Courts would be called upon to inquire into questions as to the extent and mode in which a Hindu or Mahomedan suing under S. 92, Civil P. C., observes his religious duties, how far he is in a position to resort to the temple or mosque in question and how often he actually goes there for worship or to investigate the nature and value of the offering, gift or presents made by a devotee and of other similar acts of devotion. In my opinion, the Indian legislature would ill like the Courts to embark upon such inquiries and that was probably why they took pains in Act 20 of 1863 to explain the nature of the interest required and afterwards to omit the word "direct" from the Code of Civil Procedure after the decision in *Jan Ali's* case (3). Further, if the respondents' arguments were sound, in cases where through a long course of misconduct or

(10) A I R. 1915 Mad. 863=26 I.C. 7.
(11) [1893] 20 Cal. 810.

neglect on the part of persons in charge of a temple or mosque, it has ceased to be frequented for worship either owing to disrepair of the building or the trustees' default in maintaining the necessary establishment for due performance of the services or other similar causes—and such cases are not infreqnent—there would be no one who would have a sufficient interest for purposes of a suit under S. 92.

As a mosque is dedicated to God in order that Mahomedans may say their prayers therein, so also a temple is dedicated to a particular deity in order that the worshippers of that deity may worship there. It follows that in the case of a mosque—leaving out those rare cases, if any such exist, where the dedication is expressly limited—the followers of Mahomedan religion and in the case of a temple the Hindu devotees of the particular deity for whose worship a temple is founded are the beneficiaries intended by the founders. Suppose, there had been a deed of dedication with respect to the temple in suit, and that deed stated in so many words that Mr. T. R. Ramachandra Aiyar and all other worshippers of Sri Rama would be entitled to worship there, it could hardly be contended then that Mr. T. R. Ramachandra Aiyar would not be a beneficiary of the trust and as such entitled to maintain the suit. It cannot, in my opinion, make any difference in this respect that there is no such deed of dedication available in this case, if, as is admitted, the temple in question was in fact intended for the use of worshippers of Sri Rama and Mr. T. R. Ramachandra Aiyar is a devotee of Sri Rama and as such entitled to worship in this temple. I would therefore allow the appeal and remand the suit to the District Judge of North Malabar District for trial on the merits.

Oldfield, J.—Appellants are plaintiffs in a suit filed with the consent of the Advocate-General against the trustees of a temple in Malabar under S. 92, Civil P. C., and the question is, whether one of them, to whom alone I shall refer as the appellant, has the interest in the trust, which is required of a plaintiff by that provision. It is alleged that he has not, because he comes before us on the footing that he is a practitioner in this Court, who has worshipped in the suit temple only on two or three occasions when he was in its neighbourhood on professional business, and has no particular expectation of ever doing so again. His right to worship there is disputed by respondents, but may be assumed for the present purpose as (it is admitted) it might similarly be assumed in favour of every other Hindu of the higher castes and it is the sole qualification he alleges. The question is whether it involves his possession of the interest which S. 92 requires.

Argument in his favour has been based largely on the assumption that S. 92 should be construed with reference to Act 20 of 1863 and by importation into it of the definition of an "interest," which S. 15 of that Act contains; and if the interest required is in the words of the latter provision to be "not necessarily direct or immediate" and may be claimed by "any preson having a right of attendance . . at the performance of the worship" of the institution then no doubt plaintiff has an interest. But although this construction was adopted in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (6) there is little in the details and history of the two provisions to commend it. True both deal with religious trusts and provide remedies for their mismanagement. But there the likeness between them ends and until 1908 even that statement required material qualification. The Act applies to a particular class of religious institutions, those which were or could have been under the management of Government under Regn. 7 of 1817; the Code did not originally apply in terms to religious trusts and whatever the original intention it was only in 1882 that a reference to them as well as to charitable trusts was inserted. The Act remained unaltered since it was passed in 1863, and although the Code was passed in 1877 and amended in 1882, 1888 and 1908, no exhaustive attempt was made to create or maintain similarity between the differing provisions of the one and of the other on any of these occasions. It was only in 1908 that the jurisdiction of Courts other than the District Court over suits under the Code was made possible, although they had exercised it under the Act from the beginning that the section of the Code was expressed as mandatory and that the right of suit under the Act was saved and that one removal of a trustee, obtain-

able under the Act from the beginning, but not if the Full Bench of the Court decided rightly in *Rangasami Naickan* v. *Varadappa Naickan* (12) under the Code, was expressly provided for. Last and for the present purpose most important the Act from the beginning contained the wide description of the interest entitling to sue on which appellant relies; but the Code recognized only a direct interest whatever that expression comprehends until 1888, when the word "direct" was omitted. These amendments no doubt did in fact assimilate the Code to the Act on various points in succession; and some of them may have been made in consequence of decisions, in which the latter was referred to in particular the last mentioned with reference to *Jan Ali* v. *Ram Nath Mundul* (3). But this spasmodic course of legislation does not indicate what in my opinion the material differences between the two statutes as they were enacted negative, a consciousness that the two were in pari materia or an intention that the one should be used as an aid to the interpretation of the other.

This conclusion is confirmed by reference to the character of the reliefs obtainable under the two statutes. In 1888, the crucial date for appellant's contention, because in it the interest required by the Code ceased to be qualified as direct, they differed essentially, the reliefs granted by it comprising only safeguards against future mismanagement; those granted by the Act only remedies for misfeasance in the past against trustees and managers, not alienees or other strangers to the trust; and naturally so because the provisions in the former for appointment of new trustees and for a scheme were irreconcilable with those in the latter for control and for appointment of trustees by elective committees. Whilst this distinction between the reliefs which could be granted was retained there is no reason for supposing what the Code did not state explicitly, that the persons who could claim them were regarded as identical and if it cannot be shown that those persons were the same in 1888, there is none for supposing what again was not expressed that they were intended to be the same in 1908, when provisions explicable as natural improvements in this branch of the law and without reference to the Act were introduced and the reliefs allowed by it were first made obtainable under the Code. I would respectfully associate myself with the suspicion, with which the learned Chief Justice regards the method of construction of one statute by reference to another and would hold that in this case its employment is without justification.

The description in the Code until 1888 of the qualifying interest as direct is in fact the immediate basis of the majority of the decisions to which we have been referred. For until that year the question was always whether the plaintiff, who had some interest, had a direct one. Thus to give two instances, in *Jan Ali* v. *Ram Nath Mundul* (3), already referred to, plaintiffs were habitual worshippers in the mosque which was in question, and the Court, finding in Act 20 of 1863 a distinction drawn between persons possessing a direct and immediate interest, and those who were merely in the habit of attending the worship, held that they had not the direct interest required; and in *Jawahra* v. *Akbar Husain* (5), the existence of a direct interest in persons so situated was sustained, Mahmood, J., dissenting expressly from the Calcutta decision. To turn to the more important cases, those enumerated in the judgment of the learned Chief Justice as decided after the omission of the word "direct," it is sufficient that, as he observes, the plaintiffs, who were allowed to sue, had in each an interest, which would have enabled them to proceed under Romilly's Act in England and had more than a mere right to worship. Closer reference is necessary only to two, which have been particularly relied on. In *Mohiuddin* v. *Sayiduddin* (11), the dictum that the interest must be an existing one and not a mere contingency at first sight is against appellant's contention. But the only contingency in question was the mere possibility of the plaintiffs' succession to the management of the institution, which depended on circumstances beyond their control and in no way resembled the existing right of a potential worshipper, on which appellant relies. On the other hand, in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (8), although the issue was stated as it has been in this appeal and the argument that the interest

(12) [1894] 17 Mad. 462.

required must be different from a mere right to worship was rejected, the Court proceeded, firstly on the adoption of the definition of interest in Act 20 of 1863, from which I have dissented, secondly, with reference to the decision in *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (7), which in fact recognises the right to sue not of mere worshippers but of the manager of a temple and of priests who supervised the worship there of pilgrims, and thirdly, on the finding that the plaintiffs had "a somewhat larger interest than that of mere worshippers" and in these circumstances I do not feel bound by the conclusion.

But although the direct result of the authorities, even after 1888 is negative, indirectly they are strongly against the appellant. For the fact that the wide construction he proposes has never been suggested during the last thirty years, although in every case it would have afforded a short ground of decision in the plaintiff's favour is clear reason for doubting its correctness. Apart from authority appellant relied mainly on the enumeration of alleged crucial instances, as admitting only of a decision consistent with his claim. But he did not show how any principle could be deduced from them and so far as they could be tested with reference to convenience, the result was against him, since apart from considerations of bona fides, the possession of a mere right to worship affords no security for the plaintiffs' ability to propose a suitable scheme or later to see to its working. On the subject-matter and language of the section it was suggested that the interest entitling to sue should be defined liberally to include such cases as appellant's, because the necessity for the consent of the Advocate General or Collector will afford a corrective, where one is required. But that consent is merely a condition precedent to the institution of the suit and cannot affect the responsibility of the Court for the decision as to the plaintiffs' qualification. On the other hand no good reason has been shown against the interpretation of the word "interest" in the section in the manner in which it is ordinarily interpreted in other legal connexions and in which I shall interpret it, as an interest which is substantial and not sentimental or remote. This conclusion is consistent with the only cases cited, in which a merely potential right to claim the benefits of the trust was directly in question, *Ludlow Corporation* v. *Greenhouse* (2) and *Bedford Charity, In re* (1), the former insisting on proof of a 'clear' interest, whilst the latter negatived the interest in a charity for the poor of one place alleged by persons, who were wealthy and lived in another.

The foregoing, of course, affords no immediate or explicit answer to the question as it was originally stated, whether a right to enjoy the benefits of a trust involves possession of the interest referred to in S. 92; and the assumption that such an answer must be possible underlay most of the arguments in favour of the comprehensive qualification, for which appellant contended. But there is no reason for assuming that an answer to this or any other question of interpretation, which excludes considerations of degree or the necessity for inquiry into the facts of each case, can be found or should be looked for at the expense of established principle. And in practice such inquiry will present no difficulty. Proof of residence in the neighbourhood of the institution will no doubt be one way of establishing possession of an interest, not by any analogy with the rights of parishioners in England, but on the simpler ground that those who live near to the institution will be most likely to take advantage of its benefits. Other ways however will not be excluded; and therefore I am not troubled by the suggested cases of devotees, who may conceivably visit a shrine in the future, although there is no reason for expecting and no probability that they will ever do so; or of institutions, which have ceased to be frequented, because their services have been discontinued. In the first class of cases the grievance may fairly be described as sentimental; in the second the answer is that any two persons who can show at any time that they are prejudiced or have any well-founded expectation that they will be prejudiced by the discontinuance, will be entitled to sue; and in both classes it is possible that if exceptional circumstances rendering a private suit impossible are established the Advocate-General may be justified in the independent exercise of his powers. Such cases however will be rare and usually it should be easy to ascertain whether even occasional visi-

tors or pilgrims, actual or prospective, have a substantial interest, if the character and sphere of reputation of the institution, the area from which votaries come to it and the purposes for which they ordinarily come are considered. And in the present case it is unnecessary to pursue such considerations further. For they do not arise on the statement of appellant's position, which has been made. It involves that his interest is based on a mere possibility and is too remote to be substantial : and therefore however laudable his motives or those of the society, in which he holds office, his right to sue has not been established.

I would dismiss the Letters Patent appeal with costs.

Coutts-Trotter, J. — This Letters Patent appeal comes before us on a difference of opinion between my Lord the Chief Justice and my brother Kumaraswami Sastri in an appeal from the District Judge of North Malabar. The suit was one under S. 92, Civil P. C. asking for the removal of the trustees of a temple at Tellicherry and other kindred reliefs. The plaintiffs were a Nambudri Brahmin of North Malabar, as to whom no question arises, and Mr. T. R. Ramachandra Aiyar, a well-known vakil practising in these Courts. The learned District Judge dismissed the suit on the ground that Mr. Ramachandra Aiyar had no interest in the trust relating to the temple within the meaning of S. 92, Civil P. C. The learned Chief Justice agreed with his view and Kumaraswami Sastri, J., dissented from it. I find myself in entire agreement with the views of the former and only express my opinion in words of my own out of respect for the opinion of Kumaraswami Sastri and Abdur Rahim, JJ.

It is desirable to state the exact position of Mr. Ramchandra Aiyar in relation to this suit, and the facts are to be gathered from the learned District Judge's judgment. He is the Vice President of the Dharma Rakshana Sabha and is so described in the plaint. That is a body which interests itself in the conduct and management of temples in Southern India, but it is not contended that that fact would, of itself, give Mr. Ramachandra Aiyar any locus standi in this suit. His personal connexion with the temple is so slight as to be negligible. He is a native of Cochin, he lives in Madras, and the utmost that can be said is that on two or three occasions the last of which was some eight or ten years ago, while visiting Tellicherry in his professional capacity, he took the occasion to worship in this temple. No one has seriously urged that so slender a connexion could be relied upon as creating any real interest in the temple, in the popular sense of that term. The proposition put forward is a much wider one, namely, that every Hindu has an interest, within the meaning of the section, in every Hindu temple throughout the length and breadth of India. The arguments that have been addressed to us appear to me to fall under three heads; first, the argument from the Indian decisions, secondly, the suggested analogy of Romilly's Act, 52 Geo. 3, Cap. 101, and the decisions under it, and thirdly, the suggested analogy of S. 15, Religious Endowments Act, 1863.

In considering the decided cases' it is no doubt important to remember and keep in mind the fact that S. 539 of the old Code stipulated that the relators should have not merely an interest but a "direct" interest in the trust. By S. 44, Amending Act of 1888, the word "direct" was omitted from S. 539 and it has not re-appeared in S. 92 of the present Code. Accordingly, the cases decided before 1888 were applying a more stringent rule than can be applied at present day in testing the locus standi of the relator. The Bombay cases *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (7) and *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (6) do not help us much, because the interest there was so manifest as to be held by the Court, without difficulty, to be not merely an interest but a "direct" interest, within the meaning of the old section. *Jawahra* v. *Akbar Husain* (5), which was relied upon by Mr. Ganapathi Ayyar, does not appear to me necessarily to support the position for which he contends, because the plaintiffs in that case lived in the village where the mosque in question was situated, habitually worshipped in the mosque and, moreover, had actually been obstructed in the attempt to perform their devotions in it. Mahmood, J., whose judgment has been relied upon by the appellants, describes the plaintiffs in that case as "personally entitled and accustomed to worship there." Of the

Calcutta cases, in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (8) the learned Judges, no doubt, express themselves as of the opinion that the "right to worship" is sufficient to constitute an interest under the present section. I think that must be qualified by two considerations: the first is that the learned Judges, in my opinion, at p. 427 (*of* 24 *Cal.*) completely distort the effect and scope of the decision in *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (7); the other is that, in stating the position of the plaintiffs, they say this:

> "We may add that the two plaintiffs in the present case have a somewhat larger interest than that of mere worshippers, plaintiff 1 alleging that he has for some time been performing some of the duties of the Mohunt and plaintiff 2, that he has been performing the poojah in the temple. These allegations have been supported by some evidence which is not contradicted."

No one would contend that the discharge of the duties of Mohunt and the performance of poojah did not constitute an interest, but, apart from those special facts, the use of the term "mere worshippers" by the learned Judges suggests, to my mind, that their view was not focussed on any distinction between de facto worship and the abstract and even unexercised right of worship—a distinction, which, for the purposes of this case, goes to the roof of the matter. *Mohiuddin* v. *Sayiduddin* (11) is an express decision that the interest required under the section must be an "existing one and not a mere contingency." *Jan Ali* v. *Ram Nath Mundul* (3) is an important case, because it is common knowledge that it was in consequence of that decision that the change in the law was made to omit the word "direct." The plaintiffs in that case lived in the village where the mosque was situated and were in the habit of worshipping regularly at that mosque. The Court, nevertheless, decided that they had not a direct interest in the mosque. I do not think that any of the Madras decisions have any direct bearing on the point we have to decide. *Gopala Mooppanar* v. *Subramania Iyer* (10) is no doubt an authority for the proposition that every Hindu, with perhaps certain possible restrictions which I need not consider here, has a right to worship in every Hindu temple throughout India. I am not concerned, for the purposes of this case, with questioning that doctrine or the corresponding doctrine that every Mahomedan has a right to worship in every mosque in India, and perhaps in the whole world. I am not prepared to treat the observations of the learned Judges in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (8) as compelling me to hold that the right to worship in a temple is equivalent to an interest within the meaning of S. 92, Civil P. C.

I now pass to the argument put forward by the respondents based on the analogy of Romilly's Act and the two decisions, *In re Bedford Charity* (1) and *Ludlow Corporation* v. *Greenhouse* (2). Romilly's Act authorized any two or more persons to take proceedings under the Act in regard to the trust to which the Act referred, on obtaining the sanction of the Attorney-General, and the Act contains not a word to prescribe that they should have an interest direct or otherwise. Nevertheless, Lord Eldon in those two cases expressed an emphatic opinion, that the Court would not listen to a relator who had not an interest which he describes in one place as "clear" and in another as "direct." As the section of the Civil Procedure Code is known as a matter of history, to be based on Romilly's Act, I do not think this argument from analogy is one that can be overlooked.

Mr. Ganapati Ayyar relied strongly on the definition of "interest" contained in S. 15, Religious Endowments Act of 1863. S. 14 of that Act gives a right of suit, in certain matters, to

> "any person interested in any mosque, temple or religious establishment, or in the performance of the worship or of the service thereof or the trusts relating thereto."

Section 15 proceeds to define the requisite interest in two clauses, the first of which is negative and the second positive. The clauses are as follows:

> "The interest required in order to entitle a person to sue under the last preceding section need not be a pecuniary, or a direct or immediate interest, or such an interest as would entitle the person suing to take any part in the management or superintendence of the trusts. Any person having a right of attendance, or having been in the habit of attending, at the performance of the worship or service of any mosque, temple or religious establishment, or of partaking in the benefit of any distribution of alms shall be deemed to be a person interested within the meaning of the last preceding section."

The important words are those in the second clause. If it be conceded that every

Hindu has a right to worship in every temple, and the definition of S. 15 can be applied, as it stands, to the expression "interest" in S. 92, Civil P. C.. the appellants' chain of reasoning seems to me to be complete. I respectfully agree, in general, with the learned Chief Justice's observations as to the danger of taking a definition of an expression in one statute and applying it to the same expression in another. But I am constrained to admit that very special considerations apply to the case of these two particular statutes. In the first place they are in pari materia dealing with practically the same subject-matter. The argument goes even further than that and invites us to infer that the deliberate intention of the legislature must be taken to have been to assimilate the interest stipulated for in S. 92, Civil P. C., to the interest defined in S. 15, Religious Endowments Act. The argument, as I follow it is this: Before the amending section of the Act of 1888, S. 539 of the old Code required a direct interest in the relator. Then came the decision in 1882 in *Jan Ali* v. *Ram Nath Mundul* (3). That case decided as I have already pointed out that the fact that the plaintiffs were residents of the village in which the suit mosque was situated and were regular worshippers at it, did not give them a direct interest in the trusts of the mosque. But it now becomes important to observe further that the learned Judges went on to express the opinion that the suit should have been instituted under S. 14, Religious Endowments Act of 1863 —doubtless a clear intimation that in the opinion of the learned Judges the relators had an interest within the meaning of that section, though not a direct interest. The draftsman of the amending section of the Act of 1888, we are to suppose, set himself to the task of so amending the law that persons in the position of the plaintiffs in *Jan Ali* v. *Ram Nath Mundul* (3) should be enabled in future to sue under the section of the Civil Procedure Code. He had before him the section of the Religious Endowments Act and the opinion of the learned Judges in Calcutta that the plaintiffs had an interest within the meaning of the section of the Religious Endowments Act. When he omitted the word "direct" is it not most natural to suppose that he intimated that the expression "interest," in the amended Code should have the same meaning as in the Religious Endowments Act? I think this is a most cogent argument and would yield to it but for one reason. Assuming that the words of the Religious Endowments Act, if it applied, would cover the case of the present plaintiffs, I have no manner of doubt that such a result was not in the least in the contemplation of the draftsman of the Religious Endowments Act and that such a result, from the wording of the definition, would have been regarded as startling by everybody at the time. I think that is sufficient warrant for refusing to import the definition contained in the one Act into the other. However close the historical connexion between the two sections may be the very fact that the words used in one may lead to an inconvenient and unforeseen conclusion is, it seems to me, good reason for refusing to import those words and producing the same conclusion in the other.

Numerous illustrations were put during the course of the argument to show the difficulties involved on one side or the other. The inconvenience and to my mind, the absurdity of the proposition that any two Hindus, residing, say in Peshawar, can be said to have an interest in a temple in Malabar, by virtue of merely being Hindus with the right to worship in that temple if they should ever find themselves in its vicinity, is apparent from its mere statement. On the other side it was pressed upon us that if that proposition in its extreme width be rejected, it is impossible to draw a line of demarcation. Hindu and Mahomedan law know nothing of territorial boundaries of temples or their priests or of anything corresponding to the idea of a parish with special local rights in its parishioners, which would easily solve the difficulty in the case of an English Established Church. In so far as the decided cases suggest a limitation, the limitation suggested is that of living in the neighbourhood of the institution in question and habitually resorting thereto for purposes of worship. On that one can be asked what is your definition of neighbourhood. What is your definition of habitual resorting. On that I am prepared at once to admit that I can find no words that would solve those difficulties by a universally applicable formula. But I do not think that concludes the matter.

I am content to say that the task is impossible, that the most that can be done, or attempted to be done, is to say that the interest required by the statute to reside in the relator must be in the words of Lord Eldon, "clear" or in the words of the learned Chief Justice in this case:

"a present and substantial, and not a remote and fictitious, or purely illusory interest"

or in the words of the learned Judges in *Mohiuddin* v. *Sayiduddin* (11) "an existing interest and not a mere contingency." Beyond that it seems to me that the question as to whether any given person has or has not an interest, as so defined, is a pure question of fact and must be left to the Court before whom he appears, to decide in the light of these general principles on a consideration of the particular circumstances of each case. I see nothing to regret in such a conclusion and do not feel perturbed at my own or anyone else's inability to construct a logical bed of Procrustes to fit each and every imaginable case. No doubt there are cases of special difficulty, such as the great pilgrimage temples at Benares and other sacred places. where the majority of the worshippers come from all over India. The extreme case perhaps is the temple of Rameswaram in this Presidency, which is situated on an island, and no one lives near it except those connected with the carrying out of the religious worship in the temple, and the worshippers are exclusively pilgrims. It is urged that if you are to put any construction on the section which in any way confines the right of suit to local or habitual worshippers, not one of the thousands who attend the temple would fulfil the requirement. If it be so I do not shrink from the conclusion. S. 92 of the Code does not confine the right of suit to relators but gives a right of suit to the Advocate-General himself directly. As guardian of the religious interests of the community as a whole he could doubtless be relied upon to take proper steps for the due administration of those religious establishments which are more the resort of the public at large than of the residents in their immediate neighbourhood. I am therefore of opinion that there is nothing which compels me to adopt the wide proposition contended for by the appellants with its results so directly opposed as I think to convenience as to make the position of temple trustees an intolerable one. I therefore agree with my Lord the Chief Justice and my brother Oldfield in dismissing this appeal with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 396

AYLING AND COUTTS-TROTTER, JJ.

Subraya Bhatta—Plaintiff—Appellant.

v.

Srinivasa Shanbhaga and *others*—Defendants—Respondents.

Second Appeal No 406 of 1917, Decided on 20th March 1918, against decree of Dist. Judge, South Canara, in Appeal Suit No. 521 of 1915.

Tort—Damages—Cause of action—Nonperformance of ceremonies by trustees resulting in loss to archaka of voluntary contributions—Trustees held not liable though their action be malicious.

In a suit by an archaka of a temple against the moktessors to recover damages for their wilful nonperformance of certain ceremonies which deprived him of voluntary donations from worshippers.

Held : that the plaintiff had no cause of action as the moktessors owed a duty to the public and not to the archaka to perform the ceremonies, and therefore however malicious their action to injure the plaintiff, they were not liable in damages to him. [P 397 C1]

(b) Tort—Malice—Legal right not infringed—Malice gives no cause of action.

Malice does not by itself give a cause of action unless there is an infringement of a legal right. [P 397 C1]

K. Ramanath Shenai—for Appellant.

Lakshmana Row—for Respondents.

Judgment.—This was a suit brought by an archaka against the moktessors of a certain temple for damages. The allegation was that the moktessors had failed in the first place to pay the archaka for services which he duly performed and the second head of the damages was, to quote the words of the learned Judge's judgment :

"Damages for loss sustained owing to the nonperformance of ceremonies, the allegation being that certain ceremonies which were usual and customary and which ought to be performed by the moktessors, or rather, I should say, orders were not given by the moktessors for their carrying out and the archaka's case is that owing to that donations and gifts which would have come to him from the worshippers, if the ceremonies had been performed, had not come to him and there was a loss to him in this respect and in respect of that he claims damages to the extent of Rs. 300."

That is the description of the nature of the claim which is given by the learned Judge in his judgment and which was given to us by the plaintiff's counsel on stating the grounds of appeal. With re-

gard to the first part of the claim, it is not disputed. For such services as the plaintiff has actually performed he is entitled to be remunerated and that part of the judgment is not contested. With regard to the second part of the claim, the discussion in the lower Court mainly ranged over the subject: Are the moktessors as such and thus the temple funds liable to the plaintiff or is defendant 3, who was the leading spirit and was alleged to have been actuated by malice towards the plaintiff, liable in his own person for these damages? What the learned Judge did is this. He appears to have taken it for granted that if a claim of this nature were framed against defendants 1 and 3, they would be liable, but he says that the claim is only framed as against the trustees or the moktessors as such. He did not allow the amendment and decided against the plaintiff on that ground.

We think that, if that had been the true state of affairs, the learned Judge wrongly exercised his discretion and that, if he had been satisfied that the plaintiff had a good claim in law against defendant 3 personally, he ought to have allowed that amendment of the plaint because defendant 3 has not in any way been prejudiced in his defence to the claim against himself, for the general evidence was bound to be exactly the same and the special issue of malice on which the claim against him in his private capacity would have been based was gone into at the trial. But the plaintiff on second appeal here can only succeed, as he could only succeed in the lower Court, by an amendment of this nature. Thereupon Mr. Lakshmana Rao for the defence takes a point that, even if the claim were amended so as to raise the issue, the plaintiff could not recover any damages, for this reason that malice by itself gives no cause of action unless there is an infringment of a legal right. However malicious your actions may be, if they are such as the law permits, you do not, by mere reason of the malice, acquire a cause of action. This is laid down in a number of cases of which we need only refer to the case of *Corporation of Bradford* v *Pickles* (1). Therefore the plaintiff can only succeed if he shows that the defendants were guilty of the breach of some duty which they owed to him or infringed some rights vested in him. What did the defendants do? They abstained from performing the usual services in the temple. They certainly owe a duty to perform these services. The question is, to whom did they owe this duty? They owed the duty to the worshippers as a body who are entitled to have the moktessors perform their proper duties. It seems to us quite impossible to suppose that the moktessors owed that duty to the archaka. The archaka is to get what may be offered by the generous public when these things are done. If the public do not choose to give anything, he gets nothing even if the services are performed; so that in any case, the measure of damages would be very difficult to ascertain But apart from that we hold that there is no duty owed to the archaka by the moktessors to perform these ceremonies. That being so, however maliciously and designedly to injure the plaintiff the defendants acted, he has no cause of action. Not dissimilar case arose in the case of *Dhadphale* v. *Gurav* (2) where, on much the same ground, namely, that the person sued owed no duty to the person suing, whatever his duties might be towards the deity or the public, the suit was dismissed. For the same reason this appeal must be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1894] 3 Ch. 58.

(2) [1881-82] 6 Bom. 122.

A. I. R. 1919 Madras 397
Full Bench

WALLIS, C J., AYLING, COUTTS-TROTTER, SESHAGIRI IYER, AND KUMARASWAMY SASTRI, JJ.

Periyakaruppa Mukkandan and *others* —Defendants—Appellants.

v.

B. Raja Rajeshwara Setupaty—Plaintiff—Respondent.

Second Appeals Nos. 1449 to 1472 of 1917, Decided on 4th December 1918, against decree of Dist. Judge, Ramnad, in Appeal Suits Nos. 272, 275 to 289, 292 to 298 and 316 of 1916.

Madras Estates Land Act (1908), S. 13 (3) —Raising of garden crop from wells dug by tenants at their expense—Payments of increased rent for long series of years justifies presumption of consideration if that fact alone is to be considered but if there are other circumstances all should be considered before coming to any conclusion.

There was a contract between the landholder and the tenants of a zamindari to pay rent for

their holdings at a particular rate, and the raiyats solely at their own expense raised garden crops by digging wells and thereafter had been paying increased rent. On a question being raised whether an agreement tc pay higher rent supported by consideration could be inferred from a course of payment ranging over a number of years:

Held: Per *Wallis, C. J.*—The Court may infer consideration for a contract to pay at the enhanced rate from a long course of payment if that is the sole fact to go upon: but in dealing with the question of presuming the agreement and the ccnsideration therefor that together make up a contract, the Court should not be governed by that fact alone but should come to a conclusion on all the circumstances of the case. [P 402 C 1]

Per *Ayling, J.*—The Court cannot infer consideration for a contract to pay rent at the enhanced rate solely from a long continued course of such payment. [P 404 C 1]

Per *Coutts-Trotter, J.*—If the continued payment of rent were the sole fact before the Court, it would be entitled to presume consideration from it, but if there are other facts before the Court, it must refuse to treat the payment as raising a presumption, and while giving it such weight as it thinks fit, perhaps a determining weight, treat it merely as a portion of the evidence in the case, subject to be weighed against and perhaps overstopped by the evidence on the other side. [P 404 C 2]

Per *Seshagiri Aiyar J.*—A course of payment if nothing else appears, may be an element to be considered in arriving at the conclusion whether there was consideration for it or not: but if there was a fixed payment before and the rate was enhanced solely because the tenant had cultivated new crops by his own exertions, there is no room for presuming consideration under the circumstances. [P 406 C 2]

Per *Kumaraswami Sastri, J.*—It is open to the Court from a long continued course of payment of enhanced rent to presume that there was an agreement to pay which had a lawful origin and was supported by consideration, where it is satisfied that it would be unreasonable, from lapse of time or other circumstances, to call on the landlord to give direct evidence as to the terms and circumstances that gave rise to the payment, and when circumstances exist which would render the drawing of the presumption reasonable in law and probable in fact. If all that appears is a long course of payment, the presumption may well be drawn. [P 407 C 1]

K. S. Ramabadhra Iyer—for Appellants.

R. Krishnamachariar—for Respdt.

Order of Reference

Ayling, J. — These second appeals arise out of suits for rent for Faslis 1321-1323 brought by the Rajah of Ramnad against certain raiyats of Nochiurani village; and the two points for our determination relate to the liability of the tenants to pay (1) rent on dry waste, (2) garden rates (kuli teerva) on vanpayir crops raised with the aid of their own wells. As regards the first, the District Judge finds

"that from time immemorial only cultivated lands were charged and no rent was payable in respect of waste lands. The landlord has consequently a right to claim rent only in respect of cultivated lands by virtue of S. 4 of the Act read with Ss. 27 and 28: vide *Arunachallam Chettiar* v. *Mangalam* (1), a case which relates to the Ramnad zamindari."

He proceeds however to state that although the lands were only occasionally cultivated, they contained a large number of trees which are a source of profit to the raiyats; and concludes that there is nothing unreasonable in the defendants being required to pay rent for use and occupation of the land. He therefore decided the point in favour of the landlord. In my opinion this reasoning is inadmissible. The custom of the estate had been found and whatever may be thought of its reasonableness, if the terms of tenancy had to be fixed for the first time, it is certainly not one which the law would refuse to recognize. It has, in fact, been recognized and enforced in this very estate in the case above referred to and must be followed now, unless the landlord can show an enforceable contract to the contrary. The law on the subject is clearly expounded in the case in question which I have no hesitation in following.

The vakil for respondent has argued that the decree of the lower Courts can nevertheless be supported on the basis of a contract to pay contained in the muchilikas Exs. B and E series. This is one basis of the Deputy Collector's finding though it is not relied on by the District Judge. It is a fact that for the suit faslis most of the defendants executed muchilikas undertaking to pay the rents now claimed on their holding "inclusive of tarisu." Whether this condition inserted for the first time, was understood by the raiyats may be doubted; but in any case the agreement to pay can only be enforced against them if it was supported by consideration. No consideration is found or appears on the evidence; and the only consideration that the respondent's vakil can suggest is that plaintiff newly admitted defendants to tenancy of the lands regarding which the dispute arises. But no such suggestion has ever been made in the lower Courts; and it is perfectly clear from the judgment of both

(1) [1916] 40 Mad 640=35 I. C. 329.

Courts as well as the pleadings that the suits have been tried on the understanding that the defendants have held the disputed waste lands in previous faslis although rent was only levied on them when they were actually cultivated with crops. This suggestion of possible consideration (it is no more) cannot therefore be seriously entertained. It follows that the contract to pay contained in the muchilikas is unenforceable. In my opinion the suits as far as they relate to the charge for dry waste, must therefore be dismissed.

I now pass to the second point. The suits have been tried on the footing that the vanpayir crops were raised with the water of the raiyats' own wells (vide issue 2); and we must take this to be the case. It is further admitted that garden rates have always been paid on the lands so cultivated except during the pericd of 12 years from 1878 to 1890 during which the zamindari was under the Court of Wards. During this period the lower dry rate (kurukkam teerva) only was collected; but when the estate was handed over to the Rajah the previous practice was reverted to and remined in force till the suit faslis. Appellants' vakil argues, relying on *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (2) and the cases which follow it, that this long-continued course of payment is of no avail to plaintiff's case that a custom to pay enhanced rent in consequence of the tenant's own improvements is unenforceable and that a contract to do so is only enforceable on proof of consideration which cannot be inferred merely from the long-continuance of payment. That the claim of the landlord cannot be based on custom is not disputed before us but it is argued by respondent's vakil that it has been held in more recent cases that a long-continued payment of higher rent may be a legitimate basis for the inference that there was consideration for the tenant's agreement to pay and that in this case there is actual evidence of consideration. As regards the first point there seems to me to be an irreconcilable difference between the view in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (2), *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa* (3), and *Arunachelum Chetty* v. *Syyad Ahamed Ambalam* (4) on the one hand and *Sri Mahant Prayaga Doss Jee* v. *Venkama Naidu* (5) and a recent unreported case, *Ramachendra Thevan* v. *Velayuthu Nadan*, Second Appeals Nos. 1639 to 1644 of 1916, on the other. I think our proper course is to refer the question to a Full Bench, provided that its decision is essential to the determination of the case. This brings us to the question of the other evidence. The only evidence to which we are referred by respondent is the statement of P. W. 1:

"Originally all the lands wet and dry were on a varam basis afterwards dry lands cultivated with ragi, varagu etc., were charged 5 fanams per kurukkam and crop-war rates were charged for dry Vanapayir crops."

We are asked to interpret this as meaning that the consideration for the tenant's paying the garden rates (5 fanams a kurukkam) was the landlord's abandonment of his right to insist on, or revert to the varam system. I cannot read anything of the kind into it, and neither of the lower Courts appear to have taken it as raising such a plea. Both have based their decisions solely on the long course of payment and I think we are justified in proceeding on the footing that the only evidence of consideration is that deducible from the long course of payment. It is suggested on the other side that the interruptions from 1878 to 1890 stand in the way of the desired inference being drawn. I do not think this contention can be admitted. If it is open to a Court to draw the inference of consideration from a long course of payment it will be for that Court to consider the weight to be attached to an interruption. In the present instance I should be inclined to attach very little. The Court of Wards was probably desirous of bringing the practice into conformity with the system prevailing in raiyatwari tracts where Government on grounds of public policy as well as equity was careful to encourage all raiyats to improve their lands by the certainty of reaping the full benefit of such improvement. The fact that as soon as the estate was handed back to the proprietor the old system was reverted to apparently without opposition would weigh more with

(2) [1905] 28 Mad. 444.

(3) [1910] 35 Mad. 134=8 I. C. 330.
(4) [1915] 31 I. C. 589.
(5) [1918] 44 I. C. 641.

me than the fact of interruption. It seems to me therefore that the decision of this part of the case depends solely on the legitimacy of the inference drawn by the lower Courts from the long course of payments and I would refer the following question for determination by a Full Bench:

"Where it is sought to base liability to pay enhanced rent on an alleged contract to pay can a Court infer consideration for such a contract solely from a long-continued course of payment of the enhanced rent?"

Krishnan, J.—The first point that arises for consideration is whether the raiyats are bound to pay rent on waste land left uncultivated in their holdings during the suit faslis. The District Judge has found that from time immemorial no rent has been charged in respect of waste lands in this zamindari till 1910 nevertheless he held that as the odai and palmyra trees on lands were a source of profit to the raiyats they should pay rent for them also. These lands are said to be of sandy soil cultivable only once in five or ten years and their noncultivation during the suit faslis is not shown to be due to any neglect on the part of the raiyats; admittedly till fasli 1320 no rent was charged for them when uncultivated even though the raiyats were in the habit of enjoying the odai and other trees on them. The custom relied on by the raiyats must be held to be not unreasonable so far as it is not applied to lands left uncultivated through the neglect of the tenants on the authority of the ruling in *Arunachallam Chettiar* v. *Mangalam* (1) where the question was considered at some length. That being so the attempt of the Raja now to compel the tenants to pay rent on them by getting muchilikas from them cannot be supported as it would virtually amount to an enhancement of the rent of the holding and offend against S. 24, Estates Land Act: see *Segu Rowthen* v. *Alagappa Chetty* (6) per Tyabji, J. I therefore agree with my learned brother that the charge for dry waste must be disallowed.

The second point has reference to the charge of kuli teerva for vanpayir or garden crops cultivated with water from the tenant's own wells. The lower Courts have allowed this charge to the landlord on the basis of an implied contract which they have rightly inferred from a long-continued course of payment extending at least to 40 years. It was argued that S. 13, Cl. 3, Estates Land Act, rendered such contracts invalid after the passing of the Act. The question whether the clause applies to contracts before the Act was considered and decided against the appellants' contention by two of the learned Judges in *Venkata Perumal* v. *Ramudu* (7) and I am prepared to follow their view. The only other point argued was that the Court could not imply a contract from long continued payment without independent proof of consideration for it as it was said that consideration could not be presumed from such payment however long it might have continued. The point is a small one, but as shown by my learned brother there is a definite difference of opinion on it in our Court. The proposition was supported in *Arunachelum Chetty* v. *Syyad Ahmad Ambalam* (4), but that ruling was dissented from in *Sri Mahant Prayaga Doss Jee* v. *Venkama Naidu* (5), which was followed in *Ramachendra Thevan* v. *Velayutha Nadan*, Second Appeals Nos. 1639 to 1644 of 1916 (unreported) to which ruling I was a party. The same view was taken in *Venkata Perumal* v. *Ramudu* (7) by both the learned Judges who originally heard the case. The question also arose in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (2) and *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa* (3). In the former the period was too short for any inference being only 18 years. In the latter the judgment says, "consideration may be of the same implied nature as the covenant to pay." As my learned brother proposes that the question should be settled by a reference to the Full Bench I think I must consent to that course.

The question to my mind is not really one of implying consideration as distinguished from implying an agreement, but of attributing a legal origin to a long-continued course of payments. If we are justified in applying the doctrine of legal origin to the case, as I think we are, the result is a valid contract and as all valid contracts must be supported by consideration there will be a presumption of consideration also. If there is evidence to rebut such inference it will

(9) A. I. R. 1914 Mad. 200=22 I. C. 834.

(7) [1915] 39 Mad. 84=27 I. C. 688.

not of course be drawn. But if there is not I do not see any difficulty in implying consideration from the same long course of payments from which the agreement to pay is inferred without any independent evidence for it. As however there is a difference of opinion on the point, it may be settled by the Full Bench.

Opinion.

Wallis, C. J.—There has been some discussion as to the meaning of the words "liability to pay enhanced rent on an alleged contract to pay" in the question referred to us. Whether or not these words are wide enough to cover, not only a fresh contract enhancing the rent already payable under a binding contract, but also an increased demand under an original contract to pay rent at rates varying with the crops, a well-known kind of tenancy recognized in S. 29, Madras Estates Land Act 1908, which may well have become payable under a contract to substitute money rents for the old sharing system of the country, the possibility of there having been a contract of either kind ought in my opinion, to be taken into consideration in deciding whether or not to presume a contract supported by consideration. That an implied contract within the meaning of S. 11, Rent Recovery Act 1865, to pay rent at a certain rate may be inferred from payments for a long series of years was decided in *Venkatagopal* v. *Rangappa* (8) which is referred to with approval at the outset of Lord Sumner's judgment in the recent case of *Raja Jagaveera Rama Venkatesvara Ettappa* v. *Alawarasa Asari* (9), and in the case of raiyats admitted before the passing of the Madras Estates Land Act 1908, such contracts remain in force in the absence of any provisions in the Act interfering with them.

In *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (2) at an earlier stage of the case last mentioned, Subramania Aiyar, J., after pointing out that to presume a contract you must presume consideration as well as agreement, a ruling which is now confirmed by their Lordships' judgment, went on to observe:

> "If in cases like the present, payments at the higher rate had continued to be made for a great many years so as to make it unfair to the landholder, on account of such lapse of time, to be compelled to prove the existence of some consideration when the payment commenced, it may be a question whether the Courts should not presume a lawful origin for the payment, on the analogy of the lost grant principle availed of to support long possession and enjoyment."

In *Venkata Perumal* v. *Ramudu* (7) the learned Judges cited this sentence and answered the question in the affirmative, in my opinion, rightly and the District Judge purported to follow their decision in the case which gave rise to this reference. This ruling in my opinion, is not affected by the recent decision in *Raja Jagaveera Rama Venkatesvara Ettappa* v. *Alawarasa Asari* (9). There are also other decisions to the same effect referred to in the opinion of Kumaraswami Sastri, J., which I have had the advantage of reading. In that case, as observed by Lord Sumner, this Court in the judgment under appeal had ruled that the question was

> "whether a presumption of the fact of an implied contract arose in any particular case on the facts of that case."

Their Lordships accepted this position and also the ruling of this Court that there was not sufficient reason to differ from the District Judge's finding that an agreement might be presumed although in the particular case of Arumugam Chetty, which was treated as typical of the ninety suits, the enhanced rate had only been paid in the year before suit.

> "The question," as Lord Sumner observed, "then came to be that of consideration for the subsequent agreement at garden rate thus implied."

As regards this question, as was repeatedly pointed out, the Zamindar's case throughout

> "was that of a new promise to pay at the rate of 8 fanams for land, which was already held on a binding contract of tenancy at the rate of 4 fanams per kuli"

and not an original contract to pay rent at rates varying with the crops. For such a new contract Lord Sumner agreed with the High Court that there was no consideration in that case; but he went on to say:

> "If the cases had been examined separately if distinctions had been drawn between cases where the higher rate was paid for forty year, and cases where it was only paid once or twice if the possibility of presuming a lost patta at 8 fanams or lost proof of consideration had been mooted, if the origin of these tenancies had been investigated and the terms of the original contracts fully discussed, other questions might possibly have arisen."

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(8) [1884] 7 Mad. 365 (F. B.).
(9) A.I. R. 1918 P. C. 173=48 I. C. 907 (P.C.).

All these questions were ruled out owing to the course the case had taken, but the judgment, in my opinion, sufficiently indicates that they are all matters which ordinarily may and ought to be considered. The question referred to us is, whether a Court can infer consideration for a contract to pay rent at an enhanced rate "solely from a long-continued course of payment of the enhanced rate." My answer is that it may if that is the sole fact it has to go upon ; but that in dealing with the question of presuming the agreement and the consideration therefore that together make up a contract, the Court should not be governed by that fact alone but should come to a conclusion on all the circumstances of the case.

Ayling, J.—As a member of the referring Bench I must endeavour to make two points clear, concerning both of which there has been a certain amount of misapprehension. The first is this. The case was argued before us and our reference was made on the following basis of facts: that in each case the payment of the rate of rent now demanded commenced from the digging of the well and the consequent raising of a more valuable crop by its aid by the tenant, that the well was dug by the tenant at his sole expense and that prior to the digging of the well, rent was being paid at a lower rate than the rate paid thereafter.

It would perhaps have been better if the above facts had been set forth specifically instead of being to some extent implied in my order proposing a reference: but the latter was framed in the light of the arguments addressed to us, and I venture to think it leaves no room for doubt, if carefully perused. That the Vanpayir crops were raised with the water of the raiyats' own wells is distinctly stated ; and I think the use of the term "enhanced rent" in the question is sufficient to imply the existence of a prior state of affairs in which rent was paid at a lower rate. *Fisher* v. *Kamakshi Pillai* (10) is sufficient authority for holding that the imposition of garden assessment where rent had previously been paid at dry rates is an enhancement of rent. The second point relates to the theory of an original contract of tenancy at the time of the commencement of the latter to pay rents varying with the crop raised. This theory in connexion with the cases before us appears to have been first brought forward by Mr. K. Srinivasa Iyengar at the present hearing. It was never set up in the argument before Krishnan, J., and myself ; and I do not find a single word in the judgments of the lower Courts to suggest that it was raised before them. The contract which we were asked to imply was a fresh contract contemporaneous with the digging of the well in each case, whereby the rate of rent previously paid was to be enhanced. This is the kind of contract contemplated in the order of reference precisely similar to that which was considered by the Privy Council in the recent case of *Raja Jagaveera Rama Venkatesvara Ettappa* v. *Alwarasa Asari* (9).

If the question be considered in the light of the above explanation, I think it should be answered in the negative. If we understand "consideration" for a contract to imply something moving from the promisee, I fail to see why a continued course of payment of rent at a particular rate, however far it may go back, should imply consideration, always provided that a previous state of affairs is proved in which a different and lower rate was paid. A long course of payment no doubt indicates that the tenant agreed to pay. But it throws no light on why he agreed to pay at the higher rate. He may have agreed (1) for some consideration moving from the landlord, but he may have agreed (2) because he was afraid resist his landlord's demand or (3) simply because he looked around and saw other tenants in similar circumstances paying rent at the higher rate—in other words because it was customary. Such a custom (of charging extra rent for a tenant's own improvements) is I need hardly say, unenforceable at law both before and after the enactment of the Estates Land Act: vide S. 13, Madras Estates Land Act, S. 11, Rent Recovery Act, in *Fischer* v. *Kamakshi Pillai* (10) and *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (2). It is at the same time extremely widespread a fact which, I think, no one will deny. There may be other explanations besides the three I have indicated above; but simply dealing with these three, I fail to see why No. (1)

(10) [1898] 21 Mad. 136.

should be taken to be the most probable. No (2) is to my mind at least, as likely in view of the conditions which formerly prevailed and prevail even now to some extent, in zamindari tracts. But No. (3) seems to me the most probable of all. It is difficult to exaggerate the extent to which custom or mamool governs the action of the tenantry. It is prominently referred to for example, even in the muchilikas filed in these suits (Exs. B and E series) in which the tenant undertakes: "I shall in accordance with the custom of the zamindari pay," etc.

It may be argued (and I am fully alive to the force of the argument) that, where a known result may be due to more than one cause, the determination of which is the true cause, is a question of fact. But an implied contract may be a question of law: vide Sankaran Nair, J., in *Nagu Chetti* v. *Bhaskara Sethupathi* (11). Where the data are limited and ascertained, it may not be impossible to lay down a rule of law that such data in themselves are not sufficient to justify a particular inference: and where (as here) the cause sought to be inferred is on the data available, the least probable of three possible causes. I think it may be laid down as a rule of law that such an inference is not to be drawn in the absence of other evidence to support it. As a somewhat analogous case I may mention *Raja Parthasarathi Appa Row* v. *Chevendra China Sundara Ramayya* (12), in which this Court laid it down that it was not open to Courts to infer from the mere circumstance that rent has been paid in money for a series of years but at varying rates an agreement to pay money rent; and this dictum was approved by the Privy Council in *Parthasarathi Appa Raw* v. *Chevandra Venkata Narasayya* (13). I fail to see why the legitimacy of the inference in question in the present case is not equally a question of law. It has been suggested by my learned brother Krishnan, J., in consenting to the order of reference that the question is not really one of implying consideration, but of attributing a legal origin to a long-continued course of payment. It is argued that this may be done by the application by analogy of the principle of presumption of a lost grant where long-continued possession and enjoyment of property are proved. The same aspect of the case was suggested by Subramania Aiyar, J., in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (2), though the learned Judge did not examine it. With all respect, I do not think this is the class of cases to which the doctrine of legal origin can be safely applied, if only because we know too much of the antecedent circumstances before the payment originated. The doctrine of legal origin appears to be this: that where all we know of the origin of a certain disputed right is that it has been enjoyed without interference or interruption from time immemorial, it should be presumed to have had a legal origin, if a legal origin was reasonably possible: vide the Lord Chancellor in *Goodman* v. *Mayor of Saltash* (14). Here there is no immemorial enjoyment. We know that the payment of enhanced rent originated with a certain event (the digging of a well) at a date which will in most cases be approximately ascertainable and that before that time a lower rate of rent was paid. There is neither room nor occasion for the application of the doctrine. One party sets up a particular explanation and the question is whether the balance of probability is so much in its favour that it should be presumed to be correct.

How carefully the doctrine of legal origin should be applied even in appropriate cases may be gauged from the judgment of the House of Lords in another case *Gann* v. *Free Fishers of Whitstable*: (15) Their Lordships were ready to presume from a long course of payment of the anchorage fees charged that this payment had been going on from time immemorial. But they declined to infer in the absence of evidence the existence of the facts which alone would make a grant by the Crown legal. The Lord Chancellor said:

> "If the payment be claimed as an ancient anchorage due some facts must be shown which either prove or from which it can be inferred that soil claimed by the respondents was originally within the precincts of a port or harbour or that some service or aid to navigation was rendered to the public in respect of which the alleged grant was made; but nothing of the kind appears and no such case can be presumed or inferred from the mere fact of an immemorial payment."

(11) [1911] 9 I. C. 41.
(12) [1904] 27 Mad. 543.
(13) [1910] 33 Mad. 177=37 I. A. 110=6 I. C. 988 (P. C.)
(14) [1882] 7 A. C. 633=52 L. J. Q. B. 193.
(15) [1865] 11 H. L. C. 192.

Lord Wensleydale expressed the same view.

"I perfectly agree that from the long enjoyment of a privilege in this case of demanding the payment of anchorge as for a period of ninety years from 1775 to 1864, every reasonable presumption may be made that it has continued from time immemorial; but where the privilege requires more than immemorial enjoyment in order to be legal and valid some other facts must exist and there must be some proof of these facts."

For the above reasons I would answer the question referred to us in the negative.

Coutts Trotter, J.—If the word "enhanced" be excised from the question referred to us the answer presents no difficulty and could at once be given in the affirmative. A Court with nothing before it but the fact of a long-continued payment by a tenant would be amply justfied in presuming a legal origin for that payment. But the word "enhanced" clearly carries an implication of a further fact, viz. that the tenant had previously paid a lower rent than that sought to be enforced. And when the referring judgments are looked into other facts emerge; that the rent in each case was enhanced when the tenant by means of water supplies provided by himself at his own expense changed the mode of cultivation and that the date of enhancement of rent for this cause differs in each instance and has not been specifically ascertained with regard to the case of any one of the appellants. In these circumstances the question appears to me to be one entirely of fact to be determined on the balance of probabilities. For a Court to infer consideration for a long-continued course of payment is a totally different thing when that is the sole fact before it and when it is complicated by other considerations as in this case. In the latter event it comes in effect to a balancing of probabilities; and no Court should in my opinion presume consideration passing from the landlord unless it thinks it inherently probable that such consideration could and did exist in fact. It is obvious that the tenants may have paid the enhanced rent merely because they were not strong enough to resist the landlord's demands, or because it had been the custom to pay it without demur and it is not contested here that custom will not do but that a contract supported by consideration moving from the landlord is required. I am conscious that the only answer I am able to give to the question propounded is not likely to be very helpful to the referring Bench: the reason in my opinion is that the question though apparently one of law is when analyzed one of fact. The Court which has to decide the issue involved in this case should obviously pay the greatest attention to the fact of the long-continued payments of the enhanced rents by the tenants: it is no light matter to overset a state of things which has existed without question for a long period of time. But it must not assume that it is in possession of a single fact when in truth it is in possession of many and proceed to a finding on that erroneous assumption. I think that that is what happened in this case and that the error has repeated itself in the terms of the reference.

I do not therefore feel able to say more than this: that if the continued payment of a rent were the sole fact before the Court it would be entitled to presume consideration from it; but that, if as in the present case, there are other facts before the Court, it must refuse to treat that payment as raising a presumption and while giving it such weight as it thinks fit, perhaps a determining weight, treat it merely as a portion of the evidence in the case, subject to be weighed against and perhaps overtopped by the evidence on the other side.

Seshagiri Aiyar, J. — It was stated by Ayling, J., in the course of the hearing of the Full Bench reference that it was not suggested before the Division Bench that there was or might have been an original contract between the landlord and the tenant, to the effect that in case the tenant cultivated garden crops on dry lands from whatever irrigation source it might be, he should pay a different rate of rent, different from what he was bound to pay for raising dry crops. It may be open to the Division Bench, when the case goes back, to permit the landlord to prove such an agreement. They would be guided by the nature of the pleadings, the issues and the opportunities which the parties had to present their case. But apparently until Mr. K. Srinivasa Aiyangar, opened the case in this Court, this suggestion was not put forward. The learned vakil has apparently based his contention upon the statement of Lord

Sumner in *Raja Jagaveera Rama Venkatesvara Ettappa* v. *Alawarasa Asari* (9), Privy Council Appeal No. 86 of 1916, to the following effect at p. 736 (of 1918 *M. W. N.*):

"It never appears to have been suggested that what was meant was a custom of the country, with reference to which the raiyats or their predecessors must be deemed to have contracted when they began to occupy the land in the first instance, or that the zamindar's claim was merely to have the original contract applied to new circumstances according to its terms, and was not a claim to alter those terms, to imply a new contract for that purpose."

No doubt, if that was the contention and if the question referred to us is to be regarded as relating to that argument, I would be prepared to answer the question by saying that the trial Court or the lower appellate Court would not be acting contrary to law or to any usage having the force of law "in inferring consideration for a long continued course of payment." I do not think that *Goodman* v. *Mayor of Saltash* (14), relied on by Mr. K. Srinivasa Aiyangar, would compel us or the Division Bench to draw such an inference otherwise. Lord Selbourne at the bottom of p. 639 says: [(1-82) 7 *A.C*]

"But an open and uninterrupted enjoyment from time immemorial under a claim of right seems to me to be all that is necessary for a presumption that it had such an origin as would establish the right, if a lawful origin was reasonably possible in law."

I understand the Lord Chanceller to have held that the continuance of an arrangement, for however long a period, is not evidence that the contract is lawful or supported by consideration. It would only enable the Court to infer that the parties had come to such an arrangement. The Contract Act speaks of agreements or contracts which are void for "want of consideration," therefore, the element of consideration is not an implication which is involved in the inference which attributes a lawful origin for the prevalent practice. Courts in this country are familiar with cases where notwithstanding long payment, the landlord has not been permitted to enforce these payments. In *Ramasami* v. *Appavu* (16) it was found that the inhabitants of a village contributed to a temple a quantity of grain proportionate to the holding of each raiyat. It was held that this was a voluntary one and had no consideration to make it legally enforceable. I can quote a large number of similar instances in Madras and Calcutta. I refer to them to show that a long course of payments standing by itself, although it may refer the payment to a voluntary agreement between the parties, would not suffice to indicate that the agreement was either lawful, reasonable, or bad consideration. I am willing to agree that the payment for a long period standing by itself is an element to be taken into account in deciding whether there was consideration for it or not. But that is not what we are asked to give our opinion upon. It was explained by Ayling, J., that he and Krishnan, J., used the word enhancement in the question under reference, as it was not disputed before them that there was a prior rate of rent which was enhanced after improvements were effected by the tenant.

In this view, I am unable to hold that a course of payment would lead to the presumption that there was consideration for the increased payment. Given these facts, namely, (a) an existing contract to pay at a particular rate, (b) the raiyat solely and at his expense effected improvements on the land by digging a well in it, (c) and the increased payment commenced after these operations by the raiyat, I can find no circumstances for the operation of any presumption. Consideration, which has an extended significance in the Indian law, presupposes that something moves from the promisee. But when we know that he has not moved his little finger except it be to extend it to receive the additional payment, there is no room for making a presumption. If I understand the judgment of Lord Sumner rightly, that is what the learned Lord has laid down. His Lordship says at p. 737 (of 1918 *M.W.N.*) of the judgment quoted above:

"What is this consideration to be? The mere letting of the land by the landlord will not do, for it was let at the dry rate already, and the raiyat was entitled to continue in occupation at that rate, and no fresh consideration therefore moved from the landlord for the raiyat's assumed promise to pay at the 8 fanam rate. The District Judge appears to have found consideration in the landlord's abstention from exercising his right to resort to the "waram" system, if the raiyat refused to consent to pay at the rate of 8 fanams, but, under the Act, if there was an implied contract for the 4 fanom rate, that contract had to be enforced, and there was no question of resorting to the "waram" system. By

(16) [1889] 12 Mad. 9.

the admissions, such an implied contract did exist."

If the letting was previous, and if there can be no question of going back to waram payment, because that can only be done if there was no express or implied contract, if there was a specified rate before the improvements, and if the raiyat did not cultivate the new crop with the aid of water from the landlord's sources of irrigation, there can be but one answer to the question whether the new rate had consideration. It was faintly suggested, and I find that in some of the cases this is accepted, that the landlord might have given up his claim for rent upon that portion of the holding on which the well was dug, and that forbearance might have been the consideration for the extra payment. In the first place, this is a fact to be proved and not a matter depending upon the course of payments. In the second place, it is not ordinarily the case that the landlord excludes this portion from the payment of the rent. In the third place, even if the landlord consented to the exclusion, it very often will be because instead of a precarious payment from the tenant dependent upon rain supply for the crops, he would have calculated that a good irrigation source would ensure a regular payment of the original rent ; because it has been held that if the tenant is unable to cultivate owing to want of water, he is not ordinarily chargeable with rent, unless there is a contract to the contrary. Moreover, I very respectfully adopt the observation of Lord Sumner that it would not be easy

"to say the least of it to suppose that any raiyat voluntarily agreed to have his rent enhanced whenever his own outlay should have rendered an improved mode of cultivation."

From my experience of the country, what happens is, the tenant, when in a prosperous condition owing to his own exertions, does not grudge to pay the landlord a share of the benefits which he is reaping. This is not the only country in which landlords lay claim to unearned increments, but I am unable to hold from the naked circumstance of payment alone that there must have been consideration from the start. As regards cases, my view is supported by *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (2), *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa* (3) and the recent Privy Council decision. Two earlier decisions of this Court which Lord Sumner quotes without disapproval, in *Venkatagiri Raja* v. *Pitchana* (17) and *Fischer* v. *Kamakshi Pillai* (10), though they were based on custom, lay down the law in the same way. In *Gopalasami Chettiar* v. *Fischer* (18) there is some doubt thrown on *Fischer* v. *Kamakshi Pillai* (10), but having regard to its quotation by the judicial committee, I do not attach much importance to the doubt. In *Suppa Pillai* v. *Nagayasami Thumbichi Naicker* (19) to which the present Chief Justice was a party, it was found that the commutation of waram into money was a sufficient consideration for the new payment. The price of paddy is dependent on current prices and when a fixed payment is agreed to, there is sufficient consideration for what may at first sight appear to be excess rate. I do not think that *Parthasarathi Appa Row* v. *Chevandara Vankata Narasayya* (13) has any bearing on the present question. In the other cases cited, including the one to which I was a party, it was held without discussion that payments during a particular period would or would not be evidence of consideration. These decisions ought not to be regarded as authoritative ponouncements on matters which were not discussed and decided upon.

For all these reasons, my answer is that a course of payment, if nothing else appears, may be an element to be considered in arriving at the conclusion whether there was consideration for it or not; but if there was a fixed payment before and the rate was enhanced solely because the tenant has cultivated new crops by his own exertions, my answer is that there is no room for presuming consideration under such circumstances.

Kumaraswami Sastri, J.—The question referred to the Full Bench is whether the Court can infer consideration solely from a long-continued course of payment of enhanced rent in cases where it is sought to base liability to pay enhanced rent on an alleged contract to pay it. The facts of the case and the findings of both the lower Courts have been set out in the order of reference and it is not necessary for me to repeat them here. I am of opinion that it is open to

(17) [1886] 9 Mad. 27.
(18) [1905] 28 Mad. 328.
(19) [1908] 31 Mad. 19.

the Court from a long and uniform course of payment to presume that there was an agreement to pay which had a lawful origin and was supported by consideration, where it is satisfied that it would be unreasonable from lapse of time or other circumstances to call upon the landlord to give direct evidence as to the terms and circumstances that gave rise to the payment, and when circumstances exist which would render the drawing of the presumption reasonable in law and probable in fact. If all that appears is a long course of payment, I do not see why the presumption should not be drawn. It seems to me that the drawing of the presumption is only an application of the principle that a legal origin should be presumed where there has been a long-continued assertion of a right, if such a legal origin were possible, and that in such cases Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title: see the judgment of Lord Herschell in *Phillips* v. *Halliday* (20). The presumption of a lost grant in cases of long-continued exercise of rights has been recognized in the leading case of *Goodman* v. *Mayor of Saltash* (14) and the principles governing such cases have been laid down in a series of English decisions.

As pointed out by Farwell, J., in *Mercer* v *Denne* (21) not only would Courts be slow to draw an inference of fact which would defeat a right which has been exercised for a very long period unless such an inference is irresistible, but will presume everything that is reasonably possible to presume in favour of such a right. In *Foley's Charity Trustees* v. *Dudley Corporation* (22), where a free farm rent had been paid to certain charity trustees for over 100 years in respect of a piece of land acquired for the widening of a road, it was held that the Court ought to presume that land had been granted to the turnpike trustees as land subject to a perpetual rent charge, even though no conveyance to the trustees was forthcoming. The Master of the Rolls observed that he did not think it necessary to enlarge upon the duty of the Court to make every presumption in a case like that which can be made to support such a long-continued possession. There seems to me to be nothing in the relations between landlords and tenants in this country to render it necessary or equitable to exclude the principle so clearly enunciated in the English cases, though the presumption has to be applied with great care and discrimination in cases of raiyats in zamindaris and a great many circumstances have to be noted and their probability excluded before the Court can proceed to draw the inference that what was being done had its origin in an agreement supported by consideration. For example, Courts have to take into careful consideration the fact that very often a tenant pays enhaced rent demanded not because there are any valid grounds for doing so, but because he sees his neighbours paying it without demur. The ignorance of raiyats of their legal rights and the position and influence of the zamindar have to be taken into account. The difficulties often experienced and the caution required in dealing with cases of claims based on an enhancement of rent are however no ground for not applying a principle which has so much reason and authority to support it.

Enhancement of rent may have been due to various causes and the enhanced rent may have been paid for so long a series of years that it would be unreasonable to expect the landlord to prove the grounds which led to the enhancement and the consideration therefor. When no circumstances exist which would raise a fair inference that rent was enhanced without any consideration moving from the landlord, the ordinary presumption that a person and his predecessor-in-title would not have paid for a series of years, more than what was payable voluntarily and without any legal or binding obligation to do so might well be raised. The balance of authority is in favour of the view that a legal origin may be presumed. In *Venkatagopal* v. *Rangappa* (8) Turner, C. J., observed:

> "Payment of rent in a particular form or at a certain rate for a number of years is not only presumptive evidence of the existence of a contract to pay rent in that form or at that rate for those years, but it is also presumptive evidence that the parties have agreed that it is obligatory on the one party to pay and the other to receive rent in that form and at that rate so long as the relation of landlord and tenant may continue. Either party is of course at liberty to rebut this presumption."

(20) [1891] A. C. 228.
(21) [1904] 2 Ch. 534.
(22) [1910] 1 K.B. 317.

In *Krishna* v. *Venkatasami* (23) it was held, following the above decision, that an implied contract to pay rent at waram rates within the meaning of S. 11, Rent Recovery Act, may be inferred where a landlord accepted rent at waram rates for a number of years. In *Arumugam Chetti* v. *Raja Jagveera Rama Venkateswara Ettappa* (2) Subramania Aiyar, J., in dealing with presumptions to be raised from a long course of payment, observed :

"If in cases like the present payments at the higher rate had continued to be made for a great many years so as to make it unfair to the landholder on account of such lapse of time to be compelled to prove the existence of some consideration when the payment commenced, it may be a question whether the Courts should not presume a lawful origin for the payment on the analogy of the lost grant principle availed of to support long possession and enjoyment. That even in the case of immemorial usage the doctrine of quid pro quo is not altogether to be ignored will be seen from the observations of Lord Chemsford in *Gann* v. *Free Fishers of Whitstable* (15)."

He did not pursue the argument further, as he was of opinion that the facts proved in the case he was dealing with gave no room for any such inference. In *Venkata Perumal* v. *Ramudu* (7) Sadasiva Aiyar and Napier, JJ., held that the Court can presume a lawful origin for a contract to pay enhanced rent where it has been paid for a long time, though they differed as the whether the provisions of S. 13, Estates Land Act, were retrospective. In *Sri Mahant Prayaga Dossjee* v. *Venkama Naidu* (5) Sadasiva Aiyar and Bakewell, JJ., held that an implied contract to pay an enhanced rent may be presumed from continued payment for a number of years. In *Lodd Govind Doss* v. *Chinnappa Naidu* (24) Sadasiva Aiyar and Napier, JJ., followed their decisions in *Venkata Perumal* v. *Ramudu* (7) as to the power of the Court to presume a valid contract to pay enhanced rates.

In *Devanai* v. *Ragunatha Row* (25) Sundara Aiyar and Sadasiva Aiyar, JJ., were inclined to the view that Courts may presume that there was some reason which made it obligatory on the payee to make the payment when periodical payments were made for a long time, though they pointed out that much caution was required in the application of this principle when cesses were concerned.

In Second Appeals Nos. 1639 to 1644 of 1916, Spencer and Krishnan, JJ., were of opinion that payments for a sufficiently long period would entitle the Court to raise a presumption

" that they are based on an agreement between the parties and that there must have been some consideration for that agreement."

A contrary view was taken in *Arunachelum Chetty* v. *Syyad Ahamed Ambalam* (4), where Ayling and Phillips, JJ., were of opinion that though an agreement to pay enhanced rent may be inferred from payment for a long series of years, yet independent proof of consideration was necessary to render it a binding contract. With all respect I fail to see why, if circumstances exist for drawing the presumption that there was an agreement, they should not equally be used to draw a presumption that there was consideration. As observed by Ayling, J., in *Arumugam Chetty* v. *Raja Jagaveera Rama Venkteswara Ettapa* (3) consideration may be of the same implied nature as the contract to pay. In *Sri Mahant Prayaga Dossjee* v. *Venkama Naidu* (5) Sadasiva Aiyar and Bakewell, JJ., dissented from the decision in *Arunachleum Chetty* v. *Syyad Ahammed Ambalam* (4) and I entirely agree with the reasons given by them.

In *Narasimha Naidu* v. *Ramasami* (26) and *Raja Parthasarathi Appa Row* v. *Chevendra China Sundara Ramayya* (12) it was assumed that it was open to the Courts to draw the inference that there was a valid and enforceable agreement from long course of payment, though on the facts of those cases it was held that period was not long enough. It was argued by the vakil for the appellant that in cases of permanent tenancy there is an express contract at the time of letting and that there consequently arises no room for presuming any implied contrct with a fresh consideration; and great reliance has been placed on the decisions of their Lordships of the Privy Council in *Raja Jagaveera Rama Venkatesvara Ettappa* v. *Alawarasa Asari* (9). I do not think the decision is authority for this proposition. All that was decided was that the expression "implied contract" was an English term of art

(23) [1885] 8 Mad. 164.
(24) [1915] 27 I. C. 869.
(25) [1913] 18 I. C. 298.
(26) [1891] 14 Mad. 44.

" involving the legal incident of some consideration moving from the landlord as that incident is understood in English law."

On the facts found in the cases before their Lordships (namely, that enhanced rent was claimed solely because tenants dug wells at their own expense) it was held that there was no room for presuming any implied contract. The question as to the presumption of a lost patta or lost proof of consideration was considered and the observations of Lord Sumner at the end of the judgment leave the question open. I am unable to see why a legal origin should not be presumed in cases where rent has at some remote period been enhanced. Enhancement of rents in the case of wet or garden crops raised on dry land may be due to various causes, some of which would not necessarily negative the idea of fresh consideration and some of which would ex hypothesi do so. Where it is possible to infer a legal origin from a long course of payment, I do not see why the necessary presumption should not be made. Like all presumptions their strength or weakness will depend upon the facts of the case to which they are to be applied. There may be, as pointed out in *Venkatagiri Raja* v. *Pitchana* (17), cases where the land has not been classified as wet or dry or garden, but the rent varied with the crops and where the fiscal accounts were prepared on this principle. In such cases the landlord will be entitled to enhance the rent if garden crops are raised, irrespective of whether the crops are raised with water from wells dug by the tenant or not.

There may be cases where the tenant dug wells or tanks with the help of the landlord and where the landlord gave poramboke lands for the purpose. In such cases there is nothing to prevent the parties from agreeing to pay enhanced rent: see *Lodd Govind Das* v. *Chinnappa Naidu* (24). There may be cases where rent at a certain rate appears to have been paid at some remote period and enhanced subsequently, the reason not being apparent on the evidence. In such cases there is nothing to militate against the presumption of lawful origin for the enhancement being drawn. On the other hand where there is nothing to show that there was any agreement that the rates should vary with the crops and where all the facts point to a fixed rent having been agreed upon at the time of the letting, it is clear that an enhancement cannot be claimed merely because the tenant raised garden crops with the aid of water from wells dug at his expense or water which was not the landlord's. There is obviously no consideration in such cases and no room for the drawing of any presumption because of certain known facts which exclude the possibility of any consideration: see *Venkatagiri Raja* v. *Pitchana* (17), *Raja Venkatanarasimha* v. *Venkayya* (27), *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa* (3), *Sitharamrazu Lingarazu* v. *Raja Venkatadri Appa Row* (28), *Devi Bhuknoji Kasidoss Subbaraya* v. *Allamaduga Narayana Reddi* (29) and *Mallikarjuna Prasada* v. *Vemulappalli Subbaya* (30).

The cases above referred to which decide that no consideration can be inferred merely by payment for a series of years where the only ground shown is the improvement of the land at the tenant's sole expense, do not militate against the general proposition that the Court can infer a lawful origin where a long course of conduct is proved. They only illustrate the limitation that such an inference cannot be drawn where the facts proved show that there cannot be any consideration for the enhanced payment. The rule as to the presumption of a legal origin from long course of conduct is always subject to the inference being legally possible. As the reference to us is general and is not limited to enhancement of rent owing to any particular reason, I would answer the reference as proposed by me in the opening of my judgment.

S.N /R.K. *Reference answered.*

(27) A. I. R. 1915 Mad. 321=25 I. C. 57.
(28) [1913] 21 I. C. 36.
(29) [1915] 2- I. C 492.
(30) [1911] 36 Mad. 4=10 I. C. 68.

A. I. R. 1919 Madras 409

PHILLIPS AND NAPIER, JJ.

Komuru Appalaswami and *others*—Plaintiffs—Appellants.

v.

Palli Narayanaswamy and *others*—Defendants—Respondents.

Second Appeal No. 1545 of 1917, Decided on 30th August 1918, from decree of Temporary Sub-Judge, Vizagapatam, in Appeal Suit No. 152 of 1915.

Limitation Act (1908), S. 12—Copy of decree applied for before summer vacation—Copy ready during vacation—Delivery taken on opening day—Period between date copy was ready and date of delivery cannot be excluded.

Where a party applied for copy of a decree before the long vacation of the Court and in accordance with a notification that arrangements would be made for the granting of copies during the vacation the copy was ready during the vacation, but delivery was taken only on the reopening day.

Held: that in computing the period of limitation for appeal, the party was not entitled to a deduction of the period between the date when the copy was ready and the date on which it was delivered under S. 12: 5 *Mad.* 189, *Foll.*

[P 410 C 1]

R. Narasimham for *B. N. Sarma*—for Appellants.

B. Narasimha Rao—for Respondents.

Judgment.—This second appeal was filed 108 days (excluding the time required for getting copies) after the date of the lower appellate Court's decree, and the delay of 18 days in presentation is explained by the intervention of the annual vacation. The copy was ready on 21st May 1917 during the vacation, but delivery was not taken until 25th June 1917, the reopening day. The question is whether the period from 21st May 1917 to 25th June 1917 can be considered as part of the period requisite for obtaining a copy within the meaning of S. 12, Lim. Act. Ch. 15, R. 12 of the Rules and Orders for Civil Courts, lays down that arrangements shall be made by Courts for granting copies of judgments decrees, etc., during the vacation provided that applications for such copies shall have been made before the adjournment; and the attention of the Courts was drawn to this rule by a Circular of this Court Dis. No. 1081, dated 2nd December 1902. In accordance with this rule a notification to the above effect was published in the Gazette. The appellant had therefore notice that arrangements would be made for granting the copy he had applied for. Had he exercised due diligence he could have obtained the copy on 21st May 1917, and we are therefore of opinion that the time from 21st May 1917 to 25th June 1917 cannot be included in the period requisite for obtaining copy. We are supported in this view by the Full Bench ruling in *Nachiyappa Mudali* v. *Ayyasami Ayyar* (1), which held that when an appeal was presented on the reopening day after the vacation, it was out of time because it could have been presented on a previous day on which the offices of the Court were open, but on which the Judge was not sitting, notice of which had been given in the Gazette. We have been referred to some decisions which deal with the exclusion of the Christmas holidays, but they are not applicable to the present case, for no notification is issued with regard to the Christmas holidays. It is then contended that the delay should be excused under S. 5, Lim. Act, but as appellant had his copy on 25th June 1917 and did not file his appeal until 29th Augnst 1917, we cannot say that he had sufficient cause for not preferring the appeal in time. The reason given by him that he thought the period from 21st May 1917 to 25th June 1917 would be excluded from calculation is quite inadequate to account for the subsequent period of nearly seven weeks during which no action was taken. The second appeal is out of time and is dismissed with costs.

S N./R.K. *Appeal dismissed.*

1) [1882] 5 Mad. 189 (F. B.).

*A. I. R. 1919 Madras 410
Full Bench.

WALLIS, C. J., AYLING AND KUMARASWAMI SASTRI, JJ.

Padmanabha Hebbara In re—Accused—Petitioner.

Civil Revn. Petn. No. 150 of 1919, Decided on 17th February 1919, against the order of Dist. Munsif, Kundapur.

***Criminal P. C. (1890), Ss. 195 and 476—Order for prosecution under S. 476 after termination of proceedings in which offence was committed is illegal—Per *Kumaraswami Sastri, J.*—Court can under S. 195 direct Officer of Court to file complaint.**

Where the commission of an offence is discovered by a Court after the judicial proceeding in the course of which the offence was committed has terminated but at a time when the facts are fresh in the mind of the Judge, he cannot pass an order for the prosecution of the offender under S. 476 : 1 *I. C.* 597 (F. B.), *Foll.*

Per *Kumaraswami Sastri, J.*—It is open to the Court, in such a case, to act under S. 195 and direct an officer of the Court to file a complaint.

[P 411 C 2]

G. Annaji Row—for Petitioner.

E. R. Osborne—for the Crown.

Order of Reference

Phillips and Napier, JJ.—This is a petition to revise the order of the District Munsif of Kundapur, directing the prosecution of the petitioner for offences under Ss. 193, 463, 466, 468 and 471, I. P. C. The order was made under S. 476, Crimi-

nal P. C. The offences are alleged to have been committed with reference to a decree used as genuine in Small Cause Execution Petition No. 714 of 1917 before the District Munsif, which decree is found by the District Munsif in this order to be a forgery. Those proceedings had terminated on 11th September 1917 in an order on the footing that the decree was genuine. The District Munsif states in the order under review that "within a few days of the closing of the above execution proceedings" the fact of the forgery of the decree was discoverd and the present proceedings were instituted by him to ascertain if there was a prima facie case against the persons concerned. In the result he passed this order. It is argued before us that the proceedings having terminated, he had no jurisdiction to pass the order. It has been finally decided by a Full Bench of this Court in *Aiyakannu Pillai* v. *Emperor* (1) that these orders must be passed in the course of the judicial proceeding or so shortly thereafter as to make it the continuation of the same proceeding, and if this proposition was intended by the Full Bench to be of universal application, the petitioner's contention must succeed. But we have doubts whether this view is correct. The reference to Full Bench in *Aiyakannu Pillai* v. *Emperor* (1) was whether, "on the facts stated before us, the order was made without jurisdiction." The facts were, vide p. 50 (of *I. L. R.* 32 *Mad*,) that judgment was delivered on 8th October, that the District Judge acting suo moto issued notice on 29th October and that the record gave no reason for his not taking action between 8th October and 29th October. The offence came to his notice during the proceedings terminating on 8th October. In the present case no offence was brought to the notice of the District Munsif until after the proceedings terminated and the reason for not taking action before is, therefore, apparent. This state of facts was not, therefore, before the Full Bench and the actual ruling does not in terms apply, though the dicta of the learned Judges are wide enough to cover this case. The possibility of a case of necessary delay seems to have been suggested by the (present) learned Chief Justice in *Rahimadulla Sahib* v *Emperor* (2), but he is there dealing with English practice: and the actual facts of this case were imagined by Miller, J, in *Aiyakannu Pillai* v. *Emperor* (1) and he was of opinion that an order might be passed, but as he was the dissentient Judge his opinion cannot be treated as authoritative. The principle underlying the Full Bench decision not applying, we see no reason why an order under S. 476, Criminal P. C. should not be passed in these circumstances, but in view of the language of some of the Judges on the scope of the section, we decide to refer to a Full Bench the following question:

"Where the commission of an offence has been discovered by a Court after the judicial proceedings have terminated but at a time when the facts were fresh in the mind of the Judge, can he pass an order under S. 476, Criminal P. C.?"

(1) [1909] 32 Mad. 49=1 I. C. 597 (F. B.).
(2) [1908] 31 Mad. 140 (F. B.).

Opinion.

Wallis, C. J.—In this case the facts first came to the notice of the Court after the judicial proceedings before it had terminated, but that I think is not enough to take the case out of the authority of the Full Bench decision of five Judges in *Aiyakannu Pillai* v. *Emperor* (1) which confirmed the earlier ruling in *Rahimadulla Sahib* v. *Emperor* (2). I would answer the question in the negative.

Ayling, J.—If the matter were res integra, I should concur in the view expressed by Miller, J., in *Rahimadulla Sahib* v. *Emperor* (2) and *Aiyakannu Pillai* v. *Emperor* (1). But, sitting as a member of the present Bench, I feel bound by the opinion of the Full Bench of five Judges in the last named case. I do not think the order in the present case can be treated as a valid one within the spirit of these rulings. I therefore, agree to the answer proposed

Kumaraswami Sastri, J.—I agree with my Lord and would add that in cases like the present it is open to the Court to act under S. 195, Criminal P. C. and direct an officer to file a complaint.

S.N./R.K. *Answered in the negative.*

A. I. R. 1919 Madras 411

WALLIS, C. J. AND SPENCER, J.

P. L. T. L. Lakhshumanan Chetty — Defendant—Appellant.

v.

Subramanian Chetty—Plaintiff—Respondent.

Civil Appeal No. 184 of 1917, Decided on 28th January 1918,

(a) Contract Act (9 of 1872), S. 182—Person contracting to purchase property for third party on specified date is not agent and is personally liable.

A person who contracts to purchase property for another and undertakes to pay a definite sum of money in case of default on the specified date is not an agent of the latter and is himself personally liable for the breach. [P 412 C 1]

(b) Contract Act (9 of 1872), S. 73 — Damages fixed by the parties — Measure of damages is damages really sustained—Court is not bound to enforce sum so fixed.

In the case of a breach of contract the Court is not bound to enforce the sum fixed by the parties as damages, but will award the damages really sustained by the party complaining of the breach. The measure of damages is the difference between the contract price and the value of the property at the date when the contract ought to have been performed. [P 412 C 2]

A. Krishnaswami Aiyar — for Appellant.

C. V. Ananthakrishna Aiyar — for Respondent.

Judgment.—In this case the defendant had been held liable on a contract, Ex. A, which he made with the plaintiff, to purchase a house for T. P. N. P. Pallaniappa Chetty. Ex. 1 is the counterpart executed by the plaintiff, in which he says that the defendant has agreed to purchase this house for T. P. N. P. Palaniappa Chetty and undertakes to pay Rs. 5,000, in case he, the vendor, makes default, as damages. By Ex. A the defendant binds himself before the 30th of this month to take a conveyance of the house in favour of Palaniappa Chetty for Rs. 23,950, and to pay it through a Madras hundi and that "in case of default by me before the said date, I shall pay you Rs. 5,000." Now on the face of it, that is a contract by the defendant on his own behalf. He does not say that he is making this contract on behalf of Palaniappa Chetty, or that Palaniappa Chetty is to be liable for damages. In a case of this sort, the presumption is that the party is personally liable, unless there are some grounds for showing that he was contracting as agent. The story of the defendant that this was a sham transaction got up to enable the plaintiff to sell the house to other purchasers for a higher price has been rejected rightly, we think, by the Subordinate Judge

The real question in the case is from the proper amount of damages, the defendant bound himself to pay Rs. 5 000. But under the Contract Act, we are entitled to award damages really sustained. Now the house was to be handed over on 23rd May 1915 and the defendant was to pay for it through a Madras hundi. A very recent case which has been cited before us in *Daniel, In re* (1) shows that the measure of damages is the difference between the contract price and the value of the house at the date when the contract ought to have been performed, which, in this case, may be taken to be 23rd May 1915 : see also Illus. (c), S. 73, Contract Act. That is a matter to be determined upon all the evidence which there may be before the Court. In this case the plaintiff might have brought his suit at once and in such case there would have been no question of what happened on the subsequent sale ten months later, on which Mr. Ananthakrishna Aiyar for the plaintiff has relied. The plaintiff would, in that case, have had to find some other evidence to show what other damages he sustained. But he has had no other evidence practically to put before us, as to the real value of the house before 23rd May, except the evidence of the price which the house fetched on the resale in January. It is perfectly clear law that the price which is fetched is evidence of damages. There is no other evidence and we must accept that evidence.

We must modify the decree by reducing the damages from Rs. 5,000 to Rupees 1,850 with interest at 6 per cent from the date of plaint. The parties will pay and receive proportionate costs of this appeal.

S.N./R.K. *Decree modified.*

(1) [1917] 2 Ch. 405.

A. I. R. 1919 Madras 412

Full Bench

ABDUR RAHIM, AYLING, OLDFIELD, SADASIVA AIYAR AND COUTTS TROTTER, JJ.

Chinnappan Chetty—Plaintiff—Appellant.

v.

Secy. of State — Defendant—Respondent.

Second Appeal No. 252 of 1916, Decided on 7th November 1918, against decree of Tempy. Sub-Judge, Madura, in Appeal Suit No. 11 of 1915.

(a) Madras Irrigation Cess Act (1865), S. 1 —"River or stream belonging to Government"—Meaning of, explained—Ownership

was intended to depend upon ownership of bed and banks.

Where both the bed and banks of a river do not belong to Government at a place where water is taken by a person for purposes of irrigation, the river cannot be said to "belong" to Government within the meaning of S. 1. For the purposes of the Act the ownership of the river or stream was intended to depend on the ownership of the bed and banks. [P 415 C 2]

(b) Madras Land Encroachment Act (1905), S. 2—Existing private rights are not infringed—Government also does not get rights higher than private proprietor.

Section 2, Madras Land Encroachment Act, was not intended to confiscate existing private rights, nor does it confer on Government a right of property in the water of a natural stream higher than, and different in, its nature from what the law recognizes as incidental to private proprietorship: (*Authorities reviewed.*)

Per *Abdur Rahim, J.*—S. 2, Madras Land Encroachment Act, cannot properly be said to have made any change in the ordinary rules regarding burden of proof. There is nothing in it which necessarily implies that whenever the Government lays claim to any land or water it lies upon the party against whom the claim is made to show that the property belongs to him quite apart from other considerations regulating the onus of proof as dealt with in the Evidence Act.

When the legislature says in S. 2, Madras Land Encroachment Act that all flowing water is the property of Government, save in so far as it is the property of a zamindar or any other landowner, it means only to declare with respect to flowing water passing through the lands of Government as well as of a zamindar that the Government has in them rights of the same kind as the zamindar himself as a riparian owner enjoys under the ordinary law, and not rights of a higher character materially impairing if not altogether superseding the landowner's rights. [P 420 C 1]

Per *Ayling, J.*—The owner of the bed and banks of a river is also the owner (though in a special and qualified sense) of the flowing water so long as it passes between those banks and over that bed; and the term "property" may not be inaptly applied to such ownership. [P 421 C 1]

Per *Sadasiva Aiyar, J.*—By S. 2, Madras Land Encroachment Act, the legislature intended that when a dispute arises between Government and a private person, the burden should rest on the latter of proving that a particular "water" belongs to him, though proof by him (or admission by Government) of present use and possession will shift the burden on to Government. [P 422 C 1]

Per *Coutts-Trotter, J.*—The Madras Land Encroachment Act, when it speaks of water "belonging" to any person, uses that term in the lax but commonly understood sense of water over which rights were exercised by virtue of ownership of bed or banks, for flowing water will only go to Government as a bonum vacans when the bank or banks are bona vacantia, and it will become their property only in the sense in which it is correlated to their property in the banks or bed. [P 424 C 1]

K. S. Ramabhadra Aiyar and *T. R. Venkatarama Sastri*—for Appellant.

Government Pleader—for Respondent.

Order of Reference.

Wallis, C. J.—The meaning of the words "river or stream belonging to the Government" in Madras Act 7 of 1865 has given rise to much diversity of opinion in recent cases in this Court: *Kandukuri Mahalakshmamma Garu* v. *Secy. of State* (1), *Secy. of State* v. *Ambalavana Pandarasannadhi* (2), *Secy. of State* v. *Kannepalli Janakiramayya* (3), *Zamindar of Kapileswarapuram* v. *Secy. of State* (4), *Kandalam Rajagopalacharyulu* v. *Secy. of State* (5), *Secy. of State* v. *Simhadri Jaghopathiraju* (6), *Secy. of State* v. *Kannepalli Janakiramayya* (7), *Secy. of State* v. *Maharaja of Bobbili* (8) and *Secy. of State* v. *Ambalavana Pandara Sannadhi* (9). In the still more recent case in *Kandukuri Balasurya Prasadha Row* v. *Secy. of State* (10), Lord Parker, delivering the judgment of the Judicial Committee, considered it unnecessary to decide the point, as in their Lordships' opinion the appellants were entitled to succeed on either view. The case was accordingly dealt with at p. 181 (of 44 *I. A.*) on the assumption that the river in question belonged to Government, and at p. 183 (of 44 *I. A.*) on the assumption that it did not. There is however some discussion in an earlier passage of the judgment at p. 173 (of 44 *I. A.*)

"In the next place, it is by no means easy to say what is meant by a river or stream 'belonging to the Government.' The same expression in an Act of the United Kingdom would probably connote a Government ownership of the bed or the banks of the river; but it is quite possible that the law of the Madras Presidency recognizes some proprietary right on the part of Government in the water flowing in rivers and streams. The law of the Madras Presidency as to rivers and streams certainly differs in some respects from English law: *Robert Fischer* v. *Secy. of State* (11). Further the Madras Act No. 3 of 1905 ap-

(1) [1910] 34 Mad. 295=8 I. C. 67.
(2) [1910] 34 Mad. 366=8 I. C. 357.
(3) A. I. R. 1914 Mad. 534=37 Mad. 322=18 I. C. 770.
(4) A. I. R. 1915 Mad. 619=37 Mad. 355(n)=26 I. C. 590.
(5) A. I. R. 1914 Mad. 174=38 Mad. 997=22 I. C. 107.
(6) [1915] 39 Mad. 67=26 I. C. 692.
(7) [1915] 30 I. C. 609.
(8) [1916] 32 I. C. 279.
(9) [1917] 42 I. C. 697.
(10) A. I. R. 1917 P. C. 42=41 I. C. 98=40 Mad. 886=44 I. A. 166 (P. C.).
(11) [1909] 32 Mad. 141=2 I. C. 325.

pears to enact that (inter alia) all standing and flowing water not the property of private individuals is the property of Government, but subject to the natural and easement rights of other landholders. If this section be relied on it is a nice problem whether a riparian owner, who is exercising his natural or prescriptive right of taking water from a natural stream for purposes of irrigation, is taking water from a stream belonging to the Government within the meaning of the Cess Act. If he is, the natural and prescriptive rights of riparian owners are seriously diminished by the Act, and, where the Government have not expended money in improving the natural stream, apparently without any sort of quid pro quo."

In view of the great diversity of views expressed in this Court and in the light of the above observations, it appears desirable that there should be a binding decision of this Court as to the question which has again arisen in the present case. What we have to see is which of these meanings is more in conformity with the intention of the legislature which passed the Act of 1865, and this intention is to be gathered from a careful consideration of the provisions of the Act and of the preamble. As has often been said, the preamble is, as it were a key to the understanding of the Act and

"may legitimately be consulted for the purpose of solving any ambiguity, or of fixing the meaning of words which may have more than one, or of keeping the effect of the Act within its real scope, whenever the enacting part of it is in any of these respects open to doubt: Maxwell, 5th Edn. p. 69."

At the same time,

"the preamble cannot restrict or extend the enacting part, when the language and the object and scope of the Act are not open to doubt. It is not unusual to find that the enacting part is not exactly co-extensive with the preamble. In many Acts of Parliament, although a particular mischief is recited, the legislative provisions extend beyond it: Maxwell at pp. 73 and 74."

In Act 7 of 1865 the enactment goes beyond the preamble, as has often been observed most recently in Lord Parker's judgment. If now the reason for this can be ascertained, it will help to define more clearly the scope and purport of the Act and so throw light on the present question. The explanation is, I think to be found in the fact of revenue history which is referred to in the judgments of Sankaran Nair, J., especially in Second Appeal No. 573 of 1911 [*Zamindar of Kapileswarapuram* v. *Secy. of State* (4)], that at the time the Act was passed and for reasons which do not concern us, the Secretary of State was pressing on the Madras Government the policy of showing the water-rate on irrigated land separately from and as additional to the assessment fixed on the land as dry.

If now we read the Act as originally passed, in the light of this knowledge, it is apparent that it was drafted in deference to the policy so as to give effect or enable effect to be given to it, and that this is the explanation of the fact that the body of the enactment goes beyond the preamble and enables the statutory rate to be imposed irrespective of the question whether or not the water is from a source on which public expenditure has been incurred and also irrespective of the question whether the irrigation is old or new. Though this object is not mentioned in the preamble, it is brought out in the title, which is

"an Act to enable the Government to levy a separate cess for the use of water supplied for irrigation in certain cases."

Section 1, which is applicable to raiyatwari holdings, enabled Government

"to levy at pleasure, on the land so irrigated, a separate cess for the use of the water which cess shall be additional to any land assessments that may be leviable on the said land as unirrigated or punja"

in accordance with the policy then favoured by the Secretary of State, and declared that these provisions should extend to permanently settled estates to the extent to which they were not entitled by virtue of engagements with Government to irrigation free of separate charge. It is now settled by their Lordships' decision after much divergence of opinion in this Court that the owners of these estates are entitled to make the fullest use of the facilities for irrigation which existed at the date of their grants without incurring liability to pay water-cess under the Act.

We have thus what appears to me to be an adequate explanation of the fact that the Act goes beyond the preamble by providing for the imposition of the statutory separate cess, not only where expenditure from Government funds has been incurred in the construction and improvement of works of irrigation and drainage, the case contemplated in the preamble, but also in the terms of

"whenever water is supplied or used for the purposes of irrigation from any river, stream . . . . . belonging to Government."

It may be said, and truly, that in raiyatwari tracts the system of charging separately a dry rate of assessment and a water rate might have been introduced by

Government without any fresh legislation, and that in the case of permanently settled estates it has been introduced by the Act in the very limited class of cases in which the statutory cess is payable in such estates. Whether for the purpose of complying with the policy of the Secretary of State, or for whatever other reason the legislature proceeded in this manner, we are only concerned with it in so far as it throws light on the meaning with which the words "belonging to Government" were used in the Act. As already pointed out, this much seems clear: that they were inserted to make it plain that the cess was to be imposed in cases not coming within the preamble.

In an Act of the United Kingdom Lord Parker says they would probably connote a Government ownership of the bed or the banks of the river, that is to say that is the meaning they would have prima facie in an Act drafted by an English lawyer; and it must be remembered that this Act, as appears from the papers referred to in some of the earlier cases, was drafted by the Government Pleader who was then an English barrister. Now if for a monent we apply that meaning to the Act, we find that in raiyatwari tracts it empowers Government to levy the separate water-cess in all cases where the banks and bed, or at any rate one bank and half the bed, of the river or stream, are owned by Government. This comprises nearly the whole irrigated area in raiyatwari tracts. There must, of course, be some cases in which raiyatwari tracts are irrigated under easement rights from rivers of which Government has not the ownership of the bed and banks; but such cases must be comparatively rare, and as already pointed out the desired separation into dry rate and water rate could be effected as regards them, if so desired, without legislative authority. As regards permanently settled estates also this meaning appears adequate, because water taken pursuant to natural or easement rights existing at the date of the grant from rivers and streams the banks and beds of which are in permanently settled estates, is not chargeable under the Act, unless the supply has been improved at the public expense—a case expressly provided for in the Act; and cases of water being taken in excess of such rights are too rare to require legislation of this character and could be dealt with under the ordinary law by restraining the user. Not only then is the sense that in which the words would prima facie be used by an English lawyer, but it is found to correspond with the scope of the Act, and it has also the great advantage over the rival meaning of giving some effect to the words "belonging to", which must have been intended by the framers of the Act to have some effect and not to be purely otiose or even misleading as applied to rivers and streams. If all streams and rivers in the Presidency belong to Government, the words "belonging to" would not have been made applicable to rivers and streams and the section would have read

"whenever water is supplied or used for purposes of irrigation from any river or stream, or from any channel, tank, or work belonging to or constructed by Government."

This goes to show that these words were applied to rivers and streams because the framers of the Act proceeded on the view which English lawyers might be presumed to take that the ownership of the river at any point depended on the ownership of the banks and bed. On the whole, as a result of the further consideration which I have now given to the subject, I am inclined to think that for the purposes of Act 7 of 1865 the ownership of the river or stream was intended to depend on the ownership of the bed and banks. It is, as I have said, desirable that there should be a binding decision on this question, and also supposing this to be so, on the further question as to the effect, if any, of Act 3 of 1905. The somewhat exceptional circumstances of the present second appeal are that there is a finding that water has been taken for irrigation in excess of natural and easement rights from a river at a place where the banks and bed belong to the zamindar. The river is one which rises in hills belonging to Government and passes through raiyatwari tracts before entering the zamindari. I would therefore refer to a Full Bench the question, is the river in question a iver belonging to Government within the meaning of Act 7 of 1865 ?

Oldfield, J.—I agree to the reference proposed. But I desire to say that in doing so I commit myself to no opinion as to the legitimacy of resort to the matter referred to in the judgments in

Zamindar of Kapileswarapuram v. *Secy. of State* (1) as a ground of decision or as to its comprehensive character or its effect.

Opinion

Abdur Rahim, J.—The question referred to us is whether a river called Marudarnathi, which rising in the hills belonging to the Government flows through raiyatwari tracts, then through the Kannivadi Zamindari and again through a Government village, can be said to be a river belonging to the Government within the meaning of S. 1, Madras Irrigation Cess Act 7 of 1865, as amended by Act 5 of 1900. The question arose in connexion with the right claimed by a pattadar of the Kannivadi Zamindari to take water from this river at a place within the limits of the zamindari for irrigating zamindari lands, without being liable to a separate cass levied under the above-mentioned Act. This Act enables the Government to levy a separate cess for

"water supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to or constructed by Government,"

subject to certain provisos with which we are not concerned in this reference. It does not however purport to indicate the class of rivers or streams which were within the contemplation of the legislature, but there is another Act of the Madras Legislature, the Madras Land Encroachment Act 3 of 1905 on which considerable reliance has been placed in support of the contentions on behalf of the Secretary of State. It is enacted by its Section 2 (1):

"All public roads, streets, lanes and paths, the bridges, ditches dykes and fences on or beside the same the bed of the sea and of harbours and creeks below high-water mark, and of rivers, streams, nalas, lakes and tanks, and all canals and water-courses, and all standing and flowing water and all lands, wherever situated, save in so far as the same are the property:

(a) of any zamindari, poligar, mittadar, jagirdar, shrotriemdar or inamdar or any person claiming through or holding under any of them; or (b) of any person paying shist, kattubadi, jodi, porruppu or quit-rent to any of the aforesaid persons; or (c) of any person holding under raiyatwari tenure including that of a jenmi in Malabar, or of a wargdar in South Kanara, or in any way subject to the payment of land revenue direct to Government; or (d) of any other registered holder of land in proprietary right; or (e) of any other person holding land under grant from Government otherwise than by way of license; and as to lands, save also in so far as they are temple site or owned as house-site or backyard, are and are hereby declared to be the property of Government except as may be otherwise provided by any law for the time being in force, subject always to all rights of way and other public rights and to the natural and easement rights of other landowners, and to all customary rights legally subsisting."

Within the last eight years these enactments have been the subject of discussion in a number of cases, but the decisions are conflicting and do not supply a clear preponderance of opinion in support of one view of the law rather than another. In the first *Urlam* case, *Kandukuri Mahalakshmamma Garu* v. *Secy. of State* (1), Miller and Munro, JJ., ruled on the strength mainly of S. 2, Act 3 of 1905, that the water of a stream or river belongs to the Government even though its bed or banks may belong to the zamindar and that the zamindar irrigating his land with such water is chargeable with a separate cess. Generally speaking this interpretation has been upheld by Oldfield, J, in *Secy. of State* v. *Kannepalli Janakiramayya* (7) and was accepted apparently without further discussion by Arnold White, C. J., and Ayling, J., in *Secy. of State* v. *Ambalavana Pandarasannadhi* (2). On the other hand Sankaran Nair, J., in *Secy. of State* v. *Kannepalli Janakiramayya* (3), Sadasiva Aiyar and Bakewell, JJ., in *Secy. of State* v. *Kannepalli Janakiramayya* (7), the learned Chief Justice and Seshagiri Aiyar, J., in *Secy. of State* v. *Maharaja of Bobbili* (8) and myself in *Secy. of State* v. *Ambalavana Pandara Sannadhi* (9) have expressed a contrary opinion. The judgment of Miller and Munro, JJ., in the first *Urlam* case (1) has since been reversed by the Judicial Committee of the Privy Council [see *Kandukuri Balasurya Prasadha Row* v. *Secy. of State* (10).] their Lordships holding that the Urlam zamindar concerned in that case was protected by an engagement within the meaning of the proviso to S. 1, Act 7 of 1865. But Lord Parker who delivered the Board's judgment, while indicating in the passage cited in the order of reference the problems that might arise upon the construction of the two statutes as to the rights of the Government in the rivers and streams of this Presidency, refrained from expressing any opinion on the subject.

In construing the words "river or stream belonging to Government" in Act 7 of 1865 it would be quite legitimate to take into consideration the state of the law in this connexion as it existed at the

time of the passing of the Act, and we are also bound to give effect to any later statutory enactment by which the legislature may have defined the river or stream which belongs to Government. As regards the first, the learned Government Pleader at one part of his argument contended that S. 1, Act 3 of 1905, was intended to clear away any doubt that might have been entertained as to the rights of the Government in the properties mentioned therein, but he did not make any attempt to prove that the Common law of the Presidency was in accordance with the interpretation which he sought to place on the enactment. In fact the materials available for forming a definite conclusion on the point are meagre and insufficient. In *Robert Fischer* v. *Secy. of State* (11) it was laid down that the Government has power by the Customary law in India to regulate in the public interests the collection and distribution of water of rivers and streams flowing in natural channels provided they do not thereby inflict sensible injury on other riparian owners and diminish the supply they have hitherto utilized.

This paramount right of the Government is held to be independent of the ownership of the bed of a river, but for the purpose of exercising its control the Government would not be warranted in committing an act of trespass. It is not necessary for us to examine how far these propositions, beyond which, it may be mentioned, the learned Government Pleader was apparently not in a position to carry the rights of the Government in so far as they were established by the rulings of this Court apart from any legislative enactment, are well founded. For it is obvious that the ruling in *Robert Fischer* v. *Secy. of State* (11), which is referred to by the Judicial Committee in *Kandukuri Balasurya Prasadha Row* v. *Secy. of State* (10) as showing that the law of the Madras Presidency as to rivers and streams is different in some respects from the English law, does not affect the question before us. It cannot be said that a river or stream belongs to Government because it has the power in the public interests to regulate the distribution of its water, since it is clearly recognized that this right of the Government is not in any way in supersession of the rights of the riparian proprietors.

As to S. 1, Act 7 of 1865, a Full Bench of this Court in *Secy. of State* v. *Mahadeo Sastrigal* (12) pointed out that it goes further than the preamble, enabling the Government to levy water-cess for use of waters derived from a natural stream belonging to the Government even though the Government might not have incurred any expenditure in connexion therewith. This is now placed beyond any doubt by the judgment of the Privy Council in *Kandukuri Balasurya Prasadha Row* v. *Secy. of State* (10). Therefore even if Mr. Venkatarama Sastri is right in his contention that the word "constructed" might be applied to "river or stream" as well as to "channel, tank or work", the power of the Government to levy cess clearly extends to natural streams belonging to the Government.

There has been much discussion as to what the words "river or stream" in Act 7 of 1865 were intended to import, whether merely bodies of flowing water or whether also the bed and the banks as forming part of a river. Jessel, M. R., in *Taylor* v. *Corporation of St. Helen* (13) defines a stream of water as "water which runs in a defined course so as to be capable of division" and "a watercourse" has been defined by Lord Tenterdon, C. J., in *Rex* v. *Inhabitants of Oxfordshire* (14) as "water flowing in a channel between banks more or less defined." Lord Watson in *M'Nab* v. *Robertson* (15) says:

"The word 'stream' in its primary sense denotes a body of water having as such body a continuous flow in one direction."

Wensleydale's definition of a river is "a running stream pent in on either side with walls and banks." But these definitions do not necessarily imply that the bed and the banks do not form part of a water-course: see Angel on Water Courses 80. Whether by a river or stream only the flowing water is intended or also the banks and the bed must depend on the context and the question therefore is in what sense did the legislature intend that a river or stream should be understood as "belonging to the Government" in S. 1, Act 7 of 1865. In the absence of any indication to the contrary we must give to the expression a meaning

(12) [1917] 40 Mad. 58=39 I. C. 193.
(13) [1877] 6 Ch. D. 264=46 L. J. Ch. 857.
(14) [1830] 1 B. & Ad. 289=8 L. J. K. B. (o. s.) 354.
(15) [1897] A. C. 129=66 L. J. P. C. 27.

and significance known to the law. When a river or stream rises and terminates entirely within the limits of any person's land, that person is its owner in the fullest sense, just as much as he is the owner of the soil of his domain and of the trees growing thereon. If therefore any river runs in its entire course within Government land that river is undoubtedly within the scope of the section

But there is a qualified sense in which in law a natural stream flowing through the lands of a number of persons, each one of whom is entitled to use the water of the stream as it passes through his land as a natural advantage belonging to the land and as incidental to his right to the soil itself, may be said to be the property of such persons collectively or individually. Lord Wensleydale in the following well-known passage in *Chasemore* v. *Richards* (16) observes:

"It has been now settled that the right to the enjoyment of a natural stream of water on the surface, ex jure naturae, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state."

The same learned Judge as Baron Parke had laid down in *Embrey* v. *Owen* (17):

"The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes, but flowing water is publici juris, not in the sense, that it is a bonum vacans, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only: see *Mason* v. *Hill* (18). But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it."

Lord Selborne in *Lyon* v. *Fishmongers' Company* (19), after reviewing the above and other authorities, points cut that it is by reason cf his ownership of the adjoining land that a riparian proprietor acquires the right to the usufruct of the water, for it is that which enables him to have access to the stream and to exclude others from it. The owner of land on the bank of a river is also presumed in law to be the owner of the bed opposite to his land ad medium filum aquae. We find therefore that learned Judges, having in view the nature of the rights of a riparian proprietor in the water of a stream adjoining his land, have spoken of him as owner of the stream, such as, James, L. J., in *Bush* v. *Trowbridge Waterworks Company* (20), Cockburn, C. J., in *Stone* v. *Corporation of Yeovil* (21). Except in the above sense ownership cannot be predicated of a river any more in India than in England. It is not the contertion of the Government that riparian rights are not recognized by the law of this Presidency, or are substantially different here from those established in England except perhaps to the extent indicated in *Fischer's* case: *Robert Fischer* v. *Secy. of State* (11). That very judgment takes the right of the riparian owners to be well recognized in this Presidency. The legislature has also assumed the prevalence of such rights [see S. 7, Illus. (h), Easements Act, 5 of 1882 and S. 3, Act 3 of 1905, itself on which reliance is placed by the Government] not as taking away riparian rights but as conferring on the Government the power to levy cess for the use of waters of rivers and streams belonging to the Government irrespective of such rights. Riparian rights are not unoften asserted and exercised by the Government itself in connexion with raiyatwari lands in which they claim proprietary rights analogous to those of a landlord.

Apart from such ownership as the possession of the banks of a river gives to a riparian proprietor, I do not find that before the Urlam case the Government had even claimed any other form of proprietorship with respect to it or its waters. So far therefore it would seem that by "a river or stream belonging to the Government" the legislature prima facie intended in S. 1, Act 7 of 1865 to connote a Government ownership of the banks and the bed. Has S. 2, Act 3 of 1905 then conferred on the Madras Government a right of property in the

(16) [1859] 7 H. L. C. 349.
(17) [1851] 6 Ex. 353.
(18) [1833] 5 B. & Ad. 1=2 L. J. K. B. 118.
(19) [1876] 1 A. C. 662=46 L. J. Ch. 68.
(20) [1875] 10 Ch. A. 459=44 L. J. Ch. 645.
(21) [1877] 2 C. P. D. 99=46 L. J. C. P. 137.

water of a natural stream higher than, and different in its nature from, what the law recognizes as incidental to riparian proprietorship? The history of the Act is well known. It was passed in consequence of a decision of this Court in *Madathapu Ramaya* v. *Secretary of State* (22) to legalize the practice of imposing what was known as penal assessment on lands claimed by the Government and which are encroached upon by a private individual. For that purpose S. 2 declares what shall be deemed to be the property of the Government and the rest of the Act lays down the mode of levying assessment or ejecting trespassers from Government lands. To define the incidence of water-cess is clearly not within the professed objects of the Act. At the same time if by S. 2 it has designated a class of rivers or streams as belonging to the Government, the Government will be entitled to levy cess for the use of such waters under the Irrigation Cess Act. S. 2 of the Act, the language of which appears to have been borrowed from the Bombay Act 5 of 1879, cannot be said to be very happily worded. It is undoubtedly a wide and sweeping enactment, for there can be no question that, so far as lands are concerned including those covered with water, it declares such of them as are not the property of any of the various classes of land owners in the Presidency to be the property of the Government. At the same time every endeavour is made to make it clear that the Legislature did not by this enactment mean to deprive any private individual of his property or of any rights connected with immovable property. The contention on behalf of the Government based on this Act may perhaps be best expressed in the language of Miller, J., in the following passage in *Kandukuri Mahalakshmamma Garu* v. *Secy. of State* (1):

"So far as this case is concerned the provisions of S. 2 amount to a declaration that, subject to easement and natural rights of other landholders, all standing and flowing waters which are not the property of anyone else are the property of the Government. Now clearly the waters of the Vamsadhara river do not belong to anyone else; the owners of land on the banks of the river do not own the water: their natural right as defined by the Easements Act is saved by Act 3 of 1905, but it is not contended that the water is their 'property'. It follows that it is the property of the Government.

(22) [1904] 27 Mad. 386.

And if the body of the water forming the river is the property of the Government, the river, it seems to me, belongs to the Government within the meaning of Act 6 of 1765, even though the bed may be vested in the owners of land along the banks, so as to give them the right to accretions or 'lankas' forming therein. The Vamsadhara river is undoubtedly a natural stream, and the definition of a natural stream given in the explanation to S. 7, Easements Act, indicates that in the eye of the law the stream is the flowing body of water; and a stream was defined by Lord Watson in *M'Nab* v. *Robertson* (15) as 'a body of water having as such body a continuous flow in one direction'."

If this interpretation be correct, we must give effect to it even though the natural or prescriptive rights of riparian owners would, as stated by Lord Parker, be seriously diminished by the Act and where the Government have not expended money in improving the natural stream, apparently without any sort of quid pro quo. In the first place it must be pointed out, though it hardly affects the question under consideration, that S. 2 cannot properly be said, as has sometimes been assumed, to have made any change in the ordinary rules regarding burden of proof, for I find nothing in it which necessarily implies that whenever the Government lays claim to any land or water it lies upon the party against whom the claim is made to show that the property belongs to him, quite apart from other considerations regulating the onus of proof as dealt with in the Evidence Act. Then whether a body of flowing water can be said to be the property of the owner of the land by which the stream flows depends on the meaning to be attached to the word "property" as used in this section. According to the Common law of England running water, strictly speaking, cannot be the property of anyone except by statutory enactment.

But a riparian proprietor, as I have stated, is in a qualified sense the owner of the stream adjoining his land. S. 2 itself proceeds on that assumption; otherwise there would have been no need to enumerate the landowners whose property in a water-course and in flowing water among other things is left intact. Now it would be a violation of the ordinary rules of interpretation to hold that when "flowing water" is declared by S. 2 to be the property of the Government save in so far as it is not the property of a zamindar or other land owner, that the proprietorship in contemplation

in the two cases was intended to be of a different character.

That the rights of the Government in water declared by this section are in connexion with its position as a land-owner may also well be deduced from the use of the words "other land owners" in the saving clause. Rights in water are incidental to the ownership of the land by which it flows or on which it stands, so that by the conveyance of a parcel of land the rights in the water covering any portion of it will pass. This is the law not only in England but, so far as I am aware, in India as well. If it was the intention of the Madras Legislature to confer on the Government new rights in flowing water of a nature hitherto unknown to the general law either of India or England, and which would materially diminish, if not practically destroy extensive and valuable vested rights of riparian proprietors in this Presidency, one would have expected them to carry out such intention by a more direct and lucid process than by the introduction of certain general words capable of more than one construction in a statute dealing with a wholly different subject. In my opinion when the legislature says that all "flowing water" in the Madras Presidency is the property of the Government save in so far as it is the property of a zamindar or any other landowner, it means only to declare with respect to flowing water passing through the lands of Government as well as of a zamindar that the Government has in them rights of the same kind as the zamindar himself as a riparian owner enjoys under the ordinary law, and not rights of a higher character materially impairing if not altogether superseding the landowner's rights.

The conclusion that I come to is, that where, as in the case in which the question under reference has arisen, both the banks and the bed of a river at the place at which water is taken by the zamindar do not belong to the Government, the river cannot be said to belong to the Government for purposes of S. 1, Act 7 of 1865. The answar to the question referred will therefore be given in the negative.

Ayling, J.—I agree that the answer must be in the negative. The main authority in support of the position contended for by the learned Government Pleader is the judgment of Miller, J., (concurred in by Munro, J.) in *Kandukuri Mahalakshmamma Garu* v. *Scy. of State* (1). This ruling was quoted without comment or discussion by the late Chief Justice and myself in a case which came up for disposal very shortly afterwards [*Secy. of State* v. *Ambalavana Pandarasanadhi* (2)] and relied on as one of two alternative grounds for our decision therein. We must, no doubt, be taken to have followed it, though the report of the case does not show, and my memory does not enable me to say, whether any attempt was made to question the correctness of of the ruling. However that may be, sitting as a member of a Full Bench, on which the ruling is not binding, and after hearing a full argument on the point, I can only come to the conclusion that the learned Judge's application of S. 2, Act 3 of 1905 is one from which I should respectfully dissent.

There was considerable discussion before us as to the meaning to be attached to the word "river" in S. 1, Madras Act 7 of 1863, whether as including the bed, banks and water, or only the water flowing down the river bed. I do not think it makes any practical difference in the present connexion, and the choice of meaning must always depend mainly on the context. In construing S. 1, I should be inclined to interpret the word "river" as including both the bed and the banks as well as the water; and I think the close juxtaposition of the term "work" in the same clause tends strongly to support this view. But whichever meaning be given seems to me to make little difference. The bed and banks are found as a fact to belong to the zamindar; and I agree with the opinion expressed by the learned Chief Justice in his Order of Reference that for the purpose of construing Act 7 of 1865 the ownership of the water of a river must follow the ownership of the bed and banks. In fact, no authority has been cited, nor, so far as I can see, any argument has been seriously addressed to us for the proposition that, apart from the effect of Madras Act 3 of 1905, the water of the river, while flowing through zamindari limits, was the property of Government. Some reference was made to *Fischer's* case *Robert Fisher* v. *Secy. of State* (11), but this contains nothing to support it. What has been contended is

that it was the property of no one, relying on the doctrine of English law expressed in 28 Halsbury, para. 649, that flowing water cannot be the subject of property. Construing the term "property" in the most complete and absolute sense, this, of course, commands assent. It is not suggested in the present case for instance that the zamindar could pursue the drops of water after they had flowed out of the territorial limits of his zamindari and claim them as his own. But as long as they are flowing within his zamindari, they may be his and, I think, are his, in a very real and valuable sense, whether we call his property usufructuary or use ony other word. And this kind of ownership of flowing water is recognized in the clearest manner in the judgments of English Courts: Vide James, L. J., in *Bush* v. *Trowbridge Waterworks Co.* (20), to which may be added *Stone* v. *Corporation of Yeovil* (21). This seems to me sufficient legal authority for what I should be inclined to hold on grounds of common sense and equity that the owner of the bed and banks of a river is also the owner (though in a special and qualified sense) of the flowing water, so long as it passes between those banks and over that bed; and that the term "property" may not be inaptly applied to such ownership.

Now Act 3 of 1905 declares that flowing water inter alia is the property of Government "save in so far as it is the property" (so far as we are here concerned) "of the zemindar." If at the time of passing of the Act, it was already the property of the zamindar the Act makes no difference; and the contention put forward for Government and accepted in *Kandukuri Mahalakshmamma Garu* v. *Secy. of State* (1) is simply that because the zamindar's property in the flowing water is not absolute, it should be treated as a nullity and the saving clause held inapplicable. I cannot accept this. It is not seriously suggested that this Act operated to confiscate existing private rights, and, in my opinion, it was not intended to. In so far as the river, whether in the broader or narrower sense, was the property of the zamindar before the passing of the Act it remained his property afterwards; and before the Act, his rights to use flowing water and prevent others from using it were certainly such as to make it impossible to call it the property of Government. In my view therefore the enactment of Act 3 of 1905 does not affect the present case, and, apart from its operation, the decision can only be against the ownership of the river by the Government.

Oldfield, J.—The question whether S. 2, Act 3 of 1905 involves any declaration regarding the burden of proof of the right to water or of its ownership does not arise directly in this case and I therefore think it unnecessary to express any opinion regarding the portion of the judgment of Abdur Rahim, J., in which it is considered. With this reservation I concur in the judgments just delivered and in a negative answer to the question referred.

Sadasiva Aiyar, J.—In the course of my judgment in the case of *Secy. of State* v. *Kannepalli Janakiramayya* (7) the following remarks occur at p. 419 (of 29 *M. L. J.*).

"There were some arguments advanced at the Bar on the question whether the words 'river,' 'stream,' 'channel' and 'tank' found in S. 1 (a), Madras Act 7 of 1865, meant (1) the bed, banks and the volume of waters (all taken together) of and in the river, stream, channel or tank; (2) or whether it meant the bed alone or bed and banks alone of the river, stream, channel or tank; or (3) whether it meant only the collection of the waters in the river, stream, channel or tank. I think Cl. (b), S. (1) of that Act, which speaks of 'water from any such river, stream, channel or tank' clearly indicates that the words 'river, stream, etc.,' are used in the sense of the collective body of waters which are called river, stream, channel or tank according to the respective configurations of the receptacles."

After the full arguments I have heard in the case, I feel confirmed in my view that the primary meanings of the words "river" and "stream" connote the collection of waters and exclude the bed and banks. I do not deny that by a justifiable use of words (called 'jahath lakshana vritti' in Sanskrit), the words may be made to mean the bed alone or one bank alone or both banks to the exclusion of the body of water (as when we say a village on the Ganges). But the ordinary and primary meaning is clearly the collection of waters (instance—the usual expressions "water of or from a stream or river" "bed of a river," "banks of a river," "bathing in the river," "the river is muddy," and so on). Especially the word "stream" from its very root meaning primarily connotes the body of water

flowing in a current and in Sanskrit also the primary meaning of a river is the "jala parvaham." In Murray's Dictionary, the primary meaning of the word "river" is given as "a copious stream of water, etc." At p. 423 (of 29 *M. L. J.*) of the same judgment, I said with reference to the Madras Act 3 of 1905:

"There can be no doubt that the Government starts with a strong presumption in their favour under Madras Act 3 of 1905, that all standing and flowing waters belong to them, but it is a rebuttable presumption."

Section 2 of the Act says that "all standing and flowing waters" (save in so far as the same are the property of others) "are hereby declared to be the property of Government." On this language I am still of opinion that the legislature intended that when a dispute arises between Government and a private person, the burden should rest on the latter of proving that a particular water" belongs to him, though of course proof by him (or admission by Government) of present use and possession will easily shift the burden on to Government. I do not think it necessary to consider at length the argument that the language of S. 2, grammatically considered, does not make all standing and flowing water itself the property of Government but only the bed of all standing and flowing water. In my opinion the language could not bear such construction and the matter seems to be concluded by the following sentence in the judgment of their Lordships of the Privy Council in *Kandukuri Balasurya Prasadha Row* v. *Secy. of State*(10):

"Further the Madras Act 3 of 1905 appears to enact that (inter alia) all standing and flowing water, not the property of private individuals, is the property of Government, but subject to the natural and easement rights of other landholders."

In *Secy. of State* v. *Kannepalli Janakiramayya* (7) I said:

"In this connexion, I wish to point out that not only all 'standing and flowing waters' wherever situate, are and are declared to be the property of Government, but the words just coming after the words 'all flowing and standing waters' in S. 2 (1) Act 3 of 1905 are 'all lands wherever situated.' Thus as regards all lands also wherever situate, the presumption is created by that section that they belong to Government unless proved to belong to zamindars, inamdars, etc. As regards standing water in tanks, can it be reasonably argued that the ownership of the tank bed has nothing to do with the ownership of the water standing on it? Can it be said that, even though the rain water fills the tank, the standing water in it is the property of Government? The section again assumes that zemindars, poligars, inamdars, etc. can have the same kind of 'property' or ownership in standing and flowing waters as Government is declared to possess . . . . . That flowing water by itsvery nature can never be the absolute property of the Government or anybody else (though the ownership in a very real sense can be predicated of it as vesting in a person so long as the water continues to be situated vertically over land belonging to that person) is clear to my mind; and when S. 2 (1) says that all standing and flowing waters are hereby declared to be the property of Government (except as may be otherwise provided for by any law for the time being in force, subject always to all public rights and natural and easement rights of other landowners and to all customary rights) it seems to me that the legislature did not intend to give to the Government greater rights of ownership in flowing water than the principles of general jurisprudence would allow . . . . . When water flows in a river over the bed portion belonging to one owner, that water is temporarily and usufructuarily his property (subject to well-known natural rights of others). As soon as it leaves that portion of the bed and begins to flow over another bed-portion belonging to another owner, the water becomes the property of the owner of that bed-portion, subject again to the same rights . . . . . I can find nothing in S. 2, Madras Act 3 of 1905, which was intended to give the Government greater rights over standing or flowing water vertically over their land than any other proprietor of land (like a zamindar or inamdar) has over water standing or flowing over his.'

At pp. 427 and 428 (of 29 *M. L. J.*) I said:

"There are two well-known legal maxims which usually come to mind in such cases. One is *aqua currit et debet currere cit currere solebat*, which signifies that water flows and ought to flow as it used to flow. Grounding on this maxim, it is usually stated that there is no property in running water, but merely a right to use it, and this right may only be exercised so as not to interfere with the use of the water by other persons similarly entitled But the right to use it can itself be called 'property' in running water, and (as I have said already) it is not wise to confuse ourselves by juggling with the word 'property' or the word 'owner.'

'The other maxim is *cujus est solum, etc.*, meaning that whoever is the owner of the soil, it is his even to the firmament, and to the middle of the earth. This maxim is the basis of the rule that waters in ponds, tanks and wells situated on land owned by a person belong to him in a very real sense, and that in the flowing water also running over his land, he has got a real right of property though of a qualified kind . . . . . How else is a zamindar or inamdar to prove his "property" in "standing or flowing water" except by proving his "property" in the land situated under such water, it being clear

from S. 2 (1) (*a*) itself that such "property" can exist in him? *Narasimha Sastrial* v. *Secy of State* (23).

'There is, no doubt, a distinciton in the extent of the properety or ownership rights of a man in water over his soil, according as the water is standing water (as in a tank) or water naturally flowing as a river (though the waters cannot be said to belong to anybody else so long as the waters are still vertically over his soil).'

(The existence in a man of a very real proprietary right over even flowing water within the limits of that portion of the river-bed which belongs to him is well brought out by his power to prevent other persons fishing in that portion of the current or floating over or doing any acts in that portion of the flowing water, and he can effectually exercise that power by drivings takes in the river-bed from bank to bank or drawing nets across, without interfering of course with the flow of the water down the river).

I am confirmed in the opinions quoted above by the referring judgment of my Lord the Chief Justice in this case, and by the opinion of Ayling, J., just delivered. In *Kandukuri Balasurya Prasadha Row* v. *Secy. of State* (10), their Lordships of the Privy Council state that if S. 2, Madras Act 3 of 1905, be relied on for the contention that the water of a stream belongs to Government even when the property in the bed belongs to a riparian owner:

"the natural and prescriptive rights of riparian owners are seriously diminished by the Act and where the Government have not expended money improving the natural stream, apparently without any sort of quid pro quo."

I think from this sentence, a clear indication is given as to the inclination of the minds of their Lordships of the Privy Council. Their Lordships (it seems to me) suggest that the words "property of Government" in the Madras Act 3 of 1905, should not be given as wide a meaning as is connoted by the words "belonging to Government" in the Madras Act 7 of 1865, as such a construction would lead to startling and inequitable results. For the above reasons I agree in answering the question referred to us in the negative.

Coutts-Trotter, J.— The short contention for Government is that the Act of 1905, created a property in Government in all flowing water in this Presidency, without reference to any question of ownership of the banks or bed of the river. English lawyers do not ordinarily regard flowing water as the subject of property. The owners of land on the banks of the river are owners of the soil of the riverbed usque ad medium filum aquae; and by virtue of the ownership of that land, they acquire certain rights over the water flowing past the banks which they own. Those rights are known both to English and Indian law as riparian rights; and they arise as an incident of the land through which the water passes. When Judges are using scrupulously accurate language, they are careful to point out that neither riparian owners nor others have any property in the water e. g., *Embrey* v. *Owen* (17). But the rights of a riparian owner are extensive, and it is very natural that they should often be described as rights of property or ownership, the necessary qualification that the 'property' is only usufructuary being left unexpressed, see e. g, James. L. J., in *Bush* v. *Trowbridge Waterworks Co.* (20). Statutes sometimes use similar language; e. g., S. 6, Water-Works Clauses Act, 1847. It is especially natural when the ownership of both banks is vested in the same person to speak of him generally as the owner of the river.

The material portion of Act 3 of 1905, in effect declares that all flowing water save and in so far as it is the property of any one else is henceforth to be the property of Government. What the Judges did in the *Urlam* case, *Kandukuri Mahalakshmamma Garu* v. *Secy. of State* (1), was to apply the English Common law conception to the saving clause, with the result that they held that no one had any property in flowing water, except perhaps in the abnormal case of a river which from source to mouth runs through one man's land. The result was that all flowing water would become automatically the property of Government. That is in itself a startling conclusion; but it involves a still more startling process. We are to suppose that the draftsman and the enactors of this short local Act designed, not directly but by mere intendment, to introduce a wholly new juridical conception, viz., that of property in flowing water without reference to any question of ownership of the banks or bed of the river in which it flows. That seems to me obnoxious to all the evils pointed out by the House of Lords

(23) [1891] 1 M. L. J. 167.

in the *St. Andrews'* case: *Nairn* v. *University of St. Andrews* (24). In my opinion the *Urlam* case (1) was wrongly decided, and I think the Act of 1905, when it spoke of water 'belonging' to any one, only used the term in the lax but commonly understood sense of water over which rights were exercised by virtue of ownership of bed or banks. This construction necessitates no new legal conception of property in water; for flowing water will only go to Government as a bonum vacans, when the bank or banks are bona vacantia, and it will become their property only in the sense with which every one is familiar and which is correlated to their property in the banks or bed.

Some attempt was made during the argument to draw conclusions from the linguistic implications of the word 'river'. I do not think such considerations go far much, but they certainly do not help the case of Government. 'River' is not derived from the Latin 'rivus' as most people would suppose offhand, but through the French 'riviere' from 'Riparia', i. e., the thing with banks (ripa). Nor would the case be better if the derivation was from 'rivus' for I find this in the Digest (43—21): *rivus est locus per longitudinem depressus, quo aqua decurrat.*

S N./R.K. *Answered negatively.*

(24) [1909] A. C. 147=78 L. J. P. C. 54.

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*A. I. R. 1919 Madras 424

ABDUR RAHIM, OLDFIELD AND SESHAGIRI AIYAR, JJ.

P. S. Krishna Aiyar — Defendant—Appellant.

v.

Savurimuthu Pillai—Plaintiff—Respondent.

Letters Patent Appeal No. 131 of 1917, Decided on 20th December 1918, against judgment of Phillips, J., in Second Appeal No. 389 of 1916.

*** (a) Civil P. C. (1908), O. 21, R 2—Adjustment uncertified—Assignment of decree—Execution and realization of decree amount by assignee—Suit does not lie against assignee for recovery—He can however sue original decree-holder.**

A judgment-debtor who has adjusted the decree with the decree-holder out of Court, but has not certified the adjustment in the manner required by O. 21, R. 2, can, on execution being taken and money being realized from him in violation of the adjustment, sue the decree-holder for recovery of the amount thus realized. The cause of action is either the breach of a promise or of a statutory duty on the part of the decree-holder to certify adjustment in Court,

Where however the decree is executed by the assignee of the decree-holder, no such suit lies against him, there being no privity of contract between the parties and the decree being subsistent and executable: 13 *W. R.* 69 (*F. B.*), *not Appr.*7 *I. C.* 55, *Dist.*, 21 *Bom.* 463; 14 *Cal.* 18 (*P. C.*); 20 *All.* 254 and 20 *Mad.* 369, *Appl.*

The assignee's knowledge at the time of his executing the decree of the prior adjustment does not affect his right to execute where the adjustment was not certified to Court or make him liable in damages to the judgment-debtor: 7 *I. C.* 55 *Dist.* [P 426 C 1, 2]

(b) Civil P. C. (1908), S. 49—S. 49 deals only with equities in course of execution.

Per *Abdur Rahim, J.*—Section 49 relates only to the stage of execution. Under it, it is the Court executing the decree that has to consider whether the decree is held subject to any equities which the judgment-debtor could enforce against the original decree-holder. [P 426 C 1]

The section does not contemplate that decree-holder executing a decree in spite of an adjustment out of Court is inferentially a trustee for the judgment-debtor for the decree amount. [P 426 C 2]

Per *Seshagiri Aiyar, J.*—Section 49 deals only with equities in the course of execution; for example there may be cross-decrees or a question of a set-off in respect of costs. In such matters the transferee decree-holder is bound by the equities subsisting between his assignor and the judgment-debtor. The section has no application to suits for damages. [P 429 C 1]

T. R. Venkatarama Sastri—for Appellant.

K. Jagannatha Iyer—for Respondent.

This Letters Patent appeal coming on for hearing on 18th March 1918, the Court made the following

Order.—Before disposing of this appeal it is desirable that we should have a finding whether defendant 2, when he obtained assignment of the decree in question, knew that that decree had been satisfied. The finding will be submitted on the evidence on record within the first week after recess of the High Court, and the parties will be allowed to file objections to the said finding within ten days after notice of the return of the same shall have been posted up in this Court.

Finding.—This appeal has been remanded for a finding:

"Whether defendant 2, when he obtained assignment of the decree in question, knew that that decree had been satisfied."

The finding is to be on the evidence on record. The lower Court in para. 30 of its judgment at p. 17 of the printed papers gave a definite finding on this in the affirmative. This Court, on appeal, in

para. 2 of its judgment printed at pp. 30 and 31 held:

"that this man admits in his evidence that he knew of the execution proceedings and looked into the records and therefore was aware that Antonia Pillai had set up full payment."

I did not specifically find under issue 5 that defendant 2 knew when he took the assignment that the decree had been satisfied, but I implied it in the next sentence of the judgment and both Sadasiva Aiyar, J., and Phillips, J., took this to be my finding; for in p. 6 of the printed papers in Letters Patent Appeal No. 131 of 1917, Sadasiva Aiyar, J., says:

"As defendant 2 is found to have been aware of the private satisfaction of the decree, I would make no order as to costs in any Court.

Phillips, J., at p. 8 says at line 20:

"For defendant 2 is not a bona fide purchaser for value without notice. In fact the District Judge appears to think that no consideration passed for the assignment, although there is no definite finding to that effect, but there is a finding that defendant 2 had notice of satisfaction."

I have now to give a definite finding on the issue remanded. Defendant 2 was an experienced vakil's clerk and he admitted that he knew of the execution proceedings and looked into the records and must therefore have been aware of Antonia Pillai's claim of full payment and yet he took the assignment, and the assignment deed itself refers to one of the prior execution petitions. There can be little doubt that after looking into the records he took the assignment, relying on the order of the Court on the objection of Antonia Pillai which overruled the objection. He relied on this order to be able to extract something further and took the assignment, though he had every reason to know the decree was satisfied as asserted and plaintiff had warned him. It is argued that if plaintiff had told defendant 2 that he warned defendant 2 that the decree was satisfied, and that he would have to face litigation if he took assignment, then plaintiff would in Ex. 2, his answer to defendant 2's application to have his assignment recognized, have specifically urged therein that he had warned defendant 2 that the decree was satisfied; but Ex. 2 was after the Court had decided this against plaintiff and therefore it would have been futile for plaintiff to again set it forward. I do not see how Ex. G can be held to in any way affect the question for the reason I have given in para. 4 of my former judgment. My finding therefore is that defendant 2 knew the decree had been satisfied. After the return of the finding upon the issue referred by this Court for trial on 20th December 1918 the Court delivered the following judgment.

Abdur Rahim, J.—I have come to the conclusion that the plaintiff-respondent had no cause of action against defendant 2 in the suit. Defendant 1 obtained a decree against one Antonia Pillai, whose executor is the present plaintiff. The decree amount was paid out of Court by the judgement-debtor. The payment however was not certified as required by the law by the decree-holder, whose duty it was to do so in the first instance, nor did the judgment-debtor inform the Court of the satisfaction, as he was entitled to do in default by the decree-holder. The decree was afterwards assigned to defendant 2. A question was raised in the execution of the decree as to whether it had been adjusted, and, if so, whether the adjustment could be recognized. The executing Court held that in the absence of a certificate or record of satisfaction as required by O. 21, R. 2, it remained an executable decree and it is also found that adjustment had not been proved. Defendant 2 then proceeded to realize the decree amount by execution. The plaintiff, as executor of the judgment-debtor thereafter instituted this suit claiming damages against defendants 1 and 2 to the extent of the amount, which defendant 2 had realized in execution. It has been well settled, and it can hardly be disputed, that, so far as defendant 1, the original decree-holder, was concerned, the plaintiff had a good cause of of action. This was so laid down as far back as *Viraraghava Reddi* v. *Subbakka* (1) by a Full Bench of this Court and that is also the view of the other High Courts. In that case it was held that such a suit would lie as for breach of a promise on the part of the decree-holder either not to execute the decree or to enter satisfaction. It was also held that the judgment-debtor could frame his claim against the decree-holder thus in default for damages on the basis of fraud or negligence in not certifying adjustment.

But the question whether there is a cause of action against the assignee of a decree which had been adjusted, but the adjustment of which was not certified to

(1) [1882] 5 Mad. 397 (F. B.).

the Court, is bare of authority. It cannot be said that there was any sort of contractual relation between defendant 2, the assignee in the case, and the plaintiff; and the mere fact that defendant 2, as found, knew that the decree had been satisfied will not make him guilty in law either of fraud or of negligence, inasmuch as he was under no obligation to certify adjustment, the decree amount having been received by the original decree-holder before assignment. The executing Court was right in holding that it was bound to treat the decree as still subsisting and to allow it to be executed, by virtue of O. 21, R. 2, Cl. (3), which enacts that:

"a payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recoguized by any Court executing the decree."

The decree therefore on the date of its assignment being one which, according to law, defendant 2 could enforce, the only way in which the case of the plaintiff could be put is to base it on S. 49, which enacts that :

"every transferee of a decree shall hold the same subject to the equities, if any, which the judgment debtor might have enforced against the original decree-holder."

It is argued that we must hold that the decree was in this case subject to an equity which bound the assignee who had knowledge of the adjustment before he obtained the assignment. In the first place, S. 49 relates to the stage of execution, that is to say, under it, it is the Court executing the decree that has to consider whether it was held subject to any equities which the judgment-debtor could enforce against the original decree-holder. Now the cause of action in a case like this as laid down in *Viraraghava Reddi* v. *Subbakka* (1) is breach of a promise or contract, and I am not aware of any general principles according to which the existence of such a contract or promise would create an equity which would be enforceable against the transferee. In the case of sales of immovable property, no doubt, it is well established that the transferee is bound by a contract to convey the property in favour of another person of which he had knowledge. But that rule, so far as I am aware, has not been extended either to the disposition of moveable properties or of money decrees. We have been referred to a Full Bench decision of the Calcutta High Court reported as *Goono Monee Dossia* v. *Pran Kishore Dossee* (2), where the cause of action against the original decree-holder who executed the decree in spite of adjustment out of Court is put on the ground that after such adjustment he held the decree in trust for the judgment-debtor. But I do not think that S. 49, Civil P. C., or the corresponding provision of the old Code ever contemplated such an inferential trust. The Full Bench of this Court in *Viraraghava Reddi* v. *Subbakka* (1) does not base it on any such ground and if I may say so with respect, the right way to regard the cause of action as laid down in that case is either breach of a promise or of a statutory duty to certify adjustment to Court. Defendant 2, as I have pointed out, could not be said to have committed any breach of promise or having been guilty of violating any statutory duty. We have been also referred to another decision of the Calcutta High Court in *Mon Mohan Karmakar* v. *Dwarka Nath Karmakar* (3). But I do not think that the point decided there throws much light on the principles applicable to this case. There the question arose in execution between the assignee of a decree who held it as benamidar of the judgment-debtor and other creditors of the judgment debtor and having regard to the conclusion of the learned Judges that in those circumstances there was no executable decree, any observations regarding the liability of assignees of decrees generally, cannot, in my opinion, be of much help in the present case. Here there was, undoubtedly, an executable and subsisting decree and that decree was executed according to law. I hold therefore that there was no cause of action against defendant 2. I may mention that we had called for a finding as to whether defendant 2, at the time he obtained the assignment, had knowledge of the adjustment out of Court. The finding is that he had such knowledge, but as I have already stated, that fact cannot make any difference as to his liability in the present suit. The result is that the appeal must be allowed and the suit as against defendant 2 dismissed with costs throughout.

Oldfield, J.—I am not prepared to accept all the considerations adduced by

(2) [1870] 13 W. R. 16 (F. B.).
(3) [1910] 7 I. C. 55.

my learned brethren. But I can give my reasons shortly for agreeing with the conclusion that there is no cause of action against defendant 2 ; and that is sufficient to justify concurrence in the decision that the suit must be dismissed.

The main question is whether the plaintiff is entitled to recover, not only from defendant 1 who has once recovered the decree amount (that is not disputed) but also from defendant 2 who has recovered it again by execution. I agree with my learned brethren for the reasons given by them that the claim must be regarded as for damages for injury caused by defendant 1's failure to certify satisfaction as he ought to have done after recovering the decree amount. Then the only ground, on which defendant 2 can be held liable, is that he in some way subjected himself to defendants 1's liability by taking an assignment from him. There is only one basis put forward for this contention, namely, the terms of S. 49, Civil P. C. But no authority has been cited to show that the section is intended to cover such cases as the present. Whether the fact that it occurs in the chapter relating to execution is a reason against that construction of it, I do not wish to decide. It is at all events not necessary in the present connexion to hold that it is final ; for there is another clear reason for the same conclusion.

The section provides that the transferee of a decree shall hold the same subject to the equities, which the judgment-debtor might have enforced against the original decree-holder. It seems to me that the section is not intended to mean any more than it says explicitly. It is only intended to make provision regarding the terms on which the decree is to be held ; and it is not the contention of the plaintiff in this case, and could not be, that defendant 2's holding of the decree in any way arose from or is connected with defendant 1's wrongful conduct or was ever conditional on his paying compensation for it. In fact, the claim against defendant 2 is entirely independent of his holding the decree in that way. In these circumstances, I agree with the order proposed by Abdur Rahim J.

Seshagiri Aiyar, J.—I agree with the judgment of Abdur Rahim, J. just pronounced. In Original Suit No. 316 of 1915 defendant 1 obtained a decree against the plaintiff. Subsequent to the decree, it was arranged that the plaintiff should pay off the debts due from defendant 1 to third parties and that he should enter up satisfaction of the decree obtained by him against the plaintiff. The plaintiff's case is that he did perform the agreement, but that defendant 1 fraudulently failed to enter up satisfaction. An application was made for execution by defendant 1 which was opposed by the plaintiff. But it was allowed on two grounds (1): that as no satisfaction was entered the decree can be executed and (2) that the arrangement between the parties was not carried out by the plaintiff. After this order permitting execution, defendant 1 transferred the decree to defendant 2. He executed it and recovered the money from the plaintiff. This was on 7th September 1908. Thereupon the present suit was instituted by the plaintiff for damages for wrongfully executing the decree in contravention of the original arrangement. The Courts below have found that the plaintiff did perform his part of the contract; and gave a decree for damages against both the defendants. Defendant 2 appealed to this Court in Second Appeal No. 389 of 1916. The two learned Judges who heard the appeal differed in opinion. Sadasiva Aiyar, J., was for reversing the decree as against defendant 2, but Phillips, J., was for confirming the decree against him. Hence this Letters Patent Appeal.

Although I did not dissent from the opinion of my learned colleagues that a finding should be called for on the question whether defendant 2 was aware that at the time the decree was transferred to him, the plaintiff had performed his part of the contract, in my opinion, there is no cause of action at all against defendant 2. There is no privity of contract between the plaintiff and defendant 2. The suit for damages is for the breach of the contract. That is well settled : see *Viraraghava Reddi* v. *Subbakka* (1) and *In the matter of Medai Kaliani* (4). What gives the aggrieved party a right of action is the failure to carry out the terms of the contract to enter up satisfaction. It is true that the measure of damages in such a suit is ordinarily the amount recovered by the wrongdoer. But that is not because the

(4) [1907] 30 Mad. 545.

plaintiff is entitled the follow to amount recovered in whoseover's hands it may be found, but because the Courts for the sake of convenience have enunciated the rule that the suffering must be estimated as the actual loss sustained by the aggrieved party. In all the four High Courts in this country it has been held that where there is a wrongful sale of property in violation of the agreement to enter up satisfaction, the property purchased at the execution sale cannot be recovered by the injured party but that he is only entitled to damages. *Yallappa* v. *Ramchandra* (5), *Rewa Mahton* v. *Ram Kishen Singh* (6), *Jaikaran Bharti* v. *Raghunath Singh* (7) and *Krishnasami Ayyangar* v. *Ranga Ayyangar* (8) all enunciate this principle.

Now the ground on which these decisions proceed is that the execution proceedings are not invalid by themselves, although they had been taken in violation of the agreement; because under the Civil Procedure Code so long as the decree is allowed to be outstanding without satisfaction having been entered in respect of it, it is an enforceable decree. Parties deriving benefit thereunder should not be deprived of their right because of a pre-existing agreement between the judgment-debtor and the decree-holder. That being the provision of law all the four High Courts have held that the right of the judgment-debtor who has been deprived of property is to sue the decree-holder for damages caused by the deprivation, and not to sue the purchaser for the restoration of the property taken from him. I think the principle of these decisions is applicable to the present case. Defendant 2 obtained execution in a proceeding, which was held to be subsistent and enforceable. The fact that it is not land, but money that he recovered ought to make no difference in the application of the rule of law. Therefore I am unable to hold that defendant 2 is bound to return the money which he recovered in execution against the plaintiff.

But it was suggested that the knowledge of defendant 2, that at the time he obtained a transfer of the decree, the plaintiff had performed his part of the contract entered into with defendant 1, would make a difference in the case. Now there are some recognized principles on this subject. For example we have S. 27, Specific Relief Act, which enables a party with whom a contract of sale has been entered into to sue for specific performance not only against the person who agreed to sell the property to him, but also against the person who has purchased that property with knowledge of the agreement to sell. The principle of this section is borrowed from the well-known rule in equity that "equity regards that as done which ought to have been done." From this maxim, the rule has been deduced

> "that from the time of the contract for the sale of the land, the vendor, as to the land, becomes a trustee for the vendee; and the vendee, as to the purchase money a trustee for the vendor who has a lien upon the land therefor. And every one coming in by subsequent and representative title, and every subsequent purchaser from either with notice, becomes subject to the same equities as the party would be to whom he succeeds, or from whom he purchased."

It is doubtful whether this principle is applicable to contracts relating to money or moveable property. For the sake of argument, I shall assume that it covers such cases also. What follows? The person with whom the contract not to execute the decree has been entered into can proceed to recover the amount wrongfully levied from him not only from the promisor, but also from the party who has benefited by the breach. This assumes that the proceeding is wrongful and void ab initio. But where legally the decree is executable, it is not open to argument that the party who recovered under such a decree is compellable to refund what he has recovered. Moreover, the four cases from the four High Courts to which I drew attention already, show that the principle underlying S. 27, Specific Relief Act, has no application to such cases. In my opinion when once it is conceded that the aggrieved party is not entitled to recover land or other property sold in execution contrary to the terms agreed upon between the judgment debtor and the decree-holder, it is impossible to suggest any ground of liability on the part of a third party deriving benefit under the decree. This conclusion derives further support from decisions like that reported as *Bairagulu* v. *Bapanna* (9), where it was held that no

(5) [1897] 21 Bom. 468.
(6) [1887] 14 Cal. 18=13 I. A. 106 (P.C.).
(7) [1898] 20 All. 254.
(8) [1897] 20 Mad. 369.
(9) [1892] 15 Mad. 302.

injunction will lie to prevent a party from executing a decree. The obvious reason is that the decree is legal and enforceable and the right of action to the aggrieved party arises on the breach of the agreement, and not upon the fact that the decree has been executed. The decision in *Mon Mohan Karmakar* v. *Dwarka Nath Karmakar* (3) has been very much misunderstood.

It is a case of a judgment-debtor obtaining an assignment of decree nominally after it had been satisfied. The question related to the equities enforceable in execution against the assignee.

The observations about similar equities being available in suits are pure obiter. They really have no bearing on the present case. However if that judgment lays down the proposition contended for by the respondent's vakil, I am unable to agree with it. As regards *Goono Monee Dossia* v. *Pran Kishore Dossee* (2) the question was between the original parties to the decree and no question of assignment was considered. With all respect I am unable to accept the proposition that the decree-holder is a trustee for the judgment-debtor. As regards S. 49, Civil P. C., on which reliance was placed, it is enough to point out that that section deals only with equities in the course of execution; for example, there may be cross decrees or a question of a set off in respect of costs. In such matters, the transferee decree-holder is bound by the equities subsisting between his assignor and the judgment-debtor: vide *Sinnu Pandaram* v. *Santhoji Row* (10). That has no application to the cases of suits for damages. I therefore agree with Sadasiva Aiyar, J., that there is no cause of action against defendant 2. This being my view it is unnecesary to consider the question of limitation. As I have held that there is no cause of action against defendant 2, I would reverse the decrees of the Courts below, and dismiss the suit against defendant 2, with costs throughout.

S.N./R.K. *Appeal allowed.*

(10) [1903] 26 Mad. 428.

A. I. R. 1919 Madras 429

ABDUR RAHIM AND OLDFIELD, JJ.

Ramachandra Suru and *others*—Defendant—Appellant.

v.

Akella Venkatalakshminarayana —Plaintiff—Respondent.

Appeal No. 256 of 1917, Decided on 13th November 1918, against order of Dist. Judge, Ganjam, in I. A. No. 192 of 1916.

(a) Madras Impartible Estates Act, (1904), S. 4—Act is founded on public policy.

The Madras Impartible Estates Act of 1904 is founded on public policy, being intended to prevent transfers of impartible property, not to lay down conditions on which they can be made. [P 432 C 2]

(b) Madras Impartible Estates Act (1904), S. 4—No estoppel against statute—Mortgage on impartible estate if invalid cannot be validated by mortgagor confessing judgment—Policy of Act cannot be defeated by consent decree.

A mortgage created on an impartible estate cannot, if invalid under the said Act, be validated by the mortgagor or any others interested in the property confessing judgment and the policy of the Act, which is to preserve the estate intact, cannot be defeated by the device of a consent decree. There is no estoppel against a statute. It is the duty of the Court to give effect to a statute in spite of the conduct of the parties. [P 431 C 2]

In a suit on a mortgage of the estate of Tarla, defendant 1, the proprietor mortgagor, and defendants 2 to 7, members of his family interested in the estate, pleaded that there was no necessity for the mortgage and that the same was not binding on the estate. Eventually however the suit was compromised and the parties presented a razinamah, whereby the defendants admitted the binding character of the debt and agreed to pay the amount in certain instalments, and on failure of payment, the property was to be sold. Default having been made in payment, the plaintiff applied under O. 34, R. 5, Civil P. C. for a final decree and for sale of the mortgaged property. Defendants 1 and 2 objected on the ground that the estate being impartible, was not liable to be sold and that the debt, not having been contracted for necessary purposes, was not binding on the estate. The District Judge held that it was not open to the parties to go behind the razinamah.

Held: (1) that it was competent to the Court to enquire into the question of the validity and binding character of the mortgage and that the consent decree could not override the express provisions of the Madras Impartible Estates Act of 1904. 35 *I. C.* 49 and *A. I. R.* 1914 *P. C.* 44, *Expl.*; (2) that the defendants were not estopped from questioning the charaeter of the debt by reason of the razinamah. [P 431 C 2]

S. Srinivasa Aiyangar and *A. C. Sampath Aiyangar*—for Appellant.

K. V. L. Narasimham and *P. Narayanamurthi*—for Respondent.

Abdur Rahim, J.—Defendant 1, the zamindar of Tarla, who died during the pendency of this suit, has been succeeded

by defendant 2, who is the son of defendant 1's deceased eldest son. The other defendants are the sons and grandsons of the Zamindar. The suit was instituted on a mortgage executed on 3rd Octobsr 1903 by defendant 1. The other defendants were made parties on the allegation that they were interested in the right of redemption and also that they benefited by the debts contracted by defendant 1, who was the head and managing member of the family. Defendant 2 and defendants 3 to 7 alleged that there was no necessity either for the mortgage or for the previous promissory notes which were merged in the mortgage and that defendant 1 had no right to create the mortgage and that it did not bind the estate. It appears however that the suit was compromised, the razinamah being to the effect that defendant 1 should pay the sum agreed upon in certain instalments, that the debt was binding on the estate and that, on failure of payment according to the razinamah, the mortgaged property would be sold and the money realized from the sale proceeds. There was default in paying the amount of the compromise decree, and then an application was made under O. 34, R. 5, Civil P. C., for a final decree and for sale of the mortgaged property. Both defendants 1 and 2 by their counter petitions preferred objections, mainly on the ground that as Tarla was an impartible and inalienable estate it could not be sold in pursuance of the compromise decree, defendant 2 further urging that defendant 1 had no necessity to borrow the amount for which the mortgage was executed.

The learned District Judge held that there was an express admission in the compromise petition that the debt was binding on the whole family and the property might be brought to sale and that therefore it was not competent for the defendants to re-open this question. As already stated, defendant 1 has since died and the only question now is whether, by reasons of the statements in the petition of compromise and the decree passed in accordance therewith, defendant 2 is precluded from raising the question as to the binding character of the debt, or whether the question should be tried. The transaction in dispute is governed by S. 3 Act 2 of 1902. That Act was afterwards repealed and the Act now in force is the Madras Act 2 of 1904. The section in the present Act which corresponds to S. 3 of the previous Act is S. 4. S. 3, Act 2, of 1902, says :

"Notwithstanding anything contained in S. 8, Madras Permanent Settlement Regulation 1802, the proprietor of every such estate shall be restricted from alienating his estate or any portion thereof except in circumstances where alienation would be permissible by law, if the estate were ancestral property and the proprietor occuiped the position of managing member of a joint Hindu family governed by the ordinary law of succession and no decree for debts contracted after the passing of this Act by such proprietor otherwise than under the circumstances aforesaid shall be executed against his scheduled estate ;"

and the explanation to the section states that alienation shall include temporary transfers such as mortgages and leases. Tarla is one of those scheduled estates. It is clear that, apart from the razinamah, the plaintiff would have to prove that there was necessity for the execution of the mortgage and that the debts were of such a character as a manager of a Hindu family could bind the estate with. Otherwise, though the plaintiff might obtain a decree against defendant 1 personally, he could not obtain a mortgage decree directing sale of property. There having been no inquiry and decision regarding the binding character of the debt, can it be said that the razinamah or the statements contained therein have any higher effect than the mortgage? All that is stated in the razinamah petition is that the debt is binding on the mortgaged property. That may be evidence for whatever it is worth as to the nature of the debt, but can it be said to have the same effect as a decision of the Court after inquiry on an issue properly raised in the suit?

The policy of the Impartible Estates Act is to preserve the property in the family of the zamindar and for that purpose it categorically prohibits all alienation by the zamindar for the time being except in certain circumstances. The zamindar for the time being has practically a life estate in the zamindari with powers to deal with the estate in certain contingencies. Where no such contingency has arisen the zamindar is prohibited from alienating any portion of the estate. If he could not alienate the estate by mortgaging it or selling it he could not do so by any voluntary act having the same effect such as by confessing judgment. In *Attorney-General* v. *Corporation of Dublin* (1) the old Corporation

(1) [1841] 1 Dr. & War. 545.

of Dublin having confessed judgment in respect of certain debts it was held that such judgment did not preclude the new Corporation from raising the question whether the debt was ultra vires of the powers of the Corporation. Lord Sugden held that it would be impossible for him to hold that the judgment by confession concluded the new Corporation and directed the trial of the issue as to whether the debt was such as it was within the power of the Corporation to incur. The razinamah decree here does not embody any decision of the Court but embodies a contract of the parties with reference to the subject-matter. For purposes of enforcement it stands on a higher footing than a mere contract. It is well stated however that it has many incidents of a contract attached to it. For instance, if there is a clause of forfeiture in a compromise decree the Court in a proper case would relieve against it. *Nagappa* v. *Venkat Rao* (2). In *Lakshmanaswami Naidu* v. *Rangamma* (3) it was held that a compromise decree had the effect of a sale of a religious office and could not be enforced. In *Ramasami Naik* v. *Ramasami Chetti* (4) this Court held that a transfer by an heir to an impartible estate of his chance of succession, though embodied in a consent decree was void.

The learned Judge laid down that such a decree did not involve any adjudication by the Court as to the rights of the parties and could not empower parties to do what they were otherwise prohibited from doing. In *Moti Chand* v. *Ikram Ullah Khan* (5) the Judicial Committee of the Privy Council laid down that an agreement to relinquish certain rights in the defendant's land was illegal and void as being in contravention of the policy of the Agra Tenancy Act. The policy of that Act, as found by them was to secure to a certain class of proprietors the right of occupancy in lands of a particular description and they observe that the policy of the Act was not to be defeated by ingenious devices, arrangements or agreements between a vendor and a vendee, as all such devices, arrangements and agreements are in contravention of the policy of the Act and contrary to law and are illegal and void and cannot be enforced by the vendee in any civil Court or in any Court of Revenue. If the Zamindar of Tarla could not alienate the property except under given circumstances he could not defeat the policy of the Act which is to preserve the estate intact by the device of a consent decree. But it is argued that defendant 1 having been a party to the suit and to the razinamah decree it must either be held that the debt was incurred for a proper purpose or that he is estopped from raising the question again at this stage. As regards the last it should be pointed out that in his written statement defendant 1 questioned the validity of the mortgage, and the statements in the razinamah petition as to the character of the debt can at the most be treated as evidence against defendant 1. It is difficult to see how it estops him from asking for an inquiry on this issue. It is well known that there is no estopped against a statute. It is the duty of the Court to give effect to a statute in spite of the conduct of the parties.

It is however pointed out on behalf of the respondent that it is open to the mortgagee seeking to enforce a mortgage against an estate in possession of a Hindu widow to implead the next reversioners in the suit and a decree obtained in their presence will bind the estate. The authority for this proposition is *Ganga Narayan Dutta* v. *Indra Narayan Saha* (6), but I am not satisfied that the position of an owner of an impartible estate and of an heir to such an estate is analogous in all respects to that of a Hindu widow and the next reversioner. With regard to alienations by a Hindu widow there are rulings to the effect that the consent of the nearer reversioner would be sufficient by itself to validate it while other decisions on the subject lay down that such consent is merely evidence of the propriety of the Act. A Hindu widow being regarded in Hindu law as a person of immature judgment the reversioners are for certain purposes regarded as a sort of family council whose concurrence has been held to afford strong proof of the validity of the widow's act so concurred in. I should not feel justified in importing any such theory into a case of impartible zamindaris. An heir

(2) [1901] 24 Mad. 265.
(3) [1903] 26 Mad. 31.
(4) [1907] 30 Mad. 255.
(5) A. I. R. 1916 P. C. 59=39 I. C. 454=39 All. 173=44 I. A. 54 (P. C.).
(6) [1916] 35 I. C. 49.

to an impartible estate has no sort of right in it for the time. His interest in the estate is a mere spes successionis and any attempt therefore by defendant 1 to deal with his chance of succession must be held to be void. It was next sought to apply the ruling in *Mt. Hiran Bibi* v. *Mt. Sohan Bibi* (7) to this transaction. What is laid down there is that a compromise is in no sense an alienation. There the compromise was in the nature of a family settlement, its essence being that each party took a share in the family property by virtue of the independent title which was to that extent by way of compromise admitted by the other party. The razinamah in this case could not be said to be a family settlement in any sense. It is a confession of judgment by which the estate is made liable to be sold in realisation of the zamindar's debts. The judgment of the District Judge must therefore be set aside and the case will be remitted to him for trial on the merits. Each party will bear his costs hitherto.

Oldfield, J.—Acts 2 of 1902 and 2 of 1904 are in my opinion clearly founded on public policy being intended to prevent transfers of impartible property, not to lay down conditions on which they can be made and unless the suit mortgage can be brought within the exception provided it follows from *Lakshmanaswami Naidu* v. *Rangamma* (3), which has for many years been regarded as stating the law correctly that a decree on it is not enforceable. I prefer to rely on this authority and not on *Ramasami Naik* v. *Ramasami Chetti* (4) which is also mentioned in the judgment of my learned brother because with all due deference to the learned Judges responsible for the latter decision, I doubt whether S. 6 (a), T. P. Act, which was in question in it is founded on public policy and not on the ground also indicated by them that a mere possibility of succession having none of the characteristics of prcperty, a transfer of it would be a contradiction in terms.

I concur in my learned brother's decision.

S.N./R.K. *Case remanded.*

(7) A. I. R. 1914 P. C. 44=24 I. C. 309 (P. C).

A. I. R. 1919 Madras 432

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Pathma Re Krishna Chettiar—Plaintiff—Appellant.

v.

Mu Pa Venkatachala Chettiar and *others*—Defendants—Respondents.

Appeal Suit No. 133 of 1917, Decided on 2nd October 1918, against decree of Sub-Judge, Kumbakonam, in Original Suit No. 63 of 1915.

(a) Guardians and Wards Act (1890), S. 34 (a)—Surety bond — Court as obligee alone is entitled to sue in absence of assignment.

The Court, as the obligee of a bond executed by sureties under S. 34 (a), is alone entitled to sue on it in the absence of an assignment in due form of law. [P 433 C 2]

(b) Guardians and Wards Act (1890), Ss. 34, 35—Principal bond missing — Surety bond can still be assigned.

The fact that the principal bond executed by the guardian is missing would not prevent the surety bond being duly assigned. [P 433 C 1]

(c) Guardians and Wards Act (1890), Ss. 34 and 35 — Assignment of surety bond — No failure to obey order to exhibit accounts or apply balance due — Suit on surety bond is not maintainable.

Where a surety bond is assigned on the ground that there was a prima facie case of maladministration against the guardian and there is no proof of a failure on the guardian's part to obey a specific order of Court either to exhibit accounts or to pay or apply the balance found due as directed, there is no breach of the conditions in the bond, and an action on it is not maintainable. [P 434 C 1]

(d) Guardians and Wards Act (8 of 1890), Ss. 34 and 35—Breach of conditions by guardian—Proper remedy is order under S. 34 or decree against guardian—On failure to satisfy suit against surety—Suit is governed by Limitation Act (9 of 1908), Sch. 1, Art. 68.

Obiter.—In the case of bonds under the Guardians and Wards Act the proper course is to get an order to pay against the guardian under S. 34 (d) or a decree against him, and, if he fails to satisfy the order or decree, then to sue the sureties in respect of this breach as to which there will be no defence, and the article of limitation governing the suit would be Art. 68 unless the bond charges immovable property when that article may be inapplicable. [P 434 C 1]

A. Krishnaswami Aiyar and *G. Gopala Krishna Aiyangar*—for Appellant.

S. T. Srinivasagopalachari, K. Bhashyam and *K. Narasimha Aiyangar*—for Respondents.

Wallis, C. J.—This is an appeal from the decree of the Subordinate Judge of Kumbakonam in so far as it dismissed the suit brought by the plaintiff as assignee of a surety bond Ex. A, dated 21st April 1896, charging the immovables therein mentioned for the due perform-

ance by defendant 1 of his obligations under the bond given by him to the District Court under S. 34 (a), Guardians and Wards Act, as guardian of the plaintiff who was then a minor. The immovable properties of the other sureties being insufficient, defendant 1 added certain properties of his own and became a party to the surety bond Ex. A as well as to the principal bond which is now missing. The Subordinate Judge passed a personal decree against the guardian, defendant 1, who did not contest the suit, and otherwise dismissed it on the ground that the plaintiff had no right to sue on the bond Ex A, at the date of the suit, as the principal bond had not been assigned to him and there had been no regular assignment to him of the surety bond, Ex A, but only an order of the District Court that it should be assigned. He also dismissed the suit on the ground that the plaintiff had failed to prove what were the terms of the principal bond which was missing, and held that the defendants, who are alienees from the sureties under Ex. A, took without notice and are exempt from liability.

As regards the first point, I am of opinion that the plaintiff had no title to sue on Ex. A without an assignment to him by the Court both of the principal bond and of the surety bond Ex. A, but I do not think the case can be satisfactorily disposed of on this ground. The District Judge has since assigned Ex. A by a registered instrument, and though the principal bond has not yet been assigned, we might, I think, accept the assignment even at this late stage if this was the only difficulty in the plaintiff's way. The fact that the principal bond is lost would not prevent its being duly assigned. The Ecclesiastical Courts were required by a statute of Henry VIII to take bonds with sureties from persons to whom they granted administration of the estates of deceased persons, and a statute of Charles II settled the terms of the bond to be so taken. There was a right of action on these bonds in the Common Law Courts, but the Ecclesiastical Judge to whom the bond had been given did not sue himself, but, as stated in *Bolton* v. *Powell* (1), the Ecclesiastical Court made an order in favour generally of one of the next-of-kin that the bond be "attended with" and the party in whose favour the order was made was allowed to sue in the name of the Ecclesiastical Judge to whom the bond had been given. Whether under any circumstances the sureties could be proceeded against in equity without such an order of the Ecclesiastical Court was discussed in the case just mentioned. The Probate Act of 1857 first made these bonds assignable, and its provisions in this respect have been reproduced in the Indian Succession Act, the Probate and Administration Act 1881, and lastly in Ss. 34 and 35, Guardians and Wards Act, 1890. The Court now being the obligee under the bond is alone entitled to sue on it in the absence of an assignment in due form of law.

In the present case I feel constrained to hold in the present state of the evidence that the suit fails on the broad ground that no breach of the conditions of the bond Ex. A has been proved. S. 34 (a), Guardians and Wards Act, obliges the guardian, if so required, to give a bond to the Judge of the Court

"engaging duly to account for what he may receive in respect of the property of the ward."

By S. 34 (b) he is to deliver inventory within six months, and by S. 34 (c) he is to "exhibit his accounts in the Court at such form as the Court from time to time directs;" and by S. 34 (d) he is "to pay into the Court the balance due from him on those accounts for so much thereof as the Court directs." The form of bond prescribed in Form 93 of the Civil Rules of Practice 1902 clearly follows the provisions of S. 34 (c) and (d) just set out, the condition of the bond being that the guardian shall duly account

"at such periods as the Judge shall appoint and shall duly pay or dispose of the balance which shall from time or time be found to be due from him as the said Court or Judge has directed, or shall hereafter direct."

No doubt, this form was not in force in 1896 when defendant 1 as guardian executed the principal bond which is now missing, but there is no reason to assume that the bond then executed by defendant 1 was of a more onerous character than the form now prescribed. Now to constitute a breach of this bond there must be a failure either duly to account at a period directed by the Court or a failure to pay as ordered by the Court a balance found due from him: and where there is no evidence of any order to account within a fixed time, or to pay any balance within a fixed period there is no

(1) [1852] 2 De. G. M & G. 1.

breach of the obligation of the bond. This follows from the language of the bond and has been expressly ruled in the case of a similar provision in the old statutory form of administration bond: *Archbishop of Canterbury* v. *Tappen* (2) and *Archbishop of Canterbury* v. *Robertson* (3). The latter case also deals with the question of what amounts to a breach of the condition well and truly to administer the estate in the old form of administration bond. To establish a breach of that condition it was not necessary to show a failure to obey a specific order of the Court. Similarly under S. 81, Probate Act 1857, the bond is to be conditioned for duly collecting getting in and administering the estate of the deceased, language followed in S. 256, Succession Act and S. 78, Probate and Administration Act, and therefore in the case of these bonds it is enough te show a failure to administer or collect and it is not necessary to show a failure to obey a specific order of the Court. Where however as we must assume in the present case, the only conditions in the bond were to exhibit accounts when ordered by the Court and to pay or apply the balance found due as directed by the Court, if there is no order, there is no breach and the suit on the bond necessarily fails. There is no evidence of any order to account or of any order to pay in the present case. All the District Judge did was to direct the assignment of the bond on the ground that there was a prima facie case of maladministration against defendant 1. In the case of bonds under the Guardians and Wards Act the proper course appears to be to get an order to pay against, the guardian under S. 34 (d) or a decree against him and if he fails to satisfy the order or decree, then to sue the sureties in respect of this breach as to which there will be no defence and the article of limitation will he Art. 68 unless, as in the present case, the bond charges immovable property, when that article may be inapplicable. It is unnecessary to consider this point, or the other question raised in argument before us as to when time begins to run when the condition in the bond is duly to administer. In my opinion the appeal fails and must be dismissed with costs against defendants 3 to 9 the alienees. As those grounds apply also to the decree against defendant 1, we set aside that decree also but without costs in the exercise of our powers under O. 41, R. 33.

Seshagiri Aiyar. J,—I agree,

S.N./R.K. *Appeal dismissed.*

(2) [1828] 8 B. & C. 151.
(3) [1833] 1 C. & M. 690.

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* A. I. R. 1919 Madras 434

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

J. B. Leslie Rogers—Defendant—Appellant.

v.

A.R.Hajee Fakir Muhammad Sait and *others*—Plaintiffs—Respondents.

Appeals Nos. 356 and 357 of 1917, Decided on 26th September 1918, from decree of Sub-Judge, Nilgiris, Ootacamund, in Original Suits Nos. 105 and 109 of 1915.

***Tort—Defamation—Imputation of crime to master by servant—Communication to co-servant with view to starting inquiry is privileged—English Common law as to special damage in slander is inapplicable to India.**

An imputation of a crime made in good faith by an employee against his employer as a result of his suspicion and communicated to a co-employee with a view to the latter starting inquiries, is privileged, being a communication made in the interests of the communicator, and no action for slander would lie in respect thereof. *Toogood* v. *Spyring*, (1834) 1 *C. M. & R.* 181, *Foll: Force* v. *Warren*, (1864) 15 *C. B.* (*n. s.*) 806; and *Whiteley* v. *Adams*, (1863) 15 *C. B* (*n. s.*) 392, *Expl.*

The English Common law rule as to special damage being necessary to support an action for slander except in certain cases is inapplicable to India. [P 436 C 1, 2]

Per *Wallis, C. J.*—Taking it to be defamatory to say that a person is suspected of having committed an offence, the person against whom the offence is alleged to have been committed must have a qualified privilege to discuss the case, mentioning his suspicions to people who may be in a position to throw light on it, and the privilege is not exceeded where the words actualy charged are merely words of suspicions. [P 436 C 1]

Per *Seshagiri Aiyar, J.*—To support the plea of privilege it is not necessary that the person to whom the communication is made should have an equal interest with the communicator. [P 438 C 2]

Whether the publisher of a libel would exceed the privilege by repeating it is a matter that depends on the circumstances of each case. [P 438 C 2]

D. Chamier and *C. Srinivasa Aiyangar*—for Appellant.

T. Richmond—for Respondents.

Wallis, C. J.—These are appeals from two decrees of the Subordinate Judge of Ootacamund awarding the two plaintiffs damages against the same defendant for alleged slander by falsely and maliciously publishing the following words: "I have been poisoned and I suspect the Saits are

at the bottom of it," meaning thereby that the Saits had instigated the alleged poisoning. The Subordinate Judge has found publication proved in three instances, that the occasion was not privileged, that, if it was, the defendant was actuated by malice, and also apparently that he was never ill at all and never believed himself poisoned. The defendant from April 1913 had bean in the service of the plaintiffs' firm at Ootacamund as general manager of their office and planting estates.

The evidence in this case shows what is brought out more fully in the case of wrongful dismissal, that his relations with his employers towards the end of November 1914 were very bad and that they did not wish to retain his services. The defendant appears to have suspected that, rather than dismiss him and face an action for damages as they subsequently did, they might endeavour to get rid of him by foul play whilst in one of his planting tours. He has spoken of various circumstances which excited suspicion in his mind, and which I do not think the circumstances were such as to give rise to a well-founded suspicion, it is, I think, clear that the defendant laboured under it. Before starting on his December tour he borrowed a gun to take with him, communicated with the police, and had the names of his party taken down by the police, and a constable in plain clothes sent round with him. Mr. Richmond for the plaintiffs argues that all these precautions as well as the subsequent story of poisoning were malicious inventions planned by the defendant to injure his employers. This, in my opinion, has not been proved. The defendant was clearly anxious to remain in the employment of the Saits and could only have imperilled his prospects of doing so by getting up a case of poisoning against them. As I observed in the other case, it may be that some one in the interests of the Saits had been trying to frighten him into resigning, but his conduct before starting on tour as well as the enteries in his dairy show that however unreasonably he was under apprehension as to his personal safety. This being so, if he suffered from poisoning symptoms on the 13th and 14th, he would naturally, in the circumstances of the case, suspect that the Saits were, as was said, at the bottom of it. The Subordinate Judge in the present case goes so far as to refuse to believe that he suffered from the symptoms to which he speaks, but D'Souza, the estate agent, speaks to his looking ill on the 15th, the day after the alleged poisoning, and on his way back to Ooty on the 16th he obtained a medical certificate, Ex. J [9 C. (a) in the other appeal], which showed that he had symptoms of irritant poisoning. The fact that the defendant did not send for the Devarshola doctor at once, that he brought back some of the food he had eaten for examination by the Chemical Examiner instead of excreta, and that he did not call in a doctor after his return to Ootacamund are not, in my opinion, a sufficient foundation for the Subordinate Judge's conclusion, that the whole thing was a malicious invention for the purpose of injuring the Saits. That is not conduct to be expected from a gentleman in the position of Mr. Rogers, however much he might dislike and whatever grievances he might consider himself to have against his employers and, as I have already said, such a sesenless and wicked plot would have endangered his position which he was unduly anxious to retain in spite of his differences with the Saits. The Subordinate Judge appears to me to have made far too much of the entries in his private diary in which he had relieved his feelings by jotting down what he thought of his employers from day to day. It must, I think, be taken that he really did suffer on the 13th and 14th from symptoms of poisoning, which may well in this country arise from purely accidental circumstances. This being so, I think it very natural, having regard to the evidence as to what preceded, that he should have suspected, however unjustly, the Saits, who were the only persons interested in getting rid of him, of being at the bottom of it.

The Subordinate Judge found publication to three persons proved. There is no evidence of publication to Major Ward to justify the finding and we may confine ourselves to the publication to D'Souza an estate superintendent, on the 15th and to the publication on the 16th on the defendant's way back to Ootacamund to Bikram Singh, another estate superintendent. In the evidence, which was given in July 1917, two and a half years after the event, there was a conflict between the plaintiffs' witnesses and the defendant as to the details of their conversations with the defendant, and as to whe-

S. N. DAR, B. A. LL. B.,
Vakil High Court,

ther it was the witness or the defendant who first spoke of the suspicion against the Saits arising out of the defendant's illness. As to this I am not prepared to differ from the Subordinate Judge's finding that it was the defendant who first mentioned his suspicions, as this appears the more likely story.

At Common law it is not actionable to say of a man that you suspect him of a crime, at any rate, in the absence of special damage or unless the observation be made with reference to his business: see Buller's Nisi Prius, 1200, *Harrison* v. *King* (1), *Tozer* v. *Mashford* (2) and *Simmons* v. *Mitchell* (3), a decision of the Privy Council on appeal from the Windward Islands. In *Parvathi* v. *Mannar* (4), Sir Charles Turner, C. J., and Muthusami Aiyar, J., held that the common law rule as to special damage being necessary to support an action for slander except in certain cases was inapplicable in India and the case has been argued before us as one of privilege. Justification has not been pleaded. Taking it then to be defamatory to say that a person is suspected of having committed an offence, I think the person against whom the offence is alleged to have been committed must have a qualified privilege to discuss the case mentioning his suspicions with people who may be in a position to throw light on it, and that the privilege has not been exceeded in the case of the two publications of the words actually charged, which are merely words of suspicion. The case appears to me to come within the well-known rule laid down by Parke, B., in *Toogood* v. *Spyring* (5), which has been approved in so many cases and recently by the highest tribunal, and may be looked to for guidance in the absence of any decision more closely in point:

'In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of a public or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

Here the communication was in my opinion made by the plaintiff "in the conduct of his own affairs in matters where his interest is was concerned" within the meaning of the rule, and was therefore privileged in the absence of actual malice which, in my opinion, has not been proved. It has been argued that the communication to the two superintendents could not be privileged because there was no common interest, that is to say, that it did not matter to them whether the defendant was poisoned or not. Happily this contention appears to be erroneous in law. Statements made to protect the interest of the speaker and statements made to protect a common interest form distinct heads of privilege and are so dealt with in Arts. 36 and 37 of the most recent edition of Sir Hugh Fraser's Law of Libel and Slander, Edn. 5, pp 226, 228. In my opinion the case comes within the former head of privilege and malice has not been proved. The appeals must be allowed and the suits dismissed with costs throughout.

Seshagiri Aiyar, J.— I agree. In this case the plaintiff, the head of the firm in which the defendant was employed as general manager, and who is known as the senior Sait, claims damages against the defendant for defamation. The allegation in the plaint is that the defendant maliciously spoke and published the following words: "I have been poisoned and I suspect that the Saits are at the bottom of it." These defamatory statements were said to have been made to three individuals, namely, A W. D'Scuza P J. Bikram Singh and Major Ward. The dates of the publication were 15th and 17th December 1914. The defence is that the suggestion about poisoning came from the subordinates of the plaintiff, and that the defendant

"having regard to the surrounding incidents of the particular tour on which he was engaged, thought it likely to be true."

At the time of the issues, apparently no plea of justification was advanced. Issue 1 (b) raises the question of privilege. The Subordinate Judge found that the words were uttered by the defen-

(1) [1817] 4 Price 46=146 E. R. 389.
(2) [1851] 6 Ex. 539=20 L. J. Ex. 225.
(3) [1881] 6 A C. 156=50 L. J. P. C. 11.
(4) [1895] 8 Mad. 175.
(5) [1834] 1 C. M. & R. 181.

dant, that there was no privilege and that he was actuated by malice. In the appeal Mr. Chamier mainly rested his contention upon the plea of privilege. In order to appreciate this contention a few facts have to be stated. Defendant was employed by the plaintiff and his sons as their general manager. The engagement was in May 1913. The parties were not on good terms almost from the beginning. There were frequent disputes. Ultimately plaintiff was dismissed from service on 17th February 1915. Ten days before the dismissal the defendant started on his tour of inspection to the estates belonging to the plaintiff in Wynaad. His case is that on the 13th evening he was unwell and that he suspected one Jamaluddin, a writer at the estate, of having poisoned him. He says he got worse on the morning of the 14th and that when D'Souza, the superintendent of the estate, came to see him, the latter suggested that he must have been poisoned at the instance of the Saits, and and that thereupon he informed D'Souza that he also believed that the Saits were at the bottom of the poisoning. On the 15th defendant met Bikram Singh, the superintendent of another estate, who according to him, also believed that the Saits must have set up somebody to poison him. On his way back to Ootacamund from the tour he met Major Ward to whom he communicated his suspicions.

The question for consideration is, whether these communications to these three people were privileged and if privileged, whether on the evidence it is proved that defendant was actuated by malice. As regards Major Ward, Mr. Richmond, who appeared for the defendant, did not seriously argue that the evidence is sufficient to establish publication. Major Ward himself does not remember having heard from the defendant the words complained of, and the other evidence is not strong enough to establish that the defamatory words were published to Major Ward. The case of the other two persons stands on a different footing.

D'Souza and Bikram Singh and the defendant were co-employees under the plaintiff. Defendant says that he gave expression to the words complained of as he was anxious that inquiries should be started regarding the truth of the rumour that the Saits were at the bottom of the poisoning. On the question as to whether D'Souza started the conversation or whether the statements were first made by the defendant, there is not much reliable evidence. I shall proceed to deal with the case on the footing that defendant 1 communicated his suspicions to D'Souza. It was argued by the learned counsel for the plaintiff that the defendant's evidence about his desire that inquiries should be made should not be accepted. He refers to the fact that in his deposition in the suit for damages for wrongful dismissal he did not mention this circumstance. But it must be remembered that in that case the question about poisoning arose very incidentally and consequently the omission to refer to the starting of inquiries is not a ground for holding that the defendant is not speaking the truth. It was also contended that the evidence of D'Souza and Bikram Singh is more entitled to weight than that of the defendant. These two persons did not communicate to the plaintiff their version of what happened immediately after the words were spoken and even after the dismissal of the plaintiff. The learned counsel for the plaintiff admitted that it was after the examination of the defendant in the suit for wrongful dismissal that inquiries were started from which it was learned that defendant spoke to these two persons the words complained of. I feel little hesitation in holding that the evidence of the defendant is entitled to greater weight than the evidence of these two persons. If we reject the evidence of these two witnesses, the defendant's evidence is practically uncontradicted. My conclusion is that defendant spoke these words to D'Souza and Bikram Singh with a view of starting inquiries regarding the truth of the suspicion that the Saits were at the bottom of the poisoning incident. On this conclusion the question is whether the statement is privileged.

In *Toogood* v. *Spyring* (5) Baron Parke in defining the limits of privilege uses language which has since become classical. He stated at p. 193

"In general, an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own

affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice."

In *London Association for Protection of Trade* v. *Greenlands Ltd.* (6) and in *Adam* v. *Ward* (7) this dictum of the learned Baron was regarded as laying down the law correctly. Reference may also be made to *Hamon* v. *Falle* (8) and to *Stuart* v. *Bell* (9). The point for determination therefore is whether the words published to D'Souza come within the protection referred to in the dictum above quoted. There can be no doubt that the defendant was acting in the discharge of a private duty, and that the communication related to the conduct of his own affairs. He was under the employ of the Saits. He had rightly or wrongly come to the conclusion that the Saits were anxious to get rid of him. Under these circumstances, if he asked D'Souza, a subordinate of the Saits and who was also a subordinate of his, to institute inquiries regarding the truth of the suspicion, was he not acting in the conduct of his own affairs and in respect of a matter in which his own interests were concerned? I am of opinion that the communication to D'Souza comes within the principle of Baron Parke's pronouncement. Mr. Richmond contended that the person to whom the communication is made must have an equal interest with the communicator if the privilege is to be maintained. He relied on *Force* v. *Warren* (10), which to a certain extent supports him. In *Whiteley* v. *Adams* (11) Erle, C. J., said:

"So also is the rule as to giving information concerning private individuals, when given bona fide, and to a person having an interest in making the inquiry."

I do not understand the learned Chief Justice to have laid down that unless the person who receives the communication is equally interested there can be no privilege. He was only referring to one class of cases As a matter of fact if we look into the earlier portion of the judgment, it is clear that the Lord Chief Justice was stating the law in terms identical with those employed by Baron Parke. He states:

"Not only therefore was the defendant in my judgment discharging a social and moral duty, but he was also acting with a just view to his own interest in writing that letter."

Byles, J., in the same case says that the law has been well laid down in *Toogood* v. *Spyring* (1). Mr. Richmond stated that if the receiver of the communication is a friend or a police officer the privilege would exist. I fail to see why the communication made to a subordinate with a view to starting an inquiry should stand on a different footing. In *Stuart* v. *Bell* (9) communications made to a friend were considered to be within the rule enunciated by Baron Parke. The same principle governs communications made to a subordinate. In my opinion the communication made to D'Souza was privileged. As regards Bikram Singh, it was contended by the learned counsel for the respondent that, as already a communication was made to D'Souza and as subsequently the defendant had conveyed his suspicions to a Sub-Inspector of Police, the further communication to Bikram Singh was unjustifiable. No doubt in *Force* v. *Warren* (10), Earle, C. J., says:

"It is no part of a man's duty to go into the confessional to every chance person who may choose to ask impertinent qnestions. And I see no interest that the defendant could have to justify himself in the eyes of that witness."

This decision of the Lord Chief Justice has not been commented upon or followed in any of the subsequent decisions. After all, the question for consideration is whether in the circumstances in which the defendant found himself, he exceeded the privilege by repeating his suspicions to another subordinate of his. He no doubt had set D'Souza on the track of an inquiry, and he apparently thought that the matter should be taken up in hand by Bikram Singh also. I do not think that even on the principle stated in *Force* v. *Warren* (10) the defendant can be said to have exceeded his privilege. I therefore hold that both the communications were privileged. The next question is whether the defendant was actuated by malice. The Subordinate Judge found that the defendant could have had no reasonable belief in the rumour which he had given currency to. At first sight it seems almost incredible that a person of the status and attainments of the defendant should have believed that the Saits intended to poison him. But the state of mind of the defendant has to be judged

(6) [1916] 2 A C. 15=85 L. J. K. B. 698.
(7) [1917] A. C. 309=86 L. J. K B. 849.
(8) [1879] 4 A. C. 247.
(9) [1891] 2 Q. B. 341=60 L. J. Q. B. 577.
(10) [1864] 15 C. B (n.s.) 806=143 E. R. 1002.
(11) [1863] 15 C. B. (n.s.) 392.

from the surrounding circumstances. He had conceived a great dislike to the plaintiff and the plaintiff made no secret of his desire to dispense with the services of the defendant. One ludicrous incident seems to have told on the nerves of the defendant. The Saits had stored in the office godown some manure. The defendant was led to think that these were ashes from the cremation ground brought in order to practice incantations. The defendant, who says that he has been attracted to the subject of the black magic by what he heard during his employment in the north of India, seems apparently to have heen impressed that these ashes were brought to the office with a view to practising black magic on him. Some persons in the office of the Saits seem to have played upon his credulity. In this frame of mind the defendant believed that the visit of Jaffar Sait in November 1914 to the Wynaad estates was with a view to get the defendant into trouble. He seems to have asked the Superintendent of Police at Ootacamund for the services of a detective in his tour. There can be no question that the defendant was in a morbid state of mind regarding his safety. I have no doubt that there was no reasonable ground for this belief. At the same time, I am not prepared to say that he was not bona fide under the impression that attempts were being made to get rid of him. He went on his inspecting tour in this nervous state. I fully believe his evidence that he was unwell on the evening of the 13th and on the morning of the 14th. The certificate of the Sub Assistant Surgeon given on the 16th to a certain extent supports him. D'Souza's evidence given on the former occasion also corroborates his evidence. I have no doubt that he was unwell. This illness coupled with what he believed about the bringing in of human ashes so worked upon his nerves that he thought that the Saits had engaged men to poison him. What we have to consider is whether it was an honest belief. Tindal, C. J., said in *Coxhead* v. *Richards* (12):

"On the contrary, all the evidence went to prove that what he did he did under the full belief that he was performing a duty, however mistaken he might be as to the existence of such a duty, or in the mode of performing it."

In *Stuart* v. *Bell* (9) Lindley, L. J., after examining a number of decisions, says that the opinion of Tindal, C. J., "is the most accurate and safe to take as a guide." Lord Buckmaster in *London Association for Protection of Trade* v. *Greenlands Ltd.* (6) states the law in similar terms. I am of opinion that the defendant must be taken to have been under a bona fide belief that the Saits were at the bottom of an attempt to get rid of him, and hold that no malice has been established in this case. I confess that I have come to the conclusion on the question of malice with some hesitation. But having regard to the strained relations that existed between the plaintiff and the defendant just before the incident happened and having regard to the state of mind which the defendant was in, and rejecting as I do the evidence of D'Souza and Bikram Singh for the reason that their story, if true, should have been communicated to the plaintiff either at once or at least after the dismissal of the defendant from the service, I see no reason for not accepting the uncontradicted evidence of the defendant on the question of his bona fides. I would therefore reverse the judgment of the Subordinate Judge and dismiss the plaintiff's suit with costs throughout.

S.N./R.K. *Appeals allowed.*

(12) [1846] 2 C. B. 569=15 L. J. C. P. 278.

A. I. R. 1919 Madras 439

KRISHNAN, J.

Mulukutla Ramamurthi and *others*—Defendants—Petitioners.

v.

Chillara Bhaskarayya and *others*—Plaintiffs—Opposite Parties.

Civil Revn. Petn No. 475 of 1918, Decided on 31st October 1918, from order of Temporary Sub-Judge, Guntur, in I. A. No. 384 of 1918.

Civil P. C. (1908), S. 92 and O 1, R. 1—Scheme suit—Persons claiming as truslees should be impleaded.

In a suit instituted for framing a scheme for a public charity under S. 92, persons who allege a right thereto as trustees should be impleaded as parties: 38 *I. C.* 133, *Foll.* [P 439 C 2]

N. V. L. Narasimha Row—for Petitioners.

V. Lakshminarayana— for Opposite Parties

Judgment.—Following the rulling in *Vaithilingam* v. *Ramalingam Pillai* (1), I think the petitioners should be directed to be made party defendants. They allege that they are trustees and there is nothing prima facie to show that they

(1) [1917] 38 I. C. 133.

are not. There rights as trustees would be lost by the framing of the scheme: see *Rama Das* v. *Hanumantha Row* (2), and that being so, I think they should be heard before the Court takes any action to their prejudice. No doubt the Subordinate Judge says that their application is not bona fide. It is not clear what this means or on what it is based. The defendants support the claim of the petitioners to the trusteeship. I cannot take this observation as meaning that the petitioners are putting forward a totally unfounded claim to trusteeship. If that is what is meant, it is unsupported by any evidence. I must therefore set aside the order of the Subordinate Judge and direct him to add petitioners as party defendants and proceed with the trial of the suit in accordance with law. There will be no order as to costs in this petition.

S.N /R.K. *Order set aside.*

(2) [1911] 36 Mad. 364=12 I. C. 449.

A. I. R. 1919 Madras 440

AYLING AND SESHAGIRI AIYAR, JJ.

Kaveramma—Plaintiff—Appellant.

v.

Vishnu Kunkullayya and *others*—Defendants—Respondents.

Second Appeal No. 1459 of 1915, Decided on 30th January 1918, against the decree of Dist. Judge, South Kanara, in Appeal Suit No. 414 of 1914.

(a) Hindu Law—Alienation — Co-parcener —Transfer of share by co-parcener to another member for consideration does not effect partition among all members.

Where a member of a joint Hindu family living in a distant place and earning soparately transferred his share in the family property to another member for a consideration:

Held: that the transaction amounted to a renunciation of the transferor's share for a consideration and did not effect a partition among all the members of the joint family: 5 *Mad.* 196 and 15 *All.* 339, *Appl.*: 11 *Mad.* 304, *Dist.*

[P 441 C 2]

An alienation by a co-parcener is not a unilateral declaration of intention to effect a partition in the family. [P 443 C 1]

(b) Hindu Law—Alienation—Co-parcener—Gift by one member of his share to another is not valid.

A gift by one member of a joint Hindu family of his share to another member is not permitted by Hindu law. [P 442 C 1]

B. Sitarama Row—for Appellant.

C. V. Ananthakrishna Aiyar and *Adiga*—for Respondents.

Judgment.—Before finally disposing of the case, we think that there should be a distinct finding on the question whether Ex. A refers to the whole of the family properties or only to portions of them. The question is raised in the written statement and is covered by the latter portion of issue 1. Before the District Judge a ground was taken that the Munsif should have recorded a finding on that point. Therefore a finding should be now arrived at on that question. Parties shall be at liberty to produce fresh documents, if any, and not cral evidence. Finding will be submitted in two months and ten days are allowed for filing objections. We do not think it necessary to call for a finding on the question whether Ex. A was not given effect to. The Subordinate Judge held it was acted upon and no serious attempt seems to have been made to impeach that finding.

In compliance with the order contained in the above judgment the District Judge of South Kanara submitted a finding that Ex. A referred to the whole of the family properties with the exception of the properties in Travancore.

(This second appeal and the memorandum of objections filed by respondent 1, coming on for final hearing on 23rd January 1918, after the return of the finding of the lower appellate Court upon the issue referred by this Court for trial and the case having stood over for consideration till this day, the Court delivered the following:)

Judgment.—The property in suit along with some other property in Travancore belonged to three branches of a Hindu family in South Kanara. Admittedly the three branches divided their South Kanara properties long ago. In this appeal we are concerned only with one of these branches, the head of which was one Narayana Kunkullaya. He had five sons, of whom Kesava died issueless. Padmanabha the third son transferred his properties under Ex. A to Vishnu the last son. Vasudeva the fourth son similarly transferred his properties to Vishnu, Ex. 13. All this time there was no actual partition among the brothers. The first son Venkatesa left two sons Narayana and Ramakrishna. The present plaintiff is the widow of this Narayana. Her case is that when Vishnu died in 1909 her husband Narayana was joint in estate with him, that by survivorship the properties in suit devolved on her husband,

and that she as his widow is entitled to them. This Narayana died in 1910. Shortly before his death Padmanabha, who transferred his properties in favour of Vishnu under Ex. A, sold all the properties of the branch to defendant 1, as if he were the sole owner thereof. Defendant 1 is a stranger and not a member of the family. The transfer by Padmanabha and Vasudeva to Vishnu related only to their shares in the South Kanara properties. The Subordinate Judge before whom the original suit was filed came to the conclusion that Padmanabha by conveying his properties under Ex. A ceased to be a member of the joint family and that this alienation in favour of defendant 1 was ineffective so far as the suit properties are concerned. The District Judge on appeal held that Padmanabha did not cease to belong to the joint family and modified the decree of the Subordinate Judge.

When the second appeal first came on for hearing, we remitted an issue for finding as to whether the transfer by Padmanabha and Vasudeva comprised the Travancore properties as well. The finding was that Exs. A and 13 related only to the South Kanara properties. We accepted that finding. Now the question arises for consideration whether Padmanabha had any right to deal with the property in favour of defendant 1 after he had transferred his rights to Vishnu. Mr. Sitarama Rao for the appellant contended that the effect of Ex. A was to separate Padmanabha from the joint family and to leave the other members undivided. As was pointed cut by Bashyam Aiyangar J in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1), notwithstanding the separation of one member from the joint family the others would continue to remain undivided. There can be a smaller co-parcenary within a larger co-parcenary just as there can be a tavazi in a tarward. There are dicta in the decisions of this Court and of the Privy Council which indicate that ordinarily if one member gets himself separated from the rest, the presumption is that all have become divided. In *Balabux* v. *Rukhmabai* (2) the Judicial Committee stated:

"There is no persumption when one co parcener separates from the others that the latter remain united. In many cases it may be necessary in order to ascertain the share of the outgoing member to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be the virtual separation of all.

That is also the view taken by the Madras High Court. But in a later case, *Kedar Nath* v. *Ratan Singh* (3), Lord Macnaghten in delivering the judgment of the Judicial Committee quoted the opinion of the Judicial Commissioner of Oudh and concluded with the observation: "Their Lordships agree in that opinion." The Judicial Commissioner held that when one of the members sued for partition and obtained a decree for his share, the other two remained joint with rights of survivorship. It is open to argument that this conflict of view should not affect a transaction which, in the language of the Judicial Committee, may be construed as a unilateral declaration of an intention by one member to separate himself from the others. In such a case there can be no presumption that his act disrupted the co-parcenary of all the members. Therefore even if Ex. A is to be regarded as notifying Padmanabha's desire to cease to belong to the joint family, it would not follow that there was a general partition. But, in our opinion, Ex. A must be treated as a deed of relinquishment. No doubt the document is styled a sale deed ; but Padmanabha was living away in a distant place and was an earning member. He gave a power-of-attorney to a third party to transfer his share in the family property. Another of the brothers subsequently transferred his share in the family property. In both cases the conveyance was to a member of the family. In our opinion, the effect of these documents was to relinquish the shares of the transferors in favour of their undivided brother for a consideration, and not to effect a partition among all the members of the joint family.

Under the Hindu law it is open to an earning member of the family to surrender his rights to the remaining members of the family. In Mitakshara, Ch. 1, S. 11 (12), it is stated :

"To one who is himself able to earn wealth and who is not desirous of sharing his father's goods anything whatsoever, though not valuable, may be given and the separation or division may be thus completed by the father so that the children or other heirs of that son may have no future claim to inheritance."

(1) [1902] 25 Mad. 149=11 M. L. J. 353.
(2) [1903] 30 Cal. 725=30 I. A. 130. (P. C.).
(3) [1910] 32 All. 415=7 I. C. 648=37 I. A. 161. (P. C.).

The text of Yajnavalkya which is commented on as above by Vignaneswara is in these terms :

"If one have means and do not desire to share, he shall be separated, something trifling being given to him:" (Yajnavalky, 11, 117.)

There is no mention of the right of the father in this text. Aparaka in commenting on this text of Yajnavalkya says :

"The son, who because of ability to acquire wealth does not desire paternal property ; should be separated after giving him some worthless small property, otherwise there may be dispute with him or with his children."

We think that Vignaneswara did not intend to restrict the right of making an unequal distribution only to the father. The principle deducible from the Smriti writers is that by renouncing his share for a small consideration the seceding member is alone separated from the family and the others continue to be members of the joint Hindu family with rights of survivorship, etc. If there is no consideration at all received for the relinquishment, it is doubtful whether by making a gift of his share a member of the family can renounce his rights in the general property; because it is a well established rule of Hindu law that an undivided member cannot make a gift of his share in the joint family property. There is no text of Hindu law or any binding authority which says that a gift by one member to another of his share is permissible; and as at present advised, we see no reason for introducing such an exception to a well understood principle of Hindu law. Nor are we prepared to say that the text of Yajnavalkya already referred to contains only a moral injunction in regard to the giving of some consideration and that a voluntary gift is within the spirit though not within the letter of Yajnavalkya's text. As Sarkar Shastri points out in his Hindu law, if the transaction by a member of the family is not within the meaning of the text of Yajnavalkya, it is doubtful whether he will be estopped from claiming his share in the joint family property.

In the present case in the view we take of Ex. A this question need not be pursued any further. It is the substance of the transaction and not the language used that has to be looked into and, in our opinion, Ex. A evidences a renunciation as contemplated by Hindu lawyers. As regards the decided cases, *Sivagnana Tevar, Ramasami Chetty and Kosalarama* v. *Periasami* (4) supports the view we have taken. In that case the Judicial Committee held that a surrender by one of the brothers effected a severance of interest quoad that property between the surrenderer and his brother. In *Peddayya* v. *Ramalingam* (5) Muthuswami Aiyar, J., and Sheppard, J., held that relinquishment by one of the brothers separated him from the rest of the joint family. *Sundarsanam Maistri* v. *Narsimhulu Maistri* (1), to which we already referred, follows these two decisions. In *Balkrishna Trimbak Tendulkar* v. *Savitribai* (6) the same view was taken: vide also *Muthusami Mudaliar* v. *Nallakulantha Mudaliar* (7). The theory that a renunciation by one member keeps the family intact, while excluding from it the transferor, derives support from another class of cases to which Mr. Sitarama Rao drew our attention. Generally speaking an alienation of the share of a co-parcener in a specific property is invalid: but if the other members consent to such an alienation, it would be valid: vide *Chinna Sanyasi* v. *Suriya* (8) and *Balgobind Das* v. *Narain Lal* (9). The essence of the transaction is that it is an arrangement which does not disturb the co-parcenary. The same may be said of a relinquishment by a member of the family. The object is not to disturb the joint family, but to leave it unaffected while the renouncing member wants to be excluded from it. Therefore if as we interpret Exs. A and 13, their object was to secure individual freedom to Padmanabha from the possible claims of his co parceners on his earnings while not intending to disturb them it is a natural result of such a transaction that he alone became a divided member while the others continued to remain joint and undivided.

Mr. Adiga for the respondents contended that Ex. A was in fact and in effect an alienation of Padmanabha's share and that it did not matter that that alienation was in favour of the co-parcener. It is well settled that if a member of a joint Hindu family alienates his share in the property to a stranger such a transaction

(4) [1876-78] 1 Mad. 312=5 I. A. 61 (P C.).
(5) [1888] 11 Mad. 406.
(6) [1878-79] 3 Bom. 54.
(7) [1895] 18 Mad. 418.
(8) [1882] 5 Mad. 196.
(9) [1893] 15 All. 339=20 I. A. 116 (P. C.).

dces not put an end to the co-parcenary. There is a course of decisions upon this subject in Madras and elsewhere, and we are not prepared to accept the contention that an alienation is really a unilateral declaration of intention to effect a partition in the family. It may be that logically and by parity of reasoning a member of a joint Hindu family conveying his share to a stranger should be regarded as expressing a clear intention to get his share partitioned from the shares of the others. But we agree with the learned vakil for the appellant that until the Judicial Committee expressly make such a pronouncement, we would not be justified in deducing such a rule in regard to alienation from what has been decided concerning declarations of intentions contained in plaints and documents addressed to the members of the family. It is true that in *Ariyaputri* v. *Alamelu* (10) the learned Judges suggest that a renunciation by a member is equivalent to an alienation in favour of the other members. In our opinion this obiter dictum should not be separated from the context and applied to circumstances like the present. Therefore, we must hold that the transaction evidenced by EX. A is not an alienation but a relinquishment of rights in favour of the other members of the family.

The two Courts below have held that Padmanabha and Vasudeva intended that the share relinquished should vest not only in Vishnu but in all the other members of the co-parcenary. This is a further support to our conclusion that the two members wanted that the remaining members of the family should remain undivided. Mr. Adiga next argued that there is no justification for not holding that the renunciation by Padmanabha did not put an end to the co-parcenary as a whole. We have given our reasons fully in the previous paragraphs for holding that Padmanabha's act only severed him from the co-parcenary and left the others in the same state as they were in before. In the result we reverse the decree of the District Judge and restore that of the District Munsif. In the circumstances of the case each party will bear his own costs throughout as regards the subject-matter of the appeal. The memorandum of objections is dismissed with costs.

S.N./R K. *Appeal allowed.*

(10) [1888] 11 Mad. 304.

A. I. R. 1919 Madras 443

SESHAGIRI AIYAR AND PHILLIPS, JJ.

Bagirathi Ammal — Plaintiff—Appellant.

v.

Bagirathi Ammal and others—Defendants—Respondents.

Second Appeal No. 2284 of 1917, Decided on 5th November 1918, against decree of Dist. Judge, Tanjore, in Appeal-Suit No. 809 of 1916.

Hindu Law—Alienation—Co-parcener—Gift to co-percener for performance of sradh to sonless member is valid.

The members of a joint Hindu family can make a gift of family property to a co-percener in consideration of his performing the sradh ceremonies of a deceased sonless member. Such an arrangement is valid under the Hindu Law as well as on general principles of jurisprudence, besides being supported by consideration.

[P 444 C 1]

S. Venkatachariar—for Appellant.

T. R. Venkatrama Sastri—for Respondents.

Judgment.—The dispute relates to a gift of a small portion of the family property to one of the members at the partition. The family originally consisted of a father three sons and the children of two of the sons. One of the sons died issueless. His funeral ceremonials were performed by the husband of the plaintiff, who was a son of one of the sons, Ramakrishna Aiyar. The deed provided that a portion of the family property should be given to this boy, as he performed the funeral ceremonies of his deceased uncle and as he was requested to perform the annual sradhs. Very soon after, the donee died and the suit is by the widow to recover the property given to her husband. The defence is that it is not competent to members of a joint Hindu family to give away family properties for such a purpose. The District Munsif upheld the gift. The learned District Judge has reversed that judgment. In our opinion he is wrong. The texts of Mitakshara quoted in *Kameswara Sastri* v. *Veeracharlu* (1), to which our attention was drawn by Mr. S. Vankatachariar, show that in a joint Hindu family gifts of property can be made for purposes of a similar nature. Mr. Vankatrama Sastri admitted that the performance of the sradh by some one or other of the members of the family was incumbent on them, and that failure to do it would have brought about social ostra-

(1) [1910] 34 Mad. 422.=8 I. C. 195

cism. In this state of affairs, the members decided that one of them should be selected to perform this duty and that he should be reimbursed the expenses by the allotment of certain lands.

We see no reason for holding that such an arrangement is not binding on the joint family. There was ample consideration, even if the transaction be looked at from a purely business point of view. See *Natesa Aiyar* v. *Rathai Ammal* (2). The learned vakil for the respondents contended that under Hindu law, no member of a family performing a sradh can expect any remuneration for doing it. But that is not the point. It is not a quid proquo for performing the sradh that the gift was made, but to enable the recipient to defray the expenses of the recurring monthly and annual ceremonies. We think such an arrangement is valid under the Hindu law as well as on general principles of jurisprudence. We must, therefore reverse the decree of the District Judge and restore that of the District Munsif with costs here and below.

S N./R.K. *Appeal allowed.*

(2) [1910] 4 I. C. 1104.

A. I. R. 1919 Madras 444

WALLIS, C J., AND AYLING, J.

Gurusami Nadan and *others*—Defendants—Appellants.

v.

T. S. Gopalaswami Odayar and *others*—Plaintiffs—Respondents

First Appeals Nos. 207 of 1916 and 178 of 1917, Decided on 22nd January 1919, against decree of Sub-Judge, Kumbakonam, in Original Suits Nos. 58 and 61 of 1914.

Hindu Law — Debts — Manager—Binding character—Burden of proof is on creditor—Omission of defendant's to produce accounts to prove necessity—Adverse presumption arises under Evidence Act (1872), S. 114 Illus. (g).

The onus of showing that a debt contracted by the manager of a joint Hindu family is binding on the family, is in the first instance, on the party seeking to enforce its payment. [P 445 C 1]

Even where the onus is on the plaintiff, the failure by the defendants to produce their accounts, when summoned to do so, to prove a family necessity for the debt will raise a presumption adverse to them under S. 114, Illus. (g). The defendants cannot refuse to produce the best available evidence, relying on the weakness of the plaintiff's case or on the onus being cast on the plaintiff which he has failed to discharge. On defendants' failure to produce accounts, the onus shifts on to them to prove that the debt in question was not incurred for joint family purposes.

Quaere: Whether the presumption applies to loans contracted by the manager for the purpose of a joint family trade. [P 445 C 1]

S. Srinivasa Aiyangar and *K. Rajah Aiyar*—for Appellants.

T. Rangachariar and *A. Srirangachariar*—for Respondents.

Wallis, C. J.—This is a suit by the members of a temple committee to recover temple funds which were originally lent on two promissory notes, Exs. E and J, dated 10th January 1893, executed by the late Ratnaswamy Nadar, brother of defendant 1, father of defendants 2 to 4, and uncle of defendants 5 to 10. Several promissory notes were executed in renewal of Exs. E and J by Ratnaswamy Nadar, the last of which were Exs. A and A-1. The only question is whether there is sufficient evidence to support the Subordinate Judge's finding that these debts are binding on the joint family of the defendants of which the deceased Ratnaswamy Nadar was the managing member. In 1893, when the loan was contracted, his brothers were minors and there is evidence that he was carrying on the business of an abkari contractor and that the business was a joint family business. The family had been engaged in the business for a great many years, and indeed for a long time were the best known abkari contractors in Southern India. It is contended for the appellants that the plaintiffs have not shown that the debt was contracted by the late Ratnaswamy Nadar for purposes binding on the family. The members of the temple committee who advanced the loan are dead, the clerk whom they called, P. W. 8, was unable to speak from personal knowledge, and the witnesses connected with the defendants whom the plaintiffs put into the box were not anxious to help them, so that there is a dearth of direct evidence. The books of the defendant's firm, if produced, would show whether the money advanced was utilised in the business and the debt was treated as a family debt. The plaintiffs summoned the defendants to produce their books, but the defendants failed to produce them or to explain their failure, and also abstained from going into the box relying on the weakness of the direct evidence for the plaintiff.

The defendants were under a duty to produce their books when summoned or to account for their failure to do so; and as they have done neither, a presumption arises under S. 114, (g) Evidence Act; that the books, if produced, would have been unfavourable to their case and would have shown that the money was borrowed for the purposes of the business which is in accordance with the general probabilities of the case. The Privy Council have recently ruled in *Murugesam Pillai* v. *Gnana Sambanda Pandara Sannadhi* (1), that defendants are not entitled to lie by trusting to the abstract doctrine of onus of proof and refused to furnish the Court with the best material for its decision, and that if they do so the Court is free to conclude that the evidence, if produced, would not have supported the defendants' case. There was no doubt other evidence for the plaintiffs in the case, but the presumption against the defendants arises whether the plaintiffs have any evidence or not and in my opinion it is clear enough to shift the burden in this case, assuming it to be on the plaintiffs and to throw on the defendants the onus of proving that the debts in question were not incurred for joint family purposes. I have assumed that the onus of showing that the debt is binding on the joint family is on the plaintiffs in the first instance, as is generally the case with regard to money borrowed by the managing members In *Nagendra Chandra Dey* v. *Amar Chandra Kundu* (2), and *Ganpat Rai* v. *Munni Lal* (3), this presumption has been held to apply even where the manager is carrying on a joint family business, but, as pointed out by Chandravarkar, J., in *Ragunathji Tarachand* v. *Bank of Bombay* (4), which was not cited in the case last mentioned, the case of a joint trading family is in many ways exceptional, and it appears open to question whether in such a family the presumption should not be the other way. The appeals should be dismissed.

Ayling, J.—I agree.

S N/R.K *Appeal dismissed.*

(1) A. I. R. 1917 P. C. 6=40 Mad. 402=39 I. C. 659=44 I. A. 98 (P.C.).
(2) [1903] 7 C. W. N. 725.
(3) [1917] 34 All. 195=13 I. C. 84.
(4) [1909] 34 Bom. 72=2 I. C. 173.

A. I. R. 1919 Madras 445

OLDFIELD AND SESHAGIRI AIYAR, JJ.

J. Ramaraya Shanbogue—Defendant—Appellant.

v.

Sherbett Venkatramanayya—Plaintiff—Respondent.

Appeal No. 48 of 1918, Decided on 23rd January 1919, against appellate order of Dist. Judge, South Kanara, in A. S. No. 359 of 1917.

Civil P. C. (1908), O. 21, R. 1—Deposit of decree amount—Interest ceases from date of notice to decree-holder.

When the amount of a decree is paid into Court under O. 21, R. 1, interest on the same ceases to run from the date when the decree-holder receives notice thereof: 8 *I. C.* 763, *Dist.* [P 445 C 2]

K. P. Lakshmana Row—for Appellant.

K. Y. Adiga—for Respondent.

Oldfield, J.—The only question for decision is whether interest ceases to run on money paid into Court for a decree-holder under O. 21, R. 1, on the date of that payment or on the date when the decree-holder receives notice thereof. The Code is not explicit on the point, and the authority relied on by the lower appellate Court, *Krishnaswami Chettiar* v. *Ramasawmi Chettyar* (1), deals with a payment under the special provisions of the Transfer of Property Act. Looking however to the terms of O. 21, R. 1, Civil P. C., I observe that there would be nothing to compel compliance by the judgment debtor with Cl. 2, which enjoins the giving of notice of the payment to the decree-holder, if the running of interest stopped before and independently of it.

There is further no reason why the decree-holder should be deprived of compensation for being kept out of his money, because the judgment-debtor chooses a particular method of paying it to him. On these grounds I would dismiss the appeal against appellate order with costs.

Seshagiri Aiyar, J.—I agree. Mr. Lakshmana Rao has raised an interesting question of law which is res integra. After decree, the judgment-debtor paid the decree amount into Court with interest up to the date of the deposit; notice as provided by O. 21, R. 1 (2), was given. The Court below has held that it is only from that date that the decree amount ceased to carry further interest. I think

(1) [1910] 35 Mad. 44=8 I. C. 763.

this conclusion is right. No doubt, as pointed out by the learned vakil for the appellant, the analogy of the Transfer of Property Act is not very helpful, as the legislature has provided specially for the ceesation of interest only after the service of notice. I think there is a closer analogy in O. 24, Civil P. C. R. 3 says that interest on the deposit would cease to run from the date of the notice to the defendant. That is to say that the deposit being taken to have been made up correctly to the date of the deposit, the liability for interest on the sum which, by the fact of the payment the defendant acknowledges to be due to the plaintiff, ceases when the latter has notice of it and is put in the way of receiving the money from Court.

True, that the order in question in terms only governs payments in the course of the hearing of a suit. I do not see why the same principle should not be applied to payments in the course of execution proceedings, especially as O. 21, R. (1) (a), does not say that by the payment satisfaction of the claim of the decree-holder is ipso facto to be entered. The provision for notice rather indicates that the decree-holder's right should be affected only after he is informed that the decree amount is available for him and that he can draw it out of Court. For these reasons I agree that the appeal should be dismissed.

S N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 446

WALLIS, C. J. AND SPENCER, J.

Ramanathan Chetty—Plaintiff — Appellant.

v.

Lakshmanan Chetty and *others*—Defendants—Respondents.

First Appeal No. 25 of 1912, Decided on 14th February 1918, against decree of Sub-Judge, Ramnad in O. S. No. 97 of 1911.

(a) Civil P. C. (1908), S. 14—Suit on foreign judgment—Conditions giving jurisdiction to Court present—Onus of proving want of jurisdiction is on defendant.

Under S. 14, Civil P. C., when the conditions necessary to give the Court jurisdiction to entertain a suit on a foreign judgment are apparent on the record, the onus is on the defendant to prove want of jurisdiction and he must give evidence that none of the conditions which would give jurisdiction were present. [P 446 C 2]

(b) Civil P. C. (1908), S. 14—Parties not present—Presumption is that they submitted to judgment.

In suits on foreign judgments it will be presumed that if the parties were not present, they submitted to the judgment. [P 446 C 2]

A. Krishnaswami Ayyar for *Srinivasa Ayyangar* and *A. Venkatarayaliah*—for Appellant.

C. S. Venkatachariar— for Respondents.

Judgment.— This is an appeal from the judgment of the Subordinate Judge of Ramnad in a suit brought by the plaintiff on a foreign judgment against defendant 1 and the father of defendant 3. The learned Subordinate Judge in para 6 of his judgment correctly stated what was necessary to give a foreign Court jurisdiction, so as to enable its judgment to be sued on here. But he overlooked S. 14, Civil P. C., when he held that the onus was on the plaintiff to show that these conditions were satisfied and that the plaintiff had failed to discharge the onus. S. 14 says:

"The Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction."

Therefore under this section, the onus was clearly upon the defendants to prove want of jurisdiction.

Jurisdiction may arise in a variety of ways, as by residence or by submission and possibly in other ways which it is not necessary to enumerate. When the section says that the defendant must prove want of jurisdiction, prima facie, it seems to us that he must give evidence that none of these conditions which would give jurisdiction were present, and that appears to be the law in England. In Bullen and Leake's Precedents on Pleadings, Edn. 2 of 1863 at p. 167, it is said:

"a declaration (or in cur language a plaint), upon the judgment of a foreign Court need not state that the Court had jurisdiction over the parties or the cause [*Robertson* v. *Struth* (1)] every presumption being made in favour of a foreign judgment."

If every presumption is to be made in favour of a foreign judgment, it will be presumed that, if the parties were not present, they submitted to the judgment. Therefore the result is that the learned Subordinate Judge threw the onus on

(1) [1844] 5 Q. B. 941.

the wrong side. Defendant 1 did not appear, and there is no question at all about his liability. Defendant, 3 who is the son of defendant 2 in the Penang suit went into the box and said that his father had never been in Penang, but he did not say that the father had not submitted to the jurisdiction of the Penang Court. He did not therefore discharge the burden and it is unnecessary to refer to the evidence which Mr. Krishnaswami Ayyar for the appellant was anxious to put in as to what actually happened in the Penang Court.

In the result the appeal must be allowed and the suit decreed with costs throughout—but save as regards the defendant 1 only—to the extent of the joint family property in the lands of ths defendants respectively.

S.N./R.K. *Appeal allowed.*

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* A. I. R. 1919 Madras 447

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Jagannadha Gajapati—Plaintiff—Appellant.

v.

Kunja Bihari Deo—Defendant—Respondent.

Civil Appeal No. 135 of 1917, Decided on 12th September 1918, against decree of Dist. Judge, Ganjam, in Original Suit No. 6 of 1916.

(a) Registration Act (1908), S. 49—Document containing written authority to adopt not registered—Document is not admissible unless it can be construed as will

An unregistered document containing a written authority to a person to make an adoption is inadmissible in evidence under S. 49 unless the document can be construed as a will.

[P 448 C 2]

(b) General Clauses Act (1897), S. 3 (57)—Will—Authority to adopt though revocable and taking effect after death is not will—To make it a will it should in addition contain disposal of property.

A mere authority to adopt though revocable and taking effect on the death of the person cannot be considered a will for the purpose of S. 3 (57), General Clauses Act or even apart from the section. Nor is it enough that the document should purport to be a will. To make it a will it is necessary that it should contain a disposition of property in addition to the authority to adopt

[P 448 C 2]

*** (c) General Clauses Act (1897), S. 3 (57)—Will—Mere direction to person empowered to act as guardian of adoptee to manage property is not disposition of property — Independent posthumous disposition is necessary.**

A mere direction to the person on whom the power is conferred to act as the guardian of the adoptee and to manage the property is not a disposition of property sufficient to satisfy the definition of a will. To make it a will there must be an independent posthumous disposition of property. Where the power to manage the estate conferred by the document is only subsidiary and incidental to the power of adoption and is a statement of the consequences which the testator intends to follow on the adoption the document cannot be treated as a will: 13 *M. I. A.* 277, *Expl.*; 18 *I. C.* 1006, *not Appr.*

[P 458 C 1, 2]

(d) Hindu Law—Adoption—Widow having power to adopt cannot give it up in consideration of advantage to herself.

It is not competent for a widow having power to adopt to give up the power in consideration of an advantage to herself as the authority is given to her not for herself but for the benefit of her husband.

[P 452 C 2]

*** (e) Contract Act (1872), S. 23—Widow undertaking not to exercise power of adoption—Agreement is opposed to public policy.**

An agreement by the widow whereby she undertakes not to exercise the power to make the adoption is void as being opposed to public policy.

[P 452 C 2]

*** (f) Hindu Law—Adoption—Theory that adoption must be made to last male holder does not apply to cases of impartible zamindaris.**

The theory that an adoption must be made to the last male holder has no application to the case of impartible zamindaris. The fact that the estate has passed to a collateral heir when the adoption is made does not extinguish the power of adoption given by a man who held an indefeasible estate the succession to the estate being only provisional and subject to the emergence of a male heir to the latter. The person taking the estate till such heir comes into existence or his heir only takes a defeasible estate.

[P 461 C 1]

(g) Hindu Law—Joint family—Co-parcenary in sense that members constituting it have interest in property does not exist in case of impartible zamindari—Zamindari is however joint family property in that succession to it must be traced from members constituting it — Difference between co-parcenary or joint property and joint family property stated.

Per *Seshagiri Aiyar, J.*—A co-parcenary in the sense that the members constituting it have an interest in the property does not exist in the case of an impartible zamindari. A zamindari is not the joint property of all the members of family. Nonetheless a zamindari is joint family property in the sense that succession to it must be traced from the members constituting the family. There is an essential difference between co-parcenary or joint property and joint family property. A co-parcener has the right either to joint enjoyment or to partition. A member of a joint family has not that right necessarily. In the case of an impartible property it is joint family property controlled by a custom which gives the enjoyment for the time being to a single heir by primogeniture.

[P 461 C 1]

(h) Registration Act (1908), Ss. 17 and 49—Name of document is not conclusive of its

character—Provisions of Act cannot be got over by styling instrument as will.

The name of a document is not conclusive of its character. Therefore by merely styling an instrument a will the provisions of the Registration Act cannot be got over. [P 458 C 1]

An unregistered deed conferring a power to adopt was in the following terms: "I have been laid up with severe bodily illness for the last seven months. Consequently having had serious misgivings and not having been blessed till now with an aurasa son I consent to your adopting a son at your pleasure and to your managing the estate in the best manner possible. With my full consent the will has been executed."

Held: that the deed was not a will but only an authority to adopt which was inadmissible in evidence for want of registration.

[P 449 C 1, P 459 C 2]

K. Srinivasa Aiyangar—for Appellant.

S. Srinivasa Aiyangar—for Respondent.

Wallis, C. J.—This is an appeal from a decree of the District Judge of Ganjam dismissing the suit brought by the plaintiff to recover the zamindari of Chinnakimidi as the adopted son of the deceased zemindar, Brojo Kishore, who died in 1906, leaving a widow but no issue and was succeeded by the senior collateral one Boishnava. Boishnava having died a few days after his succession the estate descended to his son Purshotham and passed on his death in October 1915 without issue to his younger brother Kunja Behari, the present defendant who was in possession and enjoyment when Brojo Kishore's widow on 5th November 1915, purporting to act under an authority given by her husband adopted the plaintiff for whom it is now claimed that this adoption divested the estate which had till then been vested in the defendant. Brojo Kishore was himself an adopted son and his adoption was the subject of a suit which came before the Privy Council in *Sri Viradu Pratapa Raghunada Deo* v. *Sri Brojo Kishore Patta Deo* (1). After his death his adoptive mother who was the widow of Adikonda the previous zamindar purported in 1907 to adopt another boy. His suit to recover the zamindari was finally dismissed by the Privy Council in the present year in *Sri Madana Mohana Ananga Bheema Deo* v. *Sri Purushothama Ananga Bheema Deo* (2), on the ground that at the date of the adoption the authority to adopt which had been conferred upon Adikonda's widow had been extinguished.

The District Judge had dismissed the present suit on the ground that the oral authority relied on was not proved and that the written authority though in his opinion sufficiently proved was inadmissible under S. 49, Registration Act, written authorities to adopt "not conferred by a will" being compulsorily registrable under S. 17 of that Act. The District Judge states that it was practically conceded before him that the evidence of a separate oral authority to adopt was insufficient and so far we entirely agree with his view of the evidence. We have next to consider whether he was right in holding that the written authority on which the plaintiff relied in the alternative was not an authority to adopt conferred by a will as it it was not the plaintiff's suit necessarily fails. Will is defined in S. 3 (57), General Clauses Act 10 of 1897, as including unless there is anything repugnant in the subject or context:

"a codicil and every writing making a voluntary posthumous disposition of property."

and the word as used in S. 17, Registration Act must be viewed in the light of this definition. It is quite clear that a mere authority to adopt though revocable and taking effect only on the death of the person conferring the authority cannot be considered a will for the purposes of the section or even apart from the section. *Mt. Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (3). Nor is it enough that the document should purport to be a will as in the present case. To make it a will it is necessary that it should contain a disposition of property in addition to the authority to adopt. The authority is in the following terms:

"I have been laid up with severe bodily illness for about the last seven months. Consequently having had serious misgivings and not having been blessed till now with an aurasa son for want of divine favour, I consent to your adopting a son at your pleasure and to your managing the estate in the best manner possible. None of my heirs shall have any ground for raising disputes about this. With my full consent the will has been executed."

The effect of these words has been strenuously contested before us. Mr. K. Srinivasa Aiyangar for the plaintiff contended in the first place that they constitute the widow executrix by

(1) [1876-78] 1 Mad. 69=3 I. A. 154 (P. C.).
(2) A. I. R. 1918 P. C. 74=41 Mad. 855=45 I. A. 156=46 I. C. 481 (P. C.).
(3) [1865] 3 W. R. 15=10 M. I. A. 279 (P. C.).

implication as from the date of the death and purported to vest in her not only her husband's separate estate, if any, but also the zamindari itself which by virtue of the Impartible Estates Act 1904, passed on his death by operation of law to his collateral Boishnava, who was the next heir according to the custom of succession prevailing in the estate. I am unable to accept this contention, because the power of management appears to be conferred as incidental to the adoption. Mr. Srinivasa Aiyangar then pointed out that executorships could be limited so as to come to an end at a fixed date or to commence from a fixed date, and asked us to hold that the widow was constituted executrix by implication at least as from the date of the adoption, and he contended that the words used did not confer a mere guardianship or power of management during the minority of the adopted boy, as in the case of *Seshamma* v. *Chennappa* (4) relied on by the other side, seeing that the management is not in terms limited to the minority of the adopted boy. This is an ingenious contention, but I do not think we should be justified in the circumstances of this case in raising an implication of executorship to commence at the date of the adoption.

The zamindar's power of testamentary disposition over the zamindari had just been taken away by the Impartible Estates Act, as he well knew, seeing that no estates were included in the schedule of impartible estates without the assent of or at least notice to, the proprietors. He knew perfectly well that on the adoption the zamindari would vest in the adopted son for his natural life, and it seems to me to be the better construction to read the power of management as incidental to the exercise of the power of adoption and as limited to such management of the zamindari as he had power to provide for, viz., management during the minority of the adopted boy. I do not think there is any authority for the proposition that the appointment of a manager or guardian to the property of another is a disposition of property sufficient to satisfy the definition of a will. In *Mt. Fanny Barlow* v. *Sophia Eveline Orde* (5) there was an express gift to the two wives on trust and not a mere power of management.

So too the Ecclesiastical Courts had no jurisdiction to grant probate of a mere appointment of guardianship as it did not pass goods or goods and lands. *Lady Chester's* case (6), *Morton, In the goods of* (7) and *Bukthawar Mull Sowcar, In re* (8). This is sufficient to dispose of the appeal, but I think it desirable in the present case to refer to the other questions which have been argued before us. The District Judge has discussed the question whether the authority to adopt, Ex. A, has been duly proved in a very careful judgment and has concluded in its favour not, he admits, without some hesitation, a hesitation which is traceable in his comments on the more or less unsatisfactory witnesses who have been called to prove it.

The District Judge did not, I gather, accept the contention for the plaintiff that the previous history and existing circumstances of the family make it highly probable that Brojo Kishore would have conferred a power of adoption on his wife. Brojo Kishore was the natural brother of the zamindar of Peddakimidi, the present plaintiff's father, and had been adopted in the sixties by the widow of Adikonda, Zamindar of Chinnakimidi, both families being descended from a common ancestor. The defendant's grandfather Raghunatha, who belonged to the junior branch of the Chinnakimidi family claimed the zemindari in the year 1852, on the ground that Adikonda was illegitimate and contested the adoption by Adikonda's widow of Brojo Kishore in a litigation which was disposed of by the Privy Council in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brojo Kishore Patta Deo* (1). There had also been litigation between the defendant's father Boishnava and Brojo Kishore as to the amount of maintenance to which the former was entitled as a junior member of the family. It appears from the records that the High Court increased the monthly allowance fixed by the District Judge to Rs. 500, and Brojo Kishore appealed to the Privy Council who dismissed his appeal in 1900. Later in the same year, we find him giving the defendant's brother Purushotham a letter of

(4) [1897] 20 Mad. 467.
(5) [1869-70] 13 M. I. A. 277=5 B.L.R. P.C. 1 (P.C.).

(6) 1 Vent. 207=86 E.R. 140.
(7) [1864] 3 Sw. & Tr. 422.
(8) [1900] 23 Mad. 133.

recommendation, Ex. 1, which would seem to show that relations between them were no longer strained, and there is evidence that they visited him in his last illness. If Brojo Kishore's natural brother, the Zamindar of Peddakimidi, had had sons, there might have been a greater inducement to adopt, but he had then lost the two children who had been born to him, so that the junior branch were the only members of the family. In these circumstances Brojo Kishore might or might not have decided to give his wife a power of adoption. There seems to be no great balance of probability either way.

On the other hand, if he did so decide, it seems strange that he did not take more effective steps to put his wishes beyond all doubt, especially as he must have known how keenly the junior branch had disputed the authority to adopt in his own case. The ordinary thing for a zamindar of his position to do on giving authority to adopt in his last illness would have been to send an arzi to the Collector mentioning the fact, or he might have registered the authority. Registration of wills is not compulsory, and failure to register is often entitled to little weight; but in the present case it is shown that on the very day the written authority is said to have been executed the Sub-Registrar was sent for by the deceased to come and register documents which he had to execute, that the documents were executed on the 19th, that the Sub-Registrar came two or three times when the zamindar was unable to see him, and that finally the two documents Exs. 8 and 9 were registered on the 28th. Having regard to the general circumstances and to what had happened as to his own adoption, I cannot but regard it as highly suspicious that there was no qnestion of registering the authority to adopt on these visits of the Sub-Registrar.

The next thing is that nothing was said to the Deputy Collector when he visited the palace on the day of the death. If the plaintiff did not call him to speak to having heard of the adoption, the defendant should have put him into the box to inform the Court what passed at the interview so as to enable us to judge whether the authority to adopt would naturally have been mentioned if it existed. In his absence we cannot, in my opinion, draw any inference as to this. It was on the occasion of the Collector's visit on the 13th, nine days after the death that the Ex. A first saw the light of day. The interval is not itself suspicious, although it was quite long enough for the preparation of a forged authority. It was not presented to him by the widow but by the Zamindar of Peddakimidi, the natural brother of the deceased and the father of the boy subsequently taken in adoption by the widow.

There was nothing suspicious about this, but this zamindar's subsequent conduct and his own admissions make it necessary to examine carefully the evidence as to his part in these transactions. His own story is that he decided to make a lakh of rupees for himself out of the situation that arose on the death of Brojo Kishore by putting forward an unfounded claim to the estate based on false allegations that Boishnava's father Ragunatha and his son Purushotham were both illegitimate. The claim was utterly baseless and no sensible person would have paid him anything for withdrawing it, if it had stood alone. The authority to adopt claimed for the widow made all the difference, and enabled the zamindar filling the triple role of the widow's representative, rival claimant to the estate and arbitrator between the widow and Purushotham, the next male heir, to bring about a settlement by which, in consideration of two villages being assigned to her by Purushotham, the widow agreed not to adopt any one but one of Purushotham's sons; and Purushotham agreed to pay the zamindar Rupees 70,000 on account of his unfounded claim and for bringing about the settlement and undertaking not to give a son in adoption to the widow without Purushotham's consent, a settlement on which he has since gone back by giving his son, the present plaintiff, in adoption to the widow and so giving rise to the present case. I refer to him as the widow's representative, because she appears to have left everything in his hands and was not separately represented except on one occasion formally.

After the Collector's visit on 13th September, Purushotham applied for registration of the eatate in his name. and the zamindar, according to his evidence, two or three days after the Collector's visit, engaged his vakil Mr. Jogiah to put

in a petition embodying his own unfounded claims. No one was engaged for the widow until 25th September, the day fixed for the inquiry, when the zamindar's vakil sent for a second grade pleader, D. W, 2, handed him a vakalat, which I assume had been duly obtained from the widow though she denies all knowledge of this particular proceeding, and introduced him to an Uriya gentleman on whose instructions he drafted a petition for registration in her name and repeated the unfounded allegations as to the illegitimacy of Purushotham. This petition was copied out in Mr. Jogiah's office. The pleader appeared before the Collector later in the day and presented his petition and there his connexion with the case ended. Some witnesses are said to have been examined but Purushotham's claim to the estate pending an adoption was so clear that the Collector seems simply to have directed registration in his name. The evidence of the zamindar and the widow as to what followed is far from clear. The next thing we really know is that on 5th December application for registration of Ex. A was made to the Sub-Registrar on behalf of the widow. It then became his duty to issue notices and hold an inquiry but before the day fixed for the inquiry the disputes were settled on the terms already mentioned. Two vakils were then sent to Madras, one Mr. Jogiah acting, it is to be observed, for Peddakimidi and the widow, and the other acting for Purushotham, to consult vakils there. They apparently brought back the drafts of V series Exhibits, the first being between Purushotham and the widow and the second between Purushotham and the zamindar of Peddakimidi. Ex. 5 represents Peddakimidi as an arbitrator and the settlement between the widow and Purushotham as having been effected on his advice, but says nothing of the Rs, 70,000 he got from one of the parties for bringing it about. Ex. 5-a is more explicit.

In summing up the evidence in support of the execution of Ex. A the District Judge observes that the zamindar of Peddakimidi was a person whose evidence should carry weight; though of course he was interested. The Zamindar's conduct he says, was not particularly honest but he did not think it lent any support to the theory that Ex. A is a forgery. No doubt, the fact that the zamindar availed himself of the existence of Ex. A to extract a large sum of money for himself on the strength of a wholly unfounded claim does not show that as part of his scheme he induced the widow by a promise of two villages for herself to join with him in setting up a forged authority from her husband, but it does show that he is a man of few scruples. His interest in obtaining this great estate for one of his sons is enormous, and has induced him to break the undertaking, for which he was paid, not to give a son in adoption to the widow without Purushotham's consent. In these circumstances I cannot agree with the District Judge that his evidence that Brojo Kishore spoke to him about the oral and written authority is entitled to any weight. On the contrary, I think it should be wholly discarded. With reference to the argument that the terms of the settlement embodied in Exs. 5 and 5-a show that Ex. A was a genuine document, I agree with the District Judge that that is not a safe test, as it seems to me that these terms might have been arrived at whether Ex. A was genuine or the reverse.

The fact that the plaintiff's advisers were not in a position to put Brojo Kishore's Dewan, Ramakrishna, into the box has next to be considered. He was the only person of any position among the attesting witnesses, and, according to the plaintiff's case, was responsible for the drafting of Ex. A which he is said to have copied from an old will which has not been produced. He was one of the witnesses to the plaintiff's adoption, and as pointed out by the District Judge, it was not alleged that he had turned hostile. The evidence of his not being at home when sent for is not entitled to serious consideration. His evidence might have thrown much light on many aspects of the case, and I think the defence were justified in commenting strongly on the fact that he was not called.

His absence was by no means supplied by an undated pencil note Ex. B, which a vakil swears to have received from him about the time when the alleged authority is said to have been given. It says the writer was starting in an hour and asks the vakil to draft a will by which the Rajah can authorize the Ranee to adopt a son when she likes. He never came, the vakil did nothing and never

heard any more about it. Consistently with this, the Raja might have thought of adopting and abandoned the idea. In the unexplained absence of the writer, it proves nothing. The District Judge does not, I think, place any reliance on the two attesting witnesses and the writer of the will who were called and I agree with him. He does not in his summing up rely on the evidence of the widow and in so far as he relies on the evidence of the Zamindar of Peddakimidi, I am unable for reasons already given to agree with him. Then we come to the evidence of Dr. Powell. Brojo Kishore was attended in his last illness by the District Surgeon as appears from Ex. 2-q. The witness, who was then in the Subordinate Medical Service, says he had previously attended him and that he saw the zamindar on two occassions before his death, on one of which he spoke of having given an oral authority to adopt, while on the next occasion he sent for the wrtiten authority and showed it to the witness. This must have been after the 14th and at a time when Brojo Kishore was being attended by the District Surgeon, a fact of which the witness was not aware. The District Judge observes:

"that the witness is a man of respectable position, but has been the medical adviser of the Zamindar of Peddakimidi for the last I2 years, and he is certainly not disinterested."

The District Judge declined to act on his evidence as to the oral authority given by Brojo Kishore, and has observed that there was no necessity to send for the will and show it to the witness. He did not mention either of these conversations to any one at the time, and it seems hardly safe, when the issues are of much magnitude as in this case, to act on his recollection of two conversations 11 years afterwards. The District Judge has also relied to some extent on the signature in English characters to Ex. A. According to Dr. Powell the deceased had been suffering from functional disease of the heart evidenced by palpitation, giddiness and fainting fits. Ex. 2 shows that as far as back as February he had ceased to initial documents as before. The signatures to Exs. 8 and 9 on 19th August, five days after Ex. A, are in a very weak and shaky hand such as might be expected from his condition. The signature to Ex. A is in a very firm hand comparatively, as are the initials made in the early part of 1906 in Ex. 2, before he fell ill. We have not been supplied with specimens of his full signature when in good health. If the signature in Ex. A is a forgery, it was no doubt copied from one of his signatures when in good health. It it is genuine, I should have expected it, having regard to his condition, to show more of the shakiness to be found in his signatures in Exs. 8 and 9 on the 19th five days later, and again in the same documents on the 28th. In these circumstances I cannot agree with the District Judge that the evidence as to the signature strengthens the case for Ex. A. Looking at the evidence as a whole I should find great difficulty, if it were necessary to decide the point, in holding that Ex. A had been proved by clear and satisfactory evidence on which it would be safe to act.

Issue 7 raises the question whether the adoption is invalid as being in contravention of the settlement arrived at on 27th January 1907. Assuming that Brojo Kishore gave his widow authority to adopt by Ex. A, I agree with Mr. K. Srinivasa Aiyangar's contention for the plaintiff that an agreement by which she undertook not to adopt in consideration of the assignment of two villages to herself was void as contrary to public policy, the authority being given to her not for herself but for her husband.

Issues 8 and 9 raise the question whether at the date of the adoption the widow's authority to adopt had come to an end by reason of the devolution of the estate from Boishnava, her husband's heir, to his son Purushotham and whether the adoption if valid could divest Purushotham and his heirs. This question, in my opinion, is concluded by the recent decision of the Privy Council in *Sri Madana Mohana Ananga Bheema Deo* v. *Sri Purushothama Ananga Bheema Deo* (2), deciding as regards this very family that the power of Brojo Kishore's mother to adopt to her husband Adkionda came to an end when the adopted son Brojo Kishore attained full age and so full capacity to continue the line either by natural-born sons or by adoption. If this be the true rule of limitation it is inapplicable here, as adoption by the widow is the only way in which Brojo

Kishore's line can be continued. The succession to the estate of Boishnava and his line was, in my opinion, in their Lordships' language, only provisional and subject to the emergence of a male heir to Brojo Kishore, which is the position of the plaintiff if the authority to adopt is held to be duly established. This however has not, in my opinion, been established, and the appeal therefore fails and must be dismissed with costs.

Seshagiri Aiyar, J.—The suit is to recover possession of the zamindari of Chinnakimidi. The plaintiff, who is the natural son of the Zamindar of Peddakimidi, was adopted in 1915 by Rathanamani Mahadevi in pursuance of an alleged authority to adopt given by her deceased husband Broja Kishore. Brojo Kishore, who was himself the adopted son of Adikonda Deo, died on 3rd September 1906. It was his adoption which led to the suit which was ultimately decided in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishore Patta Deo* (1). On the date of his death his adoptive father's brother's son Boishnava Deo was alive. This latter died on 18th September 1906, and was succeeded by Purushotham Deo who died in October 1915. The defendant is the brother of Purushotham Deo. The District Judge was of opinion that the alleged authority to adopt was true; but as that was not registered it could not be acted upon. An oral authority to adopt was also put forward and was found against. The District Judge however expressed no opinion on the question whether Brojo Kishore's widow, the plaintiff's next friend, was estopped from making the adoption as she was bound by Ex. 5. He also left undecided the question whether the adoption, if otherwise valid, was ineffectual as it was not made to the last male holder. In the result, he dismissed the suit, and the plaintiff has appealed.

In this Court there were elaborate arguments on all the issues. I shall first deal with the question of the genuineness and validity of the written authority to adopt, as both sides claimed that the value to be attached to the evidence on the question of oral authority would largely depend upon our decision on this question. The learned District Judge, who had the advantage of seeing the witnesses, came to the conclusion that Ex. A, the alleged authority, was in fact executed by Brojo Kishore. I confess that there are great difficulties in forming a definite conclusion on the question. There are some considerations which weigh heavily against the conclusions of the trial Judge. The document is said to have been attested by six persons. The first signature is that of Ononti Rajaguru. The name suggests that he was the family priest of the deceased. This man has not been examined. He is apparently alive and there is no explanation for not putting him into the witness box. The next signature is that of one Ramakrishna Rao, Dewan of the deceased zamindar. He is still alive and has not been examined. P. W. 8 was examined to prove that all possible endeavours were made to procure the attendance of the Dewan. I am not impressed by this evidence. The Dewan would naturally be the person who would have attested Ex. A if it was in fact executed. He attested the deed of adoption executed in November 1915. Certainly till then he must have been friendly to the plaintiff's adoptive mother. It was argued by Mr. K. Srinivasa Aiyangar that if this person were available there was no reason why plaintiff should have willingly failed to examine him, inasmuch as it was not suggested that his signature in Ex. A was forged. It is impossible to speculate upon the reasons which have led plaintiff's advisers not to examine this witness. It may be that this witness has been won over by the other side. Or it may be that he repents of his part in bringing into existence Ex. A. Whatever may be the reasons that have induced the plaintiff not to insist upon a warrant of arrest being issued for his attendance, there can be no doubt that the most important evidence available in the case has been kept back from the Court. The learned District Judge has weighed the evidence with painful impartiality. There is only one adverse remark that I would make against the judgment. If I were trying this case I would have examined the Dewan as a Court witness having regard to the largeness of the property at stake and to the important evidence which this man alone could give.

It is a very serious defect in the evidence on the side of the plaintiff that this man has not been examined.

The next circumstance is that Ex. A has not been attested by the Zamindar of Peddakimidi, who says that he was in the habit of visiting Brojo Kishore during his last illness. They were natural brothers, and notwithstanding the fact that a suit relating to boundary dispute was pending about the time between them, it seems unlikely that they were not on good terms. The medical attendant of the zamindar has also not attested Ex. A. I shall refer to his evidence later.

The writer of the will was a Sub-Postmaster on a very small salary. It is true he was also employed by the zamindar. But it seems strange that a document of this description should not have been drafted by the ordinary legal advisers of the zamindar. Ex. B has been produced to show that the zamindar had intended to authorize his widow to adopt. It is a letter written in pencil by Ramakrishna Rao, the Dewan, and was addressed to Mr. Ramanujaswamy, a High Court Vakil. I see nothing suspicious in its production. Mr. Ramanujaswamy, a High Court Vakil of some standing, who, the Judge says, is a respectable vakil, has deposed that it was in his office from the time of its receipt. It bears no date, but the witness says that he received it about the end of July 1906. The witness further identifies the signature and writing of the Dewan. Here again we are met by the difficulty of not having the Dewan in the witness-box to speak to the circumstances which led to Ex. B being addressed to Mr. Ramanujaswamy. I am prepared to hold, notwithstanding the comments of the learned Advocate-General against the deposition of plaintiff's witness 2, that Ex. B was written by the Dewan and was sent about the end of July 1906 to the witness. But the document does not help us very much. We do not know whether the zamindar asked the Dewan to have a will prepared, as the letter says. It may be that the Dewan of his own accord suggested the drafting of a will. Why ultimately Mr. Ramanujaswamy or some other professional gentleman was not asked to prepare a will is not explained. The suggestion that as the will was not a complicated one it was considered enough to draft one on the model of a will which gave authority to Adikonda's widow to adopt Brojo Kishore does not meet the difficulty.

Then again the will was not registered. The learned Advocate-General referred to Ex. 2 series to show that the Sub-Registrar was in attendance in the palace of the zamindar about this time to register two other documents, Exs. 8 and 9. On 14th August the Sub-Registrar was requisitioned to come to the palace. On the 17th, another letter (2-q) was sent with the necessary fees for the attendance of the Sub-Registrar. On 18th August this officer was in the palace; but Brojo Kishore excused himself from signing Exs. 8 and 9 on the ground that he was indisposed. The Sub-Registrar returned to Aska and came back on 27th August. On that date also Brojo Kishore was unable to exert himself. On the 28th the two documents were registered. It was said that having had a Sub-Registrar in the palace on these two occasions, if Ex. A was really executed on 14th August, it would have been registered. The answer of Mr. K. Srinivasa Aiyangar is not unreasonable. Brojo Kishore did not want to exert himself even when the Sub-Registrar was actually there to register a cumpulsorily registrable document. Would he go out of the way to register a document which was not compulsorily registrable? There is force in this observation. I am not prepared to attach very great weight therefore to the non-registration of Ex. A.

Then it was said that the will was not shown to the Deputy Collector, when this officer was there to see that there was no dispute regarding the possession of the zamin properties. I do not think there is any force in this contention. The Deputy Collector was there to prevent unseemly disputes, should there be any. He was not charged with making any inquiries as to succession to the zamindari. Moreover when the corpse of the deceased zamindar was in the palace, it is not reasonable to suggest that the bereaved widow should have produced the document before the revenue officer; it is opposed to all notions of decency entertained by Hindus in this matter. Then it was said that an arzi should have been sent to the Collector intimating that an authority to adopt was given. There have been instances in zamindari families where this procedure has been adopted. But having regard to the fact that on 13th September, ten days after the death of Brojo

Kishore, Ex. A was shown to the Collector who went there to make inquiries, I am not satisfied that this circumstance is entitled to any serious consideration.

Now I shall deal with the circumstances relied on by the learned vakil for the appellant. The persons who have attested the document are certainly those who might ordinarily have been expected to attest a document like Ex. A. There was a Rajagaru or the family priest; there was the Dewan; there was the Indian physician; there was the personal attendant who was also the treasurer of the household; there was the head of the peons; and there was the person who was in the habit of shampooing the zamindar. These are the men who might ordinarily be expected to be about the zamindar during his serious illness. Against this must be said that the Zamindar of Peddakimidi, the natural brother of Brojo Kishore, should have attested the deed if it was really executed. I do not attach much significance to the omission, because at that time the Zamindar of Peddakimidi had himself no son and Ex. A purports to give unlimited discretion to the widow to adopt anybody she chose. It may be that Brojo Kishore did not think it worth while to ask his natural brother to attest such a document. In favour of the will it was also said that Ex. A was produced before the Collector within ten days. This is a circumstance which is entitled to weight.

It was also pointed out that Ex. A is the kind of document which would have been executed by the deceased if he intended to empower his widow to adopt. Further the servants and the Dewan who have attested the document cannot be said to have been under the influence of the widow, because the moment Brojo Kishore died issuleess Boishnava Deo became entitled to the zamindari. The strongest circumstance however in favour of the genuineness of the will is Ex. V. The facts that led to the execution of this document must be stated in some detail. After the death of Brojo Kishore the parties were not friendly to each other. On 19th September, the day after the death of Boishnava Deo, Purushotham Deo sent a petition to the Collector in which he referred to the death of Brojo Kishore and to that of his father, and prayed that he might be recognized as the lawful successor to the zamindari of Chinnakimidi. On 25th September Rathinamani Mahadevi, Brojo Kishore's widow, sent Ex. 3 to the Collector in which she stated that a will, dated 14th August 1906, empowering her to adopt a son was left by her husband, that under the Hindu law she was the guardian of the boy to be adopted, and she as the widow of the late zamindar was entitled to succeed to the estate in her own right. There is no reference in the petition of Purushotham Deo to the will of Brojo Kishore. The fact that the Collector came to the palace on 10th September and that a will was produced before him must have been known to Boishnava Deo and his sons. I cannot accept the contention of the learned Advocate-General that Purushotham Deo was not aware that a will had been set up as early as the 10th September. Therefore the omission to make any reference to the will in this petition of Purushotham Deo is significant. On 25th September there was a petition by the Zamindar of Peddakimidi, in which it was alleged that Boishnava Deo and his son were illegitimate, that the petitioner had learned that a will was left by Brojo Kishore authorizing his widow to adopt a son, and prayed that the claim of Purushotham Deo to be placed in possession of the estate should be refused and that his name should be registered as the Zamindar of Chinnakimidi. All these three petitions were posted for inquiry sometime in October and the Collector directed that the zamindari should be registered in Purushotham's name. Subsequently in December Ex. A was presented for registration.

While matters were at this stage, agreements 5 and 5a were executed by Purushotham Deo. The terms of the agreement were that Purushotham Deo's right to Chinnakimidi should be recognized, that Ex. A should be withdrawn from the office of the Sub-Registrar, that Rathnamani Mahadevi should not insist upon her right to adopt, that the adoption, if ever made, should be with the consent of Purushotham Deo, that two villages should be absolutely given to Rathnamani Mahadevi, that if a son was born to Purushotham Deo within ten years from the date of the agreement and if Mahadevi were inclined to adopt a son, that son should be adopted by her. One other clause of the agreement is that if Purushotham Deo did not carry out his

part of the agreement Mahadevi was at liberty to exercise her right of adoption. This agreement was the result of a mediation by the Zamindar of Peddakimidi. How a party, who himself had claimed adversely to Purushotam Deo and to some extent adversely to the widow, came to be the mediator passes one's comprehension. This Peddakimidi Zamindar got Rs. 70,000 as a reward for bringing about a reconciliation between Mahadevi and Purushotham Deo. His conduct seems to me not to have been above board. But the significance of this compromise is strongly in favour of the genuineness of Ex. A. It is true that both Mahadevi and the Zamindar of Peddakimidi disputed the legitimacy of Purushotham Deo. But it is clear that it was a malicious attack and that there was no foundation for the imputation. On a previous occasion Boishnava Deo's father Raghunatha Deo had disputed the legitimacy of Adikonda Deo, but at no time was the legitimacy of Raghunatha Deo and his children ever questioned. Therefore this imputation regarding illegitimacy could not have been seriously made. Why was it then that Purushotham Deo consented to the terms embodied in Ex. 5. As I said before during all the time the inquiry was pending before the Collector regarding succession to the zamindari, Purushotham Deo does not appear to have put in writing any paper impugning the genuineness of Ex. A. He had succeeded to the zamindari.

Therefore if he believed that the will was a fabrication, he would not have agreed to the terms of Ex. 5. It is significant that he agreed to give his own son in adoption. He seems to have been anxious that his branch should have the zamindari. Until the adoption he would undoubtedly be the zamindar. And if any adoption was to be made he stipulated that his son should be adopted. As regards the Zamindar of Peddakimidi he had no children living at the date. Therefore he was losing nothing by consenting to the terms contained in Ex. 5. He had been paid a large sum of money. It is in evidence that a son and a daughter born to him had died and therefore he was not sure that he would have children enough who, in addition to succeeding to his own zamindari, could be spared to be given in adoption to Brojo Kishore. If we look at the language of Ex. 5b, which was executed between Purushotham Deo and the Zamindar of Peddakimidi, it looks as if both of them recognized the genuineness of Ex. A. To my mind the conduct of the parties at this time is the strongest piece of evidence in favour of the genuineness of Ex. A.

Then there is the deposition of Dr. Powell. I am free to confess that his evidence has not impressed me much, but there is the fact that the learned District Judge who had the witness before him believed his evidence. Other witnesses have supported Ex. A. Although as the District Judge points out, their position is not such as would warrant a Court of law in basing its decision solely upon their testimony, it must be said that in cross-examination nothing has been elicited against their credibility.

Last of all there is the question of the identity of the handwriting of Brojo Kishore. The formation of characters notwithstanding the very able adverse comments of the learned Advocate-General seems to tally with the recognized signature of the deceased. It is curious that no signature of Brojo Kishore prior to 14th August has been produced. The respondent contends that it was the duty of the appellant to have produced documents anterior to the execution of the will. It is answered that immediately after the death of Brojo Kishore the zamindari and the papers connected with the zamindari passed into the hands of Purushotham Deo and are still in the possession of his brother, and therefore if the signatures before 13th August 1906 were different from that contained in Ex. A, the respondent could easily have produced documents to sustantiate his case. The initials contained in Ex. 2 do not help one to test the signature in Ex. A. The only two documents from which a comparison could be drawn are Exs. 8 and 9. The signatures in them were affixed at a time when the zamindar was getting worse from day to day and when he was unwilling to make an exertion even to see the Sub-Registrar. Naturally they are very shaky. On the whole I am not prepared to say that the signature in Ex. A is not that of Brojo Kishore. Mr. Ramanujaswamy, who has had the opportunities as the vakil of Brojo Kishore of being acquainted with

his handwriting, swears that the signature is that of the deceased.

I have stated the objections and their answers very fully. If I had only the deposition of the witnesses before me without any idea of their demeanour, I would have felt inclined to say that Ex. A was not satisfactorily proved. The absence of the Rajaguru and of the Dewan from the witness-box would have weighed very strongly with me. But as has been very often pointed out by the Judicial Committee, the question I have to put myself is not what my decision would have been had I been a trial Judge but whether there are sufficient grounds for not accepting the conclusion of a trial Judge on a question of fact. The District Judge has seen the witnesses. He has relied upon the evidence of Dr. Powell. He has not altogether rejected the testimony of Mahadevi and of the zamindar of Peddakimidi. It is true that the latter is very much interested. But that has not weighed with the District Judge who has seen the witness to the extent of totally disbelieving his evidence. As regards the evidence of Mahadevi it must be said, as was pointed out by Mr. Srinivasa Aiyangar, that she does not gain very much by this adoption. It may be that the adopted son may dispute the validity of the agreement Ex. 5. She cannot therefore be regarded as a very interested witness, and the learned Judge has attached some weight to her testimony. In these circumstances I am not prepared to say I am satisfied that the District Judge was wrong in his conclusion. I must therefore proceed to deal with this case on the footing that Ex. A was executed by Brojo Kishore. I feel it safer to proceed on this basis as I have stated fully all the points in connexion with the will, and as it is clear that this litigation will not stop in this Court.

Now I shall proceed to deal with the next question of fact before dealing with the question of law. The learned vakil for the appellant stated that the weight to be attached to the evidence relating to the oral authority to adopt would depend largely upon our conclusion as to the execution of Ex. A. It is true, as was pointed out by him, that the written authority would have been preceded by some informal talk about the subject. Notwithstanding these considerations I see no reason to differ from the conclusion of the District Judge on this question. The strongest circumstance against the oral authority is that it was not mentioned in the petition to the Collector and it was not until November 1915 that this authority was set up. The only witness whose deposition need be examined with some care is that of Dr. Powell. He refers to a conversation with Brojo Kishore which, according to him, was interpreted by P. W's. 5 in Telugu. P. W. 5 contradicts Dr. Powell on this point. Moreover on a question relating to an incident which took place ten years ago the memory of the most respectable persons cannot be altogether relied upon. It may be that Dr. Powell did not hear what was said clearly or it may be that the conversation was not properly translated to him. Dr. Powell says that Brojo Kishore spoke in a very feeble voice. On the whole I see no reason to differ from the District Judge on this question.

I shall now deal with the first question of law arising on these two findings of fact and that is whether Ex. A is a will merely an authority to adopt. If it is the latter, not being registered it cannot be acted upon. There was some discussion at the Bar as to the reasons which led to S. 17, Cl. 3, Registration Act being introduced. Apparently the legislature was of opinion that an authority to adopt which would have the effect of transferring considerable property, should be registered. It at the same time recognized the fact that a will was not compulsorily registrable. It was not intended to introduce any change in this respect, probably for the reason that a will being ambulatory could be revoked, and consequently no right might pass under it. But the same reasoning applies to an authority to adopt It is also ambulatory in its nature and can be revoked. Therefore there seems at first sight no justification for making bare authorities to adopt compulsorily registrable. But it is not open to us to examine the reasons for the rule when the rule itself is plain and unambiguous. Two things are clear, (a) that a bare authority to adopt must be registered and (b) that a testamentary instrument need not be registered Therefore when Cl. 3 says: "that authority to adopt a son not conferred by a will shall also be registered," it must be taken to have provided that the document must prima

facie be a will. It is well settled that the name of a document is not conclusive of its character. Therefore by merely styling an instrument a will the provisions of the Registration Act could not be got over. I shall therefore examine the contents of the document to see whether it is in essence a testamentary disposition. The definition in the General Clauses Act includes "a codicil or every writing making a voluntary posthumous disposition of property." The essence therefore of a will is it is a posthumous disposition of property. The document before us reads thus:

"I have been laid up with severe illness for the last seven months. Consequently, having had serious misgivings and not having been till now blessed with an heir apparent for want of Divine favour, I have consented to your adopting a son at your pleasure and to your conducting the management of the estate in the best manner possible."

Mr. K. Srinivasa Aiyangar, laid stress upon the use of the expression "rajiabharam" in the will, that is the burden of the Raj. The learned vakil contended that ex facie the document gave the management of the zamindari at once to the widow. I am unable to agree with this interpretation of the clause. The Impartible Estates Act was passed in the year 1904, and this zamindari was included among those to which the Act applied. Consequently Brojo Kishore must have known that he had no power of disposition over the estate as the Act aimed at withdrawing the power which the Judicial Committee in the case of *Sartaj Kuari* v. *Deoraj Kuari* (9), had held an impartible estate owner possessed. There is no reason for imputing to Brojo Kishore any intention to violate the law. I am prepared to agree with the learned vakil that if there was an invalid disposition of the property that would not affect the character of the document. But I do not think having regard to the fact that the law was passed two years before the date of the alleged will, that it was the intention of Brojo Kishore to convey the whole zamindari at once to the widow.

I think the right interpretation to be placed upon the clause which I have quoted is to hold that Brojo Kishore wanted his widow to adopt a son and to manage the estate on behalf of the adopted son as his guardian. I am unable to hold that the power of management was given independently of the exercise of authority to adopt. Mr. Srinivasa Aiyangar also contended that apart from the estate there were personal effects of Brojo Kishore which it might have been the intention of the testator to give to his widow. I do not think that that was the intention which operated on the mind of Brojo Kishore. His widow without any testamentary disposition would have been the heir to his personal effects and in the document itself there is no reference to these personal effects. It refers to the conduct of the management of the estate and not to the inheritance of the personal property. Therefore, in my opinion, the power to manage the estate was regarded by the testator as subsidiary and incidental to the exercise of the power of adoption. In other words, there was no independent posthumous distribution of property. The decisions relied upon by the District Judge support him in the view he has taken. It is true that in the case of *Seshamma* v. *Chennappa* (4) the question was whether the persons named were executors. The learned Judges say :

"We think, it is quite clear, that there was no intention to vest any property in them. They were only directed to protect the property during the minority. It is not the administration of the estate which they are told to carry out. But rather it is as guardians of the child whose adoption is contemplated that they are intended to act."

There were words in that document which indicated that the persons named were to be in possession of the property only during the minority of the adopted boy. Nonetheless the sentence I have quoted indicates that in the opinion of the learned Judges if the persons mentioned in the will were only expected to act as guardians no property could vest in them. The next case of *Somasundara Mudaly* v. *Doraisami Mudaliar* (10) is more to the point. There the document stated :

"I have given you authority to adopt Somasundaram and to have my obsequies and all other ceremonies performed by him. I have hereby given you authority to put him in possession of all the properties which I got under the decree. * * * If you are not willing to adopt the said Somasundaram you shall adopt anybody you please and put the property into his possession. You shall put also all the immovable properties in my possession into the possession of the adopted boy."

(9) [1883] 10 All. 272=15 I. A. 51 (P.C.).

(10) [1904] 27 Mad. 30.

The learned Judges say with reference to this document :

"That this is simply a statement of the consequences that should legally follow on the adoption."

Similarly in the present case, the power to manage may be regarded as a statement of the consequences which the testator intended to follow on the adoption. As regards *Santhana Sooramma* v. *Santhana Mangayya* (11). I agree with the learned vakil for the appellant that the decision is wrong. There was an elaborate discussion on both sides as to whether a power to manage as a guardian could be regarded as a testamentary disposition. There are some old cases to which the learned Advocate-General has drawn our attention, where it has been held that a bare authority to manage as a guardian will not entitle the nominee to probate of the instrument ; vide *Quick* v. *Quick* (12). It was there held :

"A will which merely appoints a guardian ought not to be admitted to probate."

I do not think this is conclusive of the question whether there was a posthumous distribution of property. The mere fact that the particular instrument is not admitted to probate is not decisive of its being a non-testamentary instrument. It may now be taken as settled that where a document appoints an executor, probate can be granted of it, as such an appointment would involve a disposition of property. So also where a trustee is appointed. It seems to me that there is a very thin line of distinction between the appointment of a guardian to manage and the appointment of an executor or a trustee to manage on behalf of the beneficiary. But even in India there have been cases in which it was held that the appointment of a guardian would not amount to a posthumous distribution of property. *Bukhtawar Mull Sowcar, In re* (8) is one of those cases. In the present case I do not think that the document can be said to have constituted Mahadevi an executor or trustee. As I read it, the power to manage is to come into operation only when the adoption is made. In this country people are more conversant with the appointment of guardians than with the appointment of executors whose office is to begin at some future period. After all, what we have to see is what the testator intended, whether he intended that his widow should be executrix when and if an adoption is made by her, or whether what he intended was that when an adoption is made she should protect the adopted son as the heir to the property and manage the estate on his behalf. The idea of constituting a person an executor who is to exercise his functions on a contingency could not have been in the contemplation of Brojo Kishore. I am therefore of opinion that the natural meaning of the document is that Brojo Kishore intended his wife to adopt and after adopting to act as the guardian of his adopted son. On this ground and also for the reason that the power of management is not the primary object of the instrument but only auxiliary to the exercise of the power to adopt, I am of opinion that Ex. A is not a will but is only a power to adopt, and as such it ought to have been registered.

As we are told that the case is likely to be taken to the Judicial Committee, I think it desirable to deal with the other two contentions, although my conclusion on the last question is enough to dispose of this case. The learned Advocate-General contended that Ex. 5 estopped Mahadevi from adopting the plaintiff. I am wholly unable to agree with this contention. Mr. K. Srinivasa Aiyangar pointed out, and very rightly, that it was not competent to the widow to give up a power which was not intended for her personal benefit. The object of Brojo Kishore was that a boy should be adopted who would perpetuate his line and perform his ceremonies. It was not open to Brojo Kishore's widow to give up this power. The learned Advocate-General referred to cases in which family arrangements have been upheld by the Judicial Committee and contended that Ex. 5 evidenced such an arrangement. I do not think those authorities have any bearing on the present question. I am unable to see how Mahadevi can be said to have acted on behalf of the estate in entering into this agreement with Purushotham. In the first place she had no right to the estate, and secondly, she had no right to act on behalf of a person who was to come into existence at some future period. It may be she could have bound herself by a personal estoppel. That apparently is what the parties contemplated because there is a provision in the agreement

(11) [1913] 18 I. C. 1006.
(12) [1864] 3 Sw. & Tr. 442=10 L. T. 619.

penalising the defaulting party in damages.

I do not wish to discuss those cases relating to powers of appointment quoted by the learned Advocate-General. In my opinion, there is not much analogy between a power of appointment and an authority to adopt. If there is any, the authority to adopt can at best be only likened to a special power of appointment. In the case of a general power large discretion is given to the donee because it is open to him to have appointed himself as the heir ; but it has been held that in the case of a special power the donee ought not ordinarily to deviate from the directions of the testator. In this case the donee of the power to adopt was expected to exercise it not in her own favour but on behalf of her husband. Consequently it was not open to her to give up that right. Mr. Mayne in para. 119 expresses a doubt whether such a power could not be given up. He does not discuss the matter at any length. *Assur Purshotam* v. *Rattanbai* (13), *Suriya Rau* v. *Raja of Pittapur* (14) and *Rambhat* v. *Lakshman Chintaman Mayalay* (15), seem to indicate that a power like this cannot be given up. After all this authority is conferred to enable the donee to create a status, or in other words to bring into existence a person who would not only succeed to the property of her husband but would also be able to collaterally inherit to others. Such a creation of status involving such a bundle of rights could not be given up by the donee of the power. In Trevelyan's Hindu Law, p. 102 and Sircar on Adoption p. 214, this view is accepted. The decision in *Lala Kanhai Lal* v. *Lala Brij Lal* (16) relied on by the Advocate-General has no bearing upon this question. There the person claiming to be an adopted son was held bound by a compromise which he was not allowed to repudiate when he became entitled to succeed as a reversioner. Moreover even if Brojo Kishore's widow was estopped, in my opinion that would not affect the rights of the adopted son. There was undoubtedly the authority of the husband, and in pursuance of that authority plaintiff was adopted. What give him his status was not dependent upon the personal estoppel against Mahadevi. For these reasons I am of opinion that Mr. K. Srinivasa Aiyangar is right in his contention that Ex. 5 does not estop plaintiff from claiming the Zamindari. In this connexion I amy dispose of a short point relied on by the learned vakil. He suggested that the agreement was brought about by the exercise of undue influence on Mahadevi. There is nothing to suggest that this lady was without advisers and was otherwise incapable of looking after her interests. I see no reason to differ from the District Judge on this question.

Now comes the last question, namely as to whether the adoption is invalid because it was not made to the last male holder. According to the learned Advocate-General, the last male holder must be taken to be Purushotham Deo; and the contention is as the adoption was not made to him it is invalid. I do not propose to go into this question at any length, because I had to examine this theory in my decision in *Madana Mohana* v. *Purusthothama* (17) which has since been affirmed by the Judicial Committee in *Sri Madana Mohana Ananga Bheema Deo* v. *Sri Purushothama Ananga Bheema Deo* (2). I ventured to suggest in my judgement that an impartible zamindari is nonethelees joint family property and that therefore the theory that the adoption must be made to the last male holder has no application to such property. I also pointed out that this theory is inconsistent with many decisions of the Judicial Committee. The learned Advocate-General argued that the proposition that an impartible zamindari is the joint family property must be taken to have been overruled by the decision of the Judicial Committee in the recent Pittapur maintenance case, *Sri Rajah Rao Venkata Mahipathi Gangadhara Rama Rao Bahadur* v. *Sri Rajah Venkata Kumara Mahipati Surya Rao Bahadur Garu, Raja of Pittapur* (18). In that case Lord Dunedin in delivering the judgment of the Board said:

"An impartible zamindari is the creature of custom and it is of its essence that no co-parce-

(13) 1889] 13 Bom. 56.
(14) [1886] 9 Mad. 499=13 I. A. 97 (P.C.).
(15) [1880-81] 5 Bom 630.
(16) A. I. R. 1918 P. C. 70=40 All. 487=45 I. A. 118=47 I. C. 207=(P. C.).
(17) A. I. R. 1915 Mad. 274=38 Mad. 1105=24 I. C. 999.
(18) A. I. R. 1918 P. C. 81=41 Mad. 778=47 I. C. 354 (P. C.).

nary exists. This being so the basis of the claim is gone, inasmuch as it is founded on the consideration that the plaintiff is a person who if the zamindari were not impartible, would be entitled as of right to maintenance."

It was also pointed out:

"This proposition, it must be noted, does not negative the doctrine that *there are members of the family* entitled to maintenance in the case of an impartible zamindari; just as the impartibility is the creature of custom, so custom may and does affirm a right to maintenance in certain *members of the family*."

It is clear from this judgment that the Judicial Committee recognized that, notwithstanding there was a full owner of all the properties for the time being, there was a family to which he belonged and to which future rights of succession have to be traced. It is true that a coparcenary in the sens e that the members constituting it have an interest in the property does not exist in the case of an impartible zamindari. It is equally true that the zamindari is not the joint property of all the members of the family. But nonetheless the zamindari is joint family property in the sense that succession to it must be traced from the members constituting the family. There is an essential difference between co-parcenary or joint property and joint family property. A coparcener has the right either to joint enjoyment or to partition. A member of a joint family has not that right necessarily. In the case of an impartible property, it is joint family property controlled by a custom which gives the enjoyment for the time being to a single heir by primogeniture. In the judgment pronounced by Viscount Haldane in *Sri Madanh Mohana Ananga Bheema Deo* v. *Sri Purushothama Ananga Deo* (2) these sentences occur:

"The suit is concerned with an impartible zamindari in the District of Ganjam called Chinnakimidi or Pratapgiri. In 1863 the holder of the zamindari was Raja Adikonda Deo who was a member of a joint Hindu family subject to the Mitakshara law."

However that may be, this theory of making the adoption to the last male holder, as suggested by the Advocate-General, is opposed to what the Judicial Committee have said in *Sri Madana Mohana Ananga Bheema Deo* v. *Sri Purushothnma Ananga Bheema Deo* (2) and in very many other cases. Even if this theory of the last male holder is accepted, the person to whom adoption should be made is Brijo Kishore and not Parushotham Deo. Brojo Kishore was the full owner of the property. On his death and pending the coming into existence of a preferable heir, Boishnava Deo succeeded. From Boishnava Deo the estate went to Purushotham. The estate taken by Boishnava and Purushotham was a defeasible estate. The fact that succession in the case of Boishnaya was from son to grandson is not a reason for holding that he did not take a defeasible estate. Supposing instead of an estate which is to be put an end to on the happening of an event, a period has been fixed for the termination of the estate supposing it was a lease for 99 years which Boishnava had taken succession to that estate would go to his son and grandson and so on until the period expires. Afterwards the lessor or his heir would re-enter. Similarly until the contingency happens which acts as defeasance of the temporary estate, succession has to be traced to the line of the first intermediate owner. The learned Advocate General contended that in the hands of Boishnava the estate was defeasible, but that in the hands of Purushotham it became indefeasible and that in order that there may be defeasance of the estate the adoption should have been made before the property descended from Boishnava to Purushotham. I fail to see on what principle this rule is to be worked. Certainly there is no text of Hindu law which changes the character of the estate the moment it passes from the first possessor to his heirs, and no principle of convenience can be appealed to for sanctioning such an extraordinary rule.

On the other hand the decision of the Judicial Committee to which Mr. K. Srinivasa Aiyangar drew our attention shows distinctly that the theory when once a collateral takes a defeasible estate it becomes indefeasible in the hands of his successor is not sound. *Bachoo Hurkisondas* v. *Mankorebai* (19), which was an appeal from *Bachoo Harkinsondas* v. *Mankorebai* (20), supports this view. In *Baehoo Harkinsondas* v. *Mankorebai* (20) Sir Lawrence Jenkins, after reviewing all the authorities and particularly the first Chinnakimidi case reported as *Sri Virada Pratapa Raghunada Deo* v. *Sri Brojo Kishoro Patta Deo* (1), said:

(19) [1907] 31 Bom. 373=34 I. A. 107 (P.C.).
(20) [1905] 29 Bom. 51.

"In *Raghunada's* case (1) the family was undivided: prior to the adoption there was only one surviving member of the family and in that member the whole property had vested those conditions exist here. The only difference is that there the adopted son claimed against one who came in by descent here against one who has come in by survivorship. But is this a difference of such moment as to deprive the widow here of the power of adoption, which in that case was held to be vested in her. Though in *Raghunada's* case (1) the successor came in by descent not by survivorship still he had to be found within the limits of the joint family . . , Therefore the fact that only one member of the joint family survived at the time of the adoption was not regarded there and need not be treated here as an obstacle in the way of an adoption within the joint family."

This pronouncement establishes the fact that there has been a descent and would not put an end to the power of adoption given by the man who held an indefeasible estate. This judgment was confirmed by the Judicial Committee in *Bachoo Hurkisondas* v. *Mankorebai* (19). We find this passage in the judgment:

"The next point raised was as to the effect of the adoption on the title to the joint property. It was contended that at the time when the adoption took place the family estate had become vested absolutely and exclusively in the infant Bachoo and that the adoption could not detract from the right so vested. Their Lordships are however of opinion, as were the Courts in India that the case of *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo* (4) governs this case and excludes the appellant's contention."

In the case decided in *Sri Madana Mohana Ananga Bheema Deo* v. *Sri Purushothama Ananga Bheema Deo* (1) the Judicial Committee in clear terms indicate that the adoption if made to Brojo Kishore would be effective. In p. 160 of 45 I. A. it is stated:

"The Hindu law no doubt recognizes the validity of an authority given to a Hindu widow by her deceased husband to make a second adoption or even a third or fourth adoption on failure of the previous adoption to attain the object for which the power is given namely the perpetuation of the deceased's line, to discharge the obligations that rest on a pious Hindu."

About the conclusion of the judgment their Lordships say:

"The authority to adopt conferred on Adikonda's widow was brought to an end when Brojo Kishore the son she originally adopted died after attaining full legal capacity to continue the line either by the birth of a natural born son or by the adoption to him of a son by his own widow."

And the very last line of the judgment says:

"But Raghunatha's succession was of a character only provisional and subject to defeasance by the emergence of a male heir to Adikonda."

I have only to add the words 'or to Adikonda's adopted son Brojo Kishore" and this sentence would exactly cover the present case. Moreover their Lordships have laid down that the true principle has to be found in *Ramkrishna Ramchandra* v. *Shamrao Yeshwant* (21). The principle therein enunciated is:

"Where a Hindu dies leaving a widow and a son and that son himself dies leaving a natural-born or adopted son, or leaving no son but his own widow to continue the line by means of adoption the power of the former widow is extinguished and can never afterwards be revived."

These words apply exactly to the present case and when we bear in mind that the estates taken by Raghunatha and Boishnava and Purushotham were in the language of the Judicial Committee subject to defeasance by the emergence of a male heir to Adikonda, it is clear that the adoption made to Brojo Kishore is perfectly valid. In the result, I agree with the learned Chief Justice that the appeal should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(21) [1902] 26 Bom. 526.

A. I. R. 1919 Madras 462

SESHAGIRI AIYAR, J.

T. V. Seetharamayyar — Plaintiff — Petitioner.

v.

Munisami Mudaliar and *another* — Defendants—Opposite Party.

Civil Revn. Petn. No. 1316 of 1917, Decided on 21st October 1918, from decree of Dist. Munsif, Tiruppattur, in Small Cause Suit No. 610 of 1917.

Limitation Act (1908), Art. 75—Bond executed for subscriptions payable to chit fund in instalments — Provision for payment of whole amount on default of any instalment on demand—Demand must be made if whole amount is asked to be paid at once.

Where a bond was executed for subscriptions payable to a chit fund in certain specified instalments, and for payment of the whole amount remaining due on failure to pay any instalment on demand.

Held: (1) that a claim for the whole amount due on default of any instalment could only be based on the bond and not on the original cause of action [P 463 C 2]

(2) that the expression "on demand" was not merely a technical one meaning that the money was payable at once, but that it was intended to be a condition precedent that a demand should be made if the whole amount was to be asked to

be paid at once: 20 *Mad.* 245; 21 *Mad.* 139 and 31 *I. C.* 335, *Diss. from.* [P 463 C 2]

T. M. Krishnaswami Aiyar—for Petitioner.

C. A. Seshagiri Sastri — for Opposite Parties.

Judgment.—The case has been very fully argued by the two learned vakils who appeared for the petitioner and the counter-petitioners. I shall therefore proceed to give judgment at once. The suit is for instalments due in respect of a chit fund. The plaintiff calls himself the agent and proprietor of the fund. Defendant 1 was a subscriber in it. He obtained the prize in the raffle and received the full amount. Thereupon Ex. A was executed by him and his surety to the plaintiff. One sentence in it which has given rise to much comment is this:

"We shall severally or jointly without setting up proportionate liability pay in lump on demand the balance due with interest at 1 per cent per mensem from the date of default."

After the execution of the bond, defendant 1 paid sums of money although he did not pay them on the due dates according to the rules of the fund. The present suit was brought for the balance. It is admitted that, if the claim is made for the subscription and not based on the bond subject to other defences, if any, the suit will be in time. The District Munsif has held that the suit was barred by limitation. The first question argued before me by Mr. T. M. Krishnasami Aiyar was that the suit must be deemed to have been based on the original cause of action and not on the bond and as the plaintiff is only claiming whatever is due to him within the period of limitation, no question of limitation can arise. I was at first inclined to agree with him, but on considering the matter more fully I think that Mr. C. A. Seshagiri Sastriar's contention is well founded in regard to this matter. In para. 13 of the plaint, it is stated:

"He (the plaintiff) has not therefore enforced the penal clause of the bond and has waived his right."

There can be no question of waiver unless it be a suit on the bond itself. Nowhere is it stated that the suit is based upon the liability under the rules of the fund. Mr. T. M. Krishnasami Aiyar suggested that there can be no question of instalments under the bond, Ex. A, because there are no instalments provided in it expressly. I do not think that this contention is well founded because the bond refers back to the receipt containing the bye-laws, and the receipt containing the bye-laws would undoubtedly have given the various dates on which instalments are due. Therefore if the question turns solely upon the construction of the plaint, whether it is based upon the original cause of action or on the bond, I would have agreed with the lower Court that the suit is based upon the bond and as there has been a default in the payment of the instalments, it would be barred by limitation. The next question is whether, under the bond, the right to the whole amount accrued on default of paying any one of the instalments. Before dealing with the cases which have been quoted, I may refer to the language of the document itself. The vernacular expression is (thangal vendumbodu) and when that expression occurs in reference to the payment of the whole amount and not in regard to the payment of the instalments, it seems to me that it was the intention of the parties that, if the promisee wanted to enforce his rights under the penal clause to require the promisor to pay the whole of the amount, he must make a demand.

The context and the language employed are prima facie in favour of the view that there should be an antecedent demand before a suit is brought. As regards the cases cited, the learned vakil for the counter-petitioners invoked the very high authority of Blackburn, J., for the proposition that whenever the words "on demand" occur in any instrument, whether it be a mercantile instrument or any other deed, they should be regarded as technical words indicating that the cause of action arises at once. On examining the case quoted, namely, *Brighty* v. *Norton* (1), I do not find that the learned Judge drew any distinction between mercantile transactions and other transactions. The other English cases quoted do not take the matter any further. Before dealing with the Indian cases I may refer to the decision in *Brown's Estate, In re, Brown* v. *Brown* (2), which seems to indicate that, where a provision is made for payment of a larger amount on the happening of a contingency, that

(1) [1863] 32 L. J. Q. B. 38.
(2) [1893] 2 Ch. 300.

contingency must be proved to have happened.

That case has since been accepted as good law in *Bradford Old Bank Ltd.*, v. *Sutcliff* (3). Coming to the Indian cases I shall confine my attention, as the learned vakil did, to the decisions of this Court. In *Perumal Ayyan* v. *Alagirisami Bhagavathar* (4) and *Perianna Goundan* v. *Muthuvira Goundan* (5) where the words "on demand" occurred in a mortgage document, this Court held that they were technical words which meant that the money was payable at once. Having regard to the later authorities, Mr. C. A. Seshagiri Sastri conceded that these cases can no longer be regarded as good law. If we turn to *Nettakaruppa Goundan* v. *Kumarasami Goundan* (6), I find that on a similar expression used there the Court held that there must be a demand before the suit is brought. Since then, except for one authority to which I shall refer presently the decisions in this Court have been practically uniform. In Appeal No. 27 of 1916, in which I took part sitting with Ayling, J., we pointed out that except in transactions connected with law merchant, the words "on demand" have meaning and that there should be a demand before the cause of action arises.

In that case, we accepted the proposition laid down in *Karunakaran Nair* v. *Krishna Menon* (7) and *Kuttiassan* v. *Suppi* (8). Subsequent to that decision two learned Judges of this Court in Second Appeal No. 121 of 1916 have taken the same view. As against these decisions there is a judgment of Sadasiva Aiyar, J., in *Surayya* v. *Tirumalanadham Bapirazu* (9). As was pointed out in Appeal No. 27 of 1916 on the file of the High Court, the attention of the learned Judge does not seem to have been drawn to the judgment of Abdur Rahim, J., in *Karunakaran Nair* v. *Krishna Menon* (7). I may say that if *Surayya* v. *Tirumalanadham Bapirazu* (9) was rightly decided, this case would be covered by that authority. But as that decision was given without reference to the other decisions of this Court I am unable to follow it sitting as a single Judge. In my opinion, it is not right to hold, except in the case of instruments coming under the Negotiable Instruments Act, that words of the parties which have been deliberately inserted in a document have no meaning. In the present case, I think that the parties deliberately used the expression, because, although there was a liability to pay each of the instruments separately, they intended to make it a condition precedent that a demand should be made if the whole amount is to be asked to be paid at once. For these reasons, in my opinion, the judgment of the District Munsif holding that the suit is barred by limitation is wrong and must be reversed. I reverse his judgment and remand the case to him for disposal according to law. Costs will abide the result.

S.N./R.K. *Order set aside.*

(3) [1918] W. N. (Eng.) 295.
(4) [1897] 20 Mad. 245.
(5) [1898] 21 Mad. 139.
(6) [1899] 22 Mad. 20.
(7) [1911] 36 Mad. 66=12 I. C. 57.
(8) [1893] 3 M. L. J. 199.
(9) [1915] 31 I. C. 335.

A. I. R. 1919 Madras 464

SESHAGIRI AIYAR AND NAPIER, JJ.

Ammalu Achi—Plaintiff—Appellant.

v.

Ponnammal Achi and *others*—Defendants—Respondents.

Second Appeal No. 1425 of 1916, Decided on 11th October 1918, against decree of Dist. Judge, Tanjore, in Appeal Suit No. 253 of 1915.

(a) Election—Doctrine of, is based on principle of compensation and not on that of forfeiture—Court is not concerned with quantum of compensation.

The doctrine of election is based on the principle of compensation and not on that of forfeiture. The quantum of compensation is not what the Court looks to. It is only concerned with seeing that a party deprived of a right vesting in him is recompensed by the gift of another, whatever may be its nature or duration of enjoyment. [P 465 C 1]

(b) Will—Construction—Persons accepting benefit under will must adopt whole contents of instrument and renouncing every right inconsistent with it—Election

A person who accepts a benefit under a deed of will must adopt the whole contents of the instrument conforming to all its provisions and renouncing every right inconsistent with it. If therefore a testator has affected to dispose of property which is not his own and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition, but if, on the contrary he chooses to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those

rights. *Lord Chesham, In re: Cavendish* v. *Dacre*, (1886), 31 *Ch. D.* 466; and 30 *Cal.* 843; *(P.C.), Dist.* [P 466 C 1,2]

(c) Transfer of Property Act (1882), S. 35 —Doctrine of election is applicable to Hindus —Succession Act (1865), S. 172.

Section 35, T. P Act and S. 172, Succession Act, enunciate the doctrine of election as enforced in England, and though these sections do not apply to Hindus, the principle of English decisions applies to them. [P 466 C 2]

T. R. Ramachandra Aiyar and *A. V. Viswanatha Sastri*—for Appellant.

T. R Venkatarama Sastri and *S. Subramanya Aiyar*—for Respondents.

Judgment.—Before we dispose of this second appeal finally, there must be a finding on the following question: Whether Subramania Thevan intended the Rs. 800 which he referred to in his will as a debt due to the plaintiff, to represent the value of the 3 acres of ancestral land belonging to the plaintiff which he devised to others and other rights, if any, which the plaintiff had against him in respect of his management of her property. No fresh evidence will be adduced. The findings should be submitted in six weeks and seven days will be allowed for filing objections. (In compliance with the order contained in the above judgment, the District Judge of Tanjore submitted the following)

Finding.—I am asked to submit a finding to the High Court on the evidence already on record:

"Whether Subramania Thevan intended the Rs. 800 which he referred to in his will as a debt due to the plaintiff, to represent the value of the 3 acres of anoestral land belonging to the plaintiff which he devised to others and other rights, if any, which the plaintiff had against him in respect of his management of her property."

It is not easy to come to a decision on this point as the attention of the parties was never directed to it during the trial of the suit and there is absolutely no evidence on it. I shall therefore have to deal with the matter on general and rather vague grounds. Surbamania Thevan's will, Ex. B, dated 14th July 1909, recites that he proceeds to dispose of the "properties moveable and immovable which I have" and he proceeds to bequeath to the plaintiff, in lieu of a claim which she admits she has on him, the land detailed in Sch. C equivalent to Sch. B of the plaint, 16.52 acres, since the plaintiff's father's share at partition had been sold away. In Sch. H in the will, a list of debts, Rs. 800, is entered as due to the plaintiff. I think it is clear that Subramania Thevan thought that he was bequeathing his own property and not any property to which the plaintiff was entitled, and that therefore the idea of compensating her for unauthorizedly dealing with her property in his will cannot have been present to his mind. There is no hint in the will that he was depriving plaintiff of any property due to her and that in lieu of that he was bequeathing to her Rs. 800. There is no specific mention in the will of the plaint A schedule property, 2.59 acres (not 3 acres as stated in the order of remand), nor any clause relating to it similar to that in which he mentions the 16.52 acres or admits any reason for compensating plaintiff therefor.

The Rs. 800 mentioned in Sch. H of the will appears to me to be simply a legacy styled loosely as a debt, as probably also in the case of Rs. 1,000 due to his "grandson Srinivasan." Plaintiff admits that she has no proof of any loan or of any real debt to her by the testator. So far as any inference can be drawn from the evidence on record regarding the value of the lands, Rs. 800 will not represent the value of 2.59 acres at that time. In Sch. B, 16.52 acres is valued at Rs. 4,000. At this rate 2.59 acres would be worth a little over Rs. 600. So this again would indicate that the Rs. 800 was not intended as an equivalent for 2·59 acres. If the testator had any such intention to compensate the plaintiff for this property, I think there would have been some hint of it in the will. I therefore find in answer to the reference that there is no reason to believe that Subramania Thevan intended the Rs. 800 to represent the value of 2·59 acres belonging to the plaintiff and devised by him, or the value of any other claims which the plaintiff may have had on him. I find that in all probability he had no such intention and that the Rs. 800 was a separate legacy bequeathed to the plaintiff which is not referable to any antecedent claim which the plaintiff had on him. I return a finding accordingly.

Judgment.—The finding is that the testator intended to make an independent gift of Rs. 800 to the plaintiff by his will. The testator was the divided brother of the plaintiff's father; and ma

naged the properties which she inherited, during her minority. Before his death, the testator bequeathed a portion of the properties which he was then managing to defendant 2 : by the same instrument he gave the plaintiff Rs. 800. She now sues to recover the devised inherited property and also the legacy of Rs. 800. Issue 8 in the case raises the question of election. In our opinion, the doctrine is applicable to the present case. The weight of authority in England is to regard the doctrine as based on the principle of compensation and not on that of forfeiture : see *Ker* v. *Wauchope* (1) and *Rancliffe* (*Lord*) v. *Parkyns* (2). The fact that defendant 2 may be compelled at the instance of the reversioners to give up the property after the lifetime of the plaintiff, whereas she will have an absolute right in Rs. 800 bequeathed to her is not a ground for not applying the doctrine of election. The quantum of compensation is not what the Court looks to. It is only concerned with seeing that a party deprived of a right vesting in him is recompensed by the gift of another property, whatever may be its nature or duration of enjoyment : see *Wilson* v. *John Townshend* (*Lord*) (3) and *Webb* v. *Earl of Shaftesbury* (4). Further as pointed out in *Whistler* v. *Webster* (5):

"it is immaterial in regard to the doctrine of election whether the testator, in disposing of that which is not his own, is aware of his want of title, or proceeds on the erroneous supposition that he is exercising a power of disposition which belongs to him ; in either case, whoever claims in opposition to the will, must relinquish what the will gives him : Jarman on Wills, Edn. 1 : see also *Thellusson* v. *Woodford* (6) and *In re Brooksbank, Beauclerk* v. *James* (7).

The fact therefore that had the testator known that he was giving defendant 2 only a precarious life-interest in the two acres, he may not have given plaintiff Rs. 800, is not a sufficient reason for not giving the plaintiff the Rs. 800 if she chooses to claim it. The principle on which election rests has been thus stated by Jarman at p. 532 :

"The doctrine of election may be thus stated. That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument conforming to all its provisions and renouncing every right inconsistent with it. If therefore a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatees accepting the benefit so given to him must make good the testator's attempted disposition, but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights."

This statement has been accepted as a correct exposition of the rule by eminent Judges : see also *Cooper* v. *Cooper* (8) and *Codrington* v. *Codrington* (9). Mr. Ramachandra Aiyar, relying on *In re Lord Chesham*, *Cavendish* v. *Dacre* (10), contended that as the plaintiff had no power of disposition over the property dealt with by the testator no question of election can arise. The plaintiff could certainly alienate her life-interest even granting that that was all that she had in the two acres disposed of by the testator. The decision in *Mahommad Afzal Khan* v. *Ghulam Kasim Khan* (11) proceeded on the footing that as the party was asked to choose between two donations by two different donors, no question of election arose. We may say that S. 35, T. P. Act, and S. 172, Succession Act, enunciate the doctrine of election as enforced in England but as those sections do not apply to Hindus we have preferred to base our judgment on English decisions. We are unable to agree with Mr. T. R. Venkatarama Sastri that the plaintiff had deliberately made her choice because she took possession of the immovable properties decreed to her pending the appeal. In the appeal she claimed the money in addition. Therefore, the immovable property as well as the money were in dispute in the appeal. We think that in modification of the decree of the lower appellate Court, plaintiff should be given two months' time to elect which of the two properties she would accept. If she does not elect within that time, it must be held that she elected to retain the immovable properties which she took possession of in execution. The respondent will then be at liberty to apply for restitution of the other property if that contingency arises. The order as to costs in the lower Courts

(1) [1819] 1 Blight. 1=4 E. R. 1.
(2) [1888] 6 Dow. 149=3 E. R. 1428.
(3) [1795] 2 Ves. (Jun.) 683=30 E. R. 846.
(4) [1802] 7 Ves. (Jun.) 480=32 E. R. 194.
(5) [1794] 2 Ves. (Jun.) 367=30 E. R. 676.
(6) [1806] 13 Ves. (Jun.) 209.
(7) [1886] 34 Ch. D. 160.
* *See* Sixth Edition p. 536.—*Ed.*

(8) [1875] 7 H. L. 53.
(9) [1875] 7 H. L. 854.
(10) [1886] 31 Ch. D. 466.
(11) [1903] 30 Cal. 843=30 I. A. 190 (P.C.).

will stand. In this Court each party will bear her or their own costs.

S.N./R.K. *Decree varied.*

A. I. R. 1919 Madras 467

AYLING AND KRISHNAN, JJ.

Secy. of State—Petitioner—Appellant.

v.

Dadi Reddi Nagiah and *another*—Respondents.

Appeal No. 84 of 1918, Decided on 20th September 1918, against order of Dist. Judge, Cuddapah, D/- 28th January 1918, in Insolvency Petition No. 22 of 1917.

Provincial Insolvency Act (1907), S. 4 (b)—Nominal or benami deed of sale executed with intent to defeat creditors is act of insolvency—But sham sale not affecting interest in property does not constitute act of insolvency.

A nominal or benami deed of sale executed by a person with intent to defeat or delay creditors is an act of bankruptcy and is within the mischief of S. 4 (b). It effects a transfer of property in the same way as a deed for consideration does. [P 468 C 2]

A deed of transfer however which evidences a sham transaction which the parties have no intention whatever to give effect to and which does not affect the property or any interest in it, is a mere nullity and does not constitute an act of insolvency within the meaning of the section. [P 467 C 2]

V. Ramesam—for Appellant.

K. Koti Reddi and *P. Narayanamurthi*—for Respondents.

Krishnan, J. — This appeal arises from an application made by the present appellant to the District Judge under S. 5, Provincial Insolvency Act, to have respondent 1 adjudged an insolvent, on the ground that he committed an act of insolvency by executing and giving to respondent 2 a deed of sale of some of his properties within three months previously, with the intent of defeating the appellant's debt. In this petition the deed was stated to be a "nominal" deed. Respondent 1 admitted that as he was greatly indebted, and feared that his creditors might take away all his properties he executed the sale deed in question nominally and for no consideration out of confidence in respondent 2 who was a close relation of his. Respondent 2 who had been made a party to the proceedings pleaded on the other hand that the sale was a valid one made bona fide and for proper consideration.

The learned District Judge dismissed the appellant's petition without taking any evidence holding that it did not disclose any act of insolvency. He treated the allegation in the petition that the sale-deed was a nominal one as meaning that the transaction was a sham transaction and as he considered that such a transaction was a pure nullity and did not effect a transfer of the property within the meaning of S. 4, Cl. (b), Provincial Insolvency Act, and as it could not possibly defeat or delay creditors, he held that no act of bankruptcy had been committed by respondent 1 by executing the sale-deed. If we are to understand by a "sham" transaction a transaction which the parties have no intention whatever to give any effect to and which does not in any way affect the property or any interest in it and in which the document executed is a mere nullity a piece of paper of no value or effect regarding the property it may be that such a transaction, not effecting any transfer of property by its very nature is insufficient to constitute an act of insolvency, as S. 4, Cl. (b), requires a transfer to be made. In *Isit* v. *Beeston* (1) it was laid down that an actual transfer of property or of some interest in goods was necessary to constitute an act of bankruptcy. The same principle will no doubt apply to immovables also. The language of Cl. (b) is also clear.

But I am of opinion that the District Judge was in error in thinking that the allegation in the present case was of the nature described in the above paragraph. What the appellant stated was that the deed was a nominal one and not that it was a sham one. I understand by the expression "nominal" that the deed was executed to respondent 2 and in his name really for the benefit of respondent himself. The idea is to formally vest the title in one's nominee so that he may hold the property openly for himself but secretly for one's own benefit using the document as a cloak to save it for one's self from his creditors. In such a case, far from there being no intention to give any effect to the deed, the parties have the serious intention of defeating creditors by it. For that purpose it is necessary to legally vest the title to the property in the transferee and the deed is executed with that very object. In such a case it seems to me clear that there is transfer of property effected by the deed

(1) [1869] 4 Ex. 159.

if the formalities required by law for a proper document have been complied with as they have been in this case.

It is not the case of the petitioner that the document was got up with no intention to give any effect to it, as the District Judge supposes, for he says expressly that it was intended to defeat him. In fact it was explained to us by the Government Pleader for the appellant that the word "nominal" was inadvertenly used in the petition and as it was quite unnecessary to make an averment that the deed was a nominal one, we have allowed him to amend his petition by omitting that word. On the petition as it now stands, there is no foundation at all for thinking that the deed of sale was alleged to be a "sham" one. But even on the petition as it stood before, I consider that the view taken by the District Judge of the allegation in it is not well founded. It is not the case of the insolvent either that the deed was a mere sham, for he also asserts that though it was for no consideration it was executed to defeat creditors. On the other hand, the transferee contends that it was taken by him bona fide for full and proper consideration. The intention to transfer is thus clear according to all parties; the questions whether consideration was paid and whether the transferee was to hold the property for the transferor's benefit are immaterial in this connexion, and as a formal deed of sale was executed and registered in respondent 2's name, I must hold that a transfer of the legal title to the property was effected by it and if that transfer is shown to be made with the intent to defeat creditors, it is an act of insolvency.

The District Judge has also observed in his judgment that there must be a real obstacle created in the way of creditors for them to be defeated or delayed or for an act of insolvency to be committed. There can be no doubt that a benami deed executed by a debtor as a cloak to save his properties from his creditors is a very serious obstacle in their way and if they fail to prove its real nature they will not only be delayed but defeated altogether. In fact so far as the creditor is concerned the mischief is greater in such a case for he is unable to have recourse to the consideration money which would presumably be available for him when the transfer deed is for consideration. There is therefore all the more reason for holding that a nominal deed executed for defeating creditors is an act of bankruptcy. No authority has been cited to show that a deed of transfer can be treated as not amounting to an act of bankruptcy merely because it is a "nominal" deed. I think such a deed is as much within the meaning of Cl. (b) as any deed for consideration is.

I am therefore unable to support the District Judge's view in this case. But before respondent 1 is adjudged an insolvent it must be established that his intent in executing the deed of sale was to defeat or delay creditors. It is true that he has admitted this intention but as the transferee has been made a party to these proceedings as respondent 2 and as he has pleaded that the transfer is a bona fide one made in good faith and for valuable consideration and as the sale deed to him is the very document relied on as giving rise to the act of insolvency I think it is proper that the question whether it does amount to such an act should be tried before respondent 1 is adjudicated. The matter I think should not be left to be disposed of hereafter on an application under S. 36 or S. 37 of the Act, in the circumstances of this case. I would therefore reverse the order of the District Judge and remand the application to him for fresh disposal. Costs here to be costs in the cause.

Ayling, J.—As at present advised, I concur in the view taken by my learned brother of the meaning of the words "makes a transfer" in S. 4 (b), Provincial Insolvency Act. I speak thus cautiously because we have not had the benefit of any argument contra and the words are open to the construction placed upon them by the learned District Judge. The broader view is however not only as it seems to me the more reasonable one but certainly the one most in accord with the public interests. I agree in the order proposed.

S.N./R.K. *Case remanded.*

A. I. R. 1919 Madras 468

WALLIS, C. J. AND AYLING, J.

Secy. of State—Defendant—Appellant.

v.

Rajah of Ramnad—Plaintiff—Respondent.

Appeal Suit No. 194 of 1918, Decided on 19th February 1919.

Madras Proprietary Estates Village Service Act (1894), S. 22- Revenue Officer in charge of Division and not subordinate officer must fix annual rent value of estate.

Under S. 22, it is incumbent upon the Revenue Officer in charge of the division to fix the annual rent value of the estate. The computation of value by his subordinate officer is not a sufficient compliance with the section.

[P 469 C 1]

V. Ramesam—for Appellant.

K. Srinivasa Aiyangar and *R. Krishnamachariar*—for Respondent.

Judgment.—The result of the evidence is, as found by the Subordinate Judge, that the annual rent value of the estate was not fixed for the purposes of the Act by the Revenue Officer in charge of the division as provided in S. 22, Madras Proprietary Estates Village Service Act, but by his subordinate, the Deputy Tahsildar, nor is there any evidence to show that the Deputy Tahsildar's calculation was adopted by the Revenue Officer in charge of the Division as his own.

The Deputy Tahsildar's demand was made in Ex. C-1, dated 18th April 1913 and the money was paid by the Rajah under protest on 4th and 6th August 1915, and he now sues to recover it back on the ground, among others, that the demand was illegal owing to the failure of the Officers of Government to comply with the provisions of the section. We agree with his contention and dismiss the appeal on this ground with costs.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1919 Madras 469

ABDUR RAHIM AND OLDFIELD, JJ.

Muniappa Chettiar and *others*—Plaintiffs—Appellants.

v.

Vellachamy Munnadi and *others*—Defendants—Respondents.

Appeal No. 199 of 1916, Decided on 16th August 1918, against decree of Temporary Sub-Judge, Madura, in Original Suit No. 53 of 1915.

(a) Transfer of Property Act (1882), S. 59—Attestation before execution by one executant—Bond is not legally operative.

The word "attested" in S. 58 does not merely mean that the person attesting should see the execution of the document. It requires a further act, that is, subscribing the name of the witness on the document as having seen the execution.

[P 469 C 2]

Where therefore the attestors to a deed of mortage subscribed their names after it was signed by one of the executants and merely saw the subsequent execution of it by the other executant, but did not subscribe their names again as attesting witnesses:

Held: that the bond was not legally operative.

[P 469 C 2]

***(b) Transfer of Property Act (1882), S. 59—Document without proper attestation is ineffectual—Admission by executant of execution does not cure defect—Evidence Act (1872), S. 68.**

The provisions of S. 59, T. P. Act, relate to the question of the legal operation of the document itself apart from the mode of proving it, and without a proper attestation the document would be ineffectual to create a mortgage.

Therefore the admission of the executant in the pleadings that he executed the document will not cure the defect arising from the want of proper attestation.

[P 470 C 2]

***(c) Civil P. C. (1908), O. 8, R. 5—Admission of execution of mortgage in pleadings—Court can still frame issue to see whether document is validly attested.**

Even where the execution of a mortgage is admitted, it is competent to the Court to frame an issue whether the document has been validly attested and to require proof of the same.

In a case where a Court finds that a certain document would not be valid in law unless certain facts were proved, and it is doubtful whether those facts existed, it is competent for it to embark on an inquiry into the subject.

[P 470 C 2]

A. Krishnaswami Aiyar—for Appellants.

S. T. Srinivasagopala Chariar and *T. Naraimha Iyengar*—for Respondents.

Abdur Rahim, J.—In this case a mortgage bond was executed by two persons. One of them executed it in his own house in the presence of two attesting witnesses. Afterwards the document was taken to the jail, when the other executant executed it. The attesting witnesses who had already attested the document, went to the jail and saw the execution of it by the other executant, but they did not subscribe their names again as attesting witnesses after the document was executed by the 2nd executant in jail. It is the question of the validity of the mortgage so far as this executant, defendant 1, is concerned that has been argued before us in the appeal.

I have not the least doubt that an attestation of a document before its execution cannot be called proper attestation within the meaning of S. 59, T. P. Act. Attestation does not consist merely in seeing the execution of a document. It requires a further act, that is, subscribing the name of the witness on the document as having seen the execution. I think this is involved in the very definition of the word "attest," and that is also in ac-

cordance with what is laid down by their Lordships of the Privy Council in *Shamu Patter* v *Abdul Kadir Rowthan* (1) and *Maharaja Ram Narayan Singh* v. *Adhindra Nath Mukhurji* (2). This is again how it was understood by a Division Bench of this Court in the case of *Kotamreddi Seetamma* v. *Vannelakanti Krishnaswamy Row* (3). It seems to me something like contradiction in terms to speak of attestation of a document before its execution. Mr. A. Krishnaswami Aiyar argued that if the so-called witnesses put down their names to a document intending to see its execution afterwards and then actually saw its execution, such a continuity of intention and action would constitute the act a sufficient attestation within the meaning of law. But I fail to see what the intention of the witnesses has got to do with it. The document must be signed by the executant, and that fact must be testified on the document itself by the witnesses who saw its execution. Then it was argued on behalf of the appellants that in this case, it was not open to the trial Judge to go into this question at all, because defendant 1 in his written statement admitted that the mortgage bond had been executed. It was argued that this amounts to an admission that the document was validly executed, that is to say, it was not only executed by defendant 1, but that the requirements of law regarding attestation by two witnesses had been complied with. In the first place I cannot read the statement as necessarily implying that the requirements of law with respect to attestation had been conformed to. I think all that was meant to be admitted was that defendant 1 had signed the document.

No doubt no legal objection to the validity of the document was taken in the written statement by the defendant on the ground that it was not properly attested as required by the law. It was not until the examination of one of the witnesses for the plaintiff that the Subordinate Judge, thinking that the question of due attestation ought to be inquired into, framed the additional issue with respect to this point. It is argued that it was not open to the Subordinate Judge to do this. I do not however see any force in this contention. Both S. 58, Evidence Act, and O. 8, R. 5, Civil P. C., give a discretion to the trial Judge to require a fact that has been admitted by one of the parties to be proved otherwise than by the admission. And taking this to be merely a case of proof, I think it was within the competence of the trial Judge to require proof of the due attestation of the bond in question. The legislature in giving discretion to the Court in this connexion does not in any way attempt to define under what circumstances the discretion is to be exercised. But I am inclined to hold that in a case where a Court finds that a certain document would not be valid in law unless certain facts were proved, and it is doubtful whether those facts existed, it is competent for it to embark on an inquiry on the subject. I think in the Privy Council case of *Shamu Patter* v. *Abdul Kadir Rowthan* (1) this very point was raised and their Lordships thought that under such circumstances the Court has ample power to frame an additional issue. Mr. De Gruyther, the learned counsel for the appellant, relied upon an admission by the respondent of the execution of the bond, but their Lordships held that it was competent to the Court to inquire into the matter.

There is also another answer to this argument of the appellants based upon the so-called admission of defendant 1. S. 59, T. P. Act, requires attestation by two witnesses for the validity of the document itself. It says that a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. All the rulings on the subject have interpreted these words as importing that without such attestation, a document would be ineffectual to create any mortgage. This is in effect the ruling of the Privy Council in *Maharaja Ram Narayan Singh* v. *Adhindra Nath Mukharji* (2). It is not merely a question of proving a document; S. 68, Evidence Act, requires that one of the attesting witnesses shall be examined in order to prove a document of this character. That is undoubtedly a question of proof. But even if a mortgage bond is proved in that way, the bond would not be valid if the requirements of S. 59, T. P. Act, regarding attestation by two witnesses had not been

(1) [1912] 35 Mad. 807=16 I. C. 250=39 I. A. 218 (P.C.)
(2) A. I. R. 1916 P. C. 169=34 I. C. 900.
(3) [1916] 35 I. C. 18.

complied with. If, as I think, the provisions of S. 59, T. P. Act, relate to the question of the legal operation of the document itself, apart from the mode of proving it, then there can be no force in the argument based on the so-called admission the effect of which would only be to dispense with the proof of the document. On these grounds I think the appeal must fail and be dismissed with costs of respondent 1.

Oldfield, J.—I am not prepared to dissent from my learned brother's references to the lower Court's view of its discretion under S. 58, Evidence Act and O. 8, R. 5, Civil P. C., but I think that that part of the case can be put on a former foundation because defendants 4 and 5 were ex parte and as in *Shamu Patter* v. *Abdul Kadir Rowthan* (1), it was the duty of the trial Judge to satisfy himself that the claim was formally proved against them. As regards the remainder of my learned brother's judgment, I respectfully concur.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 471

WALLIS, C. J. AND AYLING, J.

Sankararama Iyer—Plaintiff—Appellant.

v.

T. M. Ponnuswami Pillai—Defendant—Respondent.

Second Appeal No. 981 of 1916, Decided on 8th October 1918, against decree of Dist Judge, Trichinopoly, in Appeal Suit No. 290 of 1915.

(a) Civil P. C. (1908), O. 8, R. 2 and O. 14, R. 5—Fresh facts not covered by pleadings disclosed in evidence—For awarding relief on such facts amendment of pleadings and framing of issues are necessary.

A Court should not base its judgment or award relief on new facts disclosed in the evidence for the first time but not covered by the pleadings without having the pleadings amended and framing a fresh issue on those facts and trying it. [P 471 C 2]

(b) Contract Act (1872), Ss. 59 and 60—Security given for debtor—Still payments may be appropriated for prior debts not covered by guarantee.

A debtor for whom security has been given and his creditor remain at liberty to appropriate payments after the security has been given just in the same way as they could before, payments may be appropriated for prior debts not covered by the guarantee : 33 *I. C.* 34, *Foll.* [P 471 C 2]

Judgment.—In this case the Subordinate Judge, who heard the case in the first instance allowed a very extraordinary course to be adopted and one which could only lead to subsequent difficulties. The suit was filed against defendant 1 for a debt and against defendant 2 on a gurantee. There was no plea that this guarantee was obtained by misrepresentation of any kind and no issue was raised as to whether there was any misrepresentation of any kind. In the cross-examination of the plaintiff's witnesses, again, there was no suggestion that there was misrepresentation of any kind.

When defendant 2, who was the sole witness on his side, came into the box, he at once was allowed to start off with a story that he had been misled by misrepresentation, when he gave the letter of guarantee, that there were no pre-existing debts due by the debtor to the plaintiff. On that both the Subordinate Judge and the District Judge have recorded a finding that the plaintiff obtained the guarantee by means of misrepresentation. Such a finding cannot stand for one moment and we must reverse that finding and set it aside. If the Subordinate Judge thought that during the course of the evidence facts had come to the knowledge of defendant 2 which made it proper to allow him to raise a fresh plea in the course, of the case the only proper course for him was to allow defendant 2 to amend his written statement, and to frame a fresh issue and try that issue and take evidence upon it, and it was only then that he could properly record a finding that the plaintiff had obtained the letter of guarantee by misrepresentation. As both the lower Courts were of opinion that on this fact coming to light in the trial this question ought to have been raised, we will not differ from them but are prepared, on defendant 2 paying the costs of the original suit, the first appeal and this second appeal, to allow a fresh issue to be raised. Apart from this, we think that there is absolutely no answer to the plaintiff's case. It seems to us to be perfectly settled law, on the authorities cited to us of which the latest is the decision reported in *A. K. A. Khan Ghuznavi* v. *National Bank of India* (1) that a debtor for whom security has been given and his creditor remain at liberty to appropriate payments after the security has given just in the same way as they were before, and there is therefore nothing in

(1) [1916] 33 I. C. 34.

the fact that payments were appropriated so as to clear off the prior indebtedness before credit was given in reduction of the liability for which defendant 2 stood security, in any way to affect the plaintiff's claim. Upon defendant 2 satisfying the conditions to which we have referred within one month, we direct the lower appellate Court to return a finding upon the issue whether the consent of defendant 2 to the letter of guarantee Ex. A, was procured by misrepresentation of the plaintiff that there was no prior indebtedness from defendant 1 to him, as alleged by defendant 2 at the beginning of his deposition. Fresh evidence may be taken. The finding will be submitted in three months and seven days will be allowed for objections. In the event of the costs above mentioned not being paid by defendant 2 in this lower appellate Court in one month, the second appeal will be allowed and the decree of the Subordinate Judge varied by allowing the full claim against defendant 2 also with costs throughout.

Finding.—I am required to submit a finding on the following issue :

" Whether the consent of defendant 2 to the letter of guarantee, Ex. A, was procured by misrepresentation of the plaintiffs that there was no prior indebtedness from defendant 1 to him as alleged by defendant 2 at the beginning of his deposition. " On the side of the plaintiff further evidence was adduced. P. W. 1, was recalled and a new witness P. W. 4 was examined. Exs. D, D-1 and E series were filed for defendant 2 defendant 1 was examined on commission. The plaint is so worded as to suggest that the dealings with defendant 1 began after Ex. A had been given to the plaintiff's firm by defendant 2 vide paras. 3 and 6 : The written statement of defendant 2 is confined to meeting the case set out in the plaint. P. W. 1, when examined on 12th January 1915, asserted that it was after the execution of Ex. A that the dealings began. P. W 1 deposes that the accounts of prior dealings Ex. 1 were not with him then. When these were produced, the fact that advances had been made to defendant prior to the date of Ex. A was admitted vide P. W. 2. P. W. 1 is obliged to admit that his earlier statement was wrong,

The misrepresentation complained of by defendant 2 and referred to in the issue is that P. W. 1 had told him that defendant had no previous dealings with the plaintiff's firm. Two letters, Exs. D and D-1, are now put in to show that defendant 2 was aware of the existence of previous dealings. These letters are proved to have been written and signed by defendant 2. In a postscript to Ex. D 1 on 27th November 1918 defendant 2 writes that defendant 1 (referred to by his vilasam) needs Rs. 1,000 and adds "I am coming." P. W. 1 deposes that defendant 2 did come accordingly and then said that Rs. 1,000 might be advanced to defendant 1. Payment was made and entered in the account of defendant 1. This second letter, Ex. D, is dated 2nd December 1908 and in it the plaintiff's firm is asked to pay defendant 1's brother Rs. 300 on behalf of defendant 1. Receipt is acknowledged on the letter itself and the sum is debited in the account. Defendant 1 has been examined on commission on behalf of defendant 2. He states that he gave no information to defendant 2 about the prior dealings or the extent of his indebtedness to plaintiff's firm, as he was afraid that if he did so defendant 2 would decline to give the guarantee. I think that the letters now produced establish that defendant 2 was aware before he executed Ex. A that defendant 1 had had dealings with the plaintiff's firm. He had in fact recommended the grant of advances to defendant 1 and this within a few weeks before signing Ex. A. I think therefore that the particular allegation of misrepresentation on which defendant 2 relies is not true. The question raised by the issue is answered in the negative. (After the return of the finding upon the issue referred the Court delivered the following.)

Judgment.—We accept the finding and modify the decree of the lower appellate Court by making defendant 2 also liable for the amount decreed against defendant 1 with costs incurred subsequent to the calling for a finding.

S.N./R.K. *Decree modified.*

A. I. R. 1919 Madras 473

OLDFIELD AND SADASIVA AIYAR, JJ.

T. V. Sankaranarayana Aiyar—Petitioner—Appellant.

v.

Alagiri Aiyar—Respondent.

Appeal No 271 of 1917, Decided on 18th February 1918, against order of Dist. Judge, Salem, in Insol. Appeal No. 36 of 1916, D/- 23rd March 1917.

(a) Provincial Insolvency Act (1907), Ss. 16 (6) and 36—Adjudication in S. 36 is to be treated as made on date of presentation of petition.

The adjudication referred to in S. 36 is to be treated as made, not on the actual date of the order of adjudication, but with reference to S. 16 (6) on the date of the presentation of the petition in which the insolvency originated. [P 475 C 2]

The words "the transferor is adjudged insolvent" in S. 36 mean "the adjudication of insolvency against the transferor takes effect, and not "the order adjudicating that the transferor is insolvent is passed:" *A. I. R.* 1914 *Oudh* 246, *not Foll*: 30 *I. C.* 82 *and* 38 *I. C.* 369; *Doubted.* [P 476 C 1]

(b) Provincial Insolvency Act (1907), S. 37—Preferred creditor can escape S. 37 if preference was beyond 3 months before petition.

Per *Sadasiva Aiyar, J.*—A preferred creditor was intended by the Indian Legislature to be more leniently dealt with than a voluntary, colourable or fraudulent donee, and hence while the former could escape S. 37 if his preference took place beyond the short period of three months before the date of the petition, the receiver was given two years to attack a mere gratuitous donee's transfer. [P 476 C 2]

B. Narasimha Row and *K. S. Ganesa Aiyar*—for Appellant.

T. M. Krishnaswami Aiyar and *S. S. Ramachandra Aiyar* — for Respondent.

Oldfield, J.—The question is, whether the adjudication as insolvent referred to in S. 36, Provincial Insolvency Act, is to be treated as made on the actual date of the order of adjudication, or with reference to S. 16 (6) on the date of the presentation of the petition in which the insolvency originated. I have had the advantage of reading my learned brother's judgment and I can give my reasons for agreeing with him shortly.

The important point is, I think, that the application of S. 16 (6) is not subjected to any explicit restriction. It no doubt stands as part of the section relating to the order of adjudication and its immediate consequences, not as a separate provision like S. 43, English Act of 1883 and S. 51, Presidency Towns Insolvency Act. But neither that nor the detailed comparison relied on by respondents between the provisions of the Provincial Act inter se and with those of the other Acts referred to goes far towards supporting their contention that S. 16 (6) affects only the provisions as to the date from which the insolvent's property vests in the Court or receiver, not those relating to avoidance of his dealings with it. It has not, in my opinion, been shown that there is any scheme of the Provincial Act, which entails any particular interpretation of S. 36, with which alone we are concerned and with which alone I desire to deal. The only acceptable presumption, which has been suggested to us, is against an interpretation such as respondents,' which would allow the insolvent's or the Courts' delays to reduce the period before the petition, transfers during which are liable to be avoided. That presumption is entirely in accordance with the provisions of S. 47, English Act, under which that period ends, when the bankruptcy, as defined in S. 43, begins, independently of the date of the petition or time taken in its prosecution. Respondents' argument has been based mainly on the difference between the wording of Ss. 36 and 37, Provincial Act and the inference that different dates for the end of the period were intended. That difference is perhaps due to adhesion to the wording of the corresponding English Ss. 47 and 48, the fact being disregarded that, whereas in the former the reference to the bankruptcy as fixing the end of the period did provide a date different from that provided in the latter by reference to the presentation of the petition, the dates provided in S. 36 read with S. 16 (6) and in S. 37, Provincial Act would be the same.

But whether that is so or not, I am not prepared to reject in favour of this inferential construction that which the unrestricted wording of S. 16 (6) and the objects of the statute dictate. Next, *Madhu Sardar* v. *Khitish Chandra Banerjee* (1) and *Hemraj Champa Lall* v. *Ramkishen Ram* (2) are relied on as supporting a restricted application of S. 16 (6) since they negative its application to S. 34 (1). But I concur with my learned brother in respectfully doubting the correctness of the reasons given for

(1) [1915] 42 Cal. 289=30 I. C. 82.
(2) [1917] 38 I. C. 369.

those decisions and I observe that (1) they go further than respondents' argument since respondents do not deny that S. 16 (6) controls the vesting provisions of the Act, of which S. 34 is one, and (2) the case of *Fox, Ex parte: Smith, In re* (3) referred to in the former supports a construction of the English Act similar to that claimed by appellant for the Provincial.

In these circumstances appellant's contention must be accepted and the appeal must be allowed, the lower Court's order being set aside and the petition being remanded to it for re-admission and disposal with reference to the other questions raised. Costs to date here and in the lower Court will be costs in the case and will be provided for in the order to be passed.

Sadasiva Aiyar, J.—The Receiver appointed in an insolvent petition 1 of 1913 by the District Court of Salem is the appellant before us. The material dates are : (1) On 15th January 1913 a heavily involved debtor Saminadha Pillai assigned a pro-note (of which he was the holder) in favour of one Meikka Pillai ; (2) a creditor of Saminadha Pillai presented a petition on 7th March 1913 (within two months of the assignment) to adjudge Saminadha Pillai an insolvent; (3) the District Court passed on this petition an order on 2nd December 1915 adjudicating Saminadha Pllai an insolvent. It will be seen that this order was passed nearly three years after the assignment to Meikka Pillai by Saminadha Pillai and about $1\frac{3}{4}$ years after the petition of the creditor (on which Saminadha Pillai was adjudged insolvent) was filed, though the filing itself of that petition was presented within two months of the assignment. (4) On 6th November 1916 the Receiver filed a petition under S. 36, Provincial Insolvency Act 3 of 1907, to annul the transfer made by the insolvent on 15th January 1913 on the ground that the transferor was "adjudged insolvent" on 7th March 1913, when the creditor's petition to adjudge the transferor insolvent was filed. That date, 7th March 1913, was (as stated already) within two months of the date of transfer, 15th January 1913, and was of course also within the two years mentioned in S. 36, though the order of adjudication itself was passed on 2nd February 1915, more than two years from the date of the transfer (15th January 1913). The Receiver relied upon Cl. 6, S. 16, Provincial Insolvency Act, which states that an order of adjudication

"shall relate back to and take effect from the date of the presentation of the petition on which it is made."

The learned District Judge, following the view of the Judicial Commissioner of Oudh enunciated in *Jokhan Singh* v. *Deputy Commissioner, Fyzabad* (4) held that the expression

"if the transferor is adjudged insolvent within two years after the date of transfer found in S. 36 means if the order of adjudication of insolvency is passed within two years after the date of the transfer;"

and that, as the order was passed more than two years after the date of the transfer in this case, S. 36 did not apply. He therefore dismissed the Receiver's application. The contentions raised on behalf of the Receiver-appellant in this appeal are ably set out in grounds 3 to 8 of the memorandum of appeal as follows: "3. Under S. 16, Cl. 6 of the Act, the order of adjudication relates back to and takes effect from the date of presentation of the petition for adjudication and the alienation being within two years from the latter date, can be impugned and annulled under S. 36 of the Act. 4. The Receiver, who represents the general body of creditors, cannot apply under S. 36 before the order of adjudication, on which alone the property of the insolvent vests in him (vide S. 16, Cl. 2) and therefore he cannot be prejudiced by the Court's delay and the length of the pendency of the list which has culminated in the order of adjudication. 5. The learned Judge failed to note that S. 16, Cl. 6, is enacted to fix the earliest possible date for the distribution of the debtor's estate. 6. Under S. 36 the alienation can only be voidable against the Receiver from the date to which under S. 16, Cl. 6, his title relates back and not earlier. The two sections ought to have been read together and applied in deciding the point arising in the case. 7. The view of the lower Court as to the scope of S. 36 is narrow and incorrect, as it would take away a large class of fraudulent and secret alienations out of the mischief of the Act, while the very object of the Act is to strike at them to protect the creditors. 8. The scheme of

(3) [1886] 17 Q. B. D. 4.

(4) A. I. R. 1914 Oudh 246=23 I. C. 924.

the Provincial Insolvency Act as well as the English Act as expressed by the framers as well as the reason of the thing and the weight of authority is in favour of the view pressed for the appellant and the lower Court ought to have accepted the same."

Having heard full arguments on both sides, I am satisfied that both on principle and convenience the appellant's above contentions ought to be allowed. S. 16, Cl. 6, was clearly intended to enable the Receiver to get hold of all the properties of the insolvent for the benefit of all his creditors as a class, so as to distribute whatever is realized from the properties as equitably as possible among the said creditors. The English Bankruptcy law goes further, as by S. 38 all the property belonging to the bankrupt at the commencement of the bankruptcy itself, that is, on the date of the act of bankruptcy on which the creditors' petition was grounded (which act however under S. 4, Bankruptcy Act of 1914 must be committed within three months before the date of the creditors' petition) became vested in the Receiver. The Receiver's title may, thus, under the English Act, relate back to a period up to three months before the presentation of the petition, whereas, under the Indian Act, it could relate back only to the date of the presentation of the petition. S. 42, Cl. 1, Bankruptcy Act of 1914, corresponding to S. 47, Bankruptcy Act of 1883, says that

"any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration . . . . . shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement."

(The word "settlement" in the English Acts includes conveyances and transfers—see Cl. 4, S. 42). Sub-S. 2, S. 42 made even a settlement in consideration of marriage void, if made within two years before the date of the commencement of the bankruptcy. The words "becomes bankrupt" were held to mean "commits an available act of bankruptcy:" *Fawcett* v. *Fearne* (5), *Harris*, *Ex parte*, *James*, *In re* (6) and *Reis*, *In re*. *Clough*, *Ex parte* (7) per Wright, J., Wright, J's., opinion being approved in *Hart*, *In re Green*, *Ex parte* (8). The Indian law for the mofussil as enacted in S. 36, Provincial Insolvency Act, omits the restriction found in Cls. 2 and 3, S 42, English Bankruptcy Act even as regards contracts and transfers made in consideration of marriage, and so far as regards transfers not in consideration of marriage or made in favour of a purchaser in good faith and for valuable consideration reduces the ten years found in S. 42, Cl. 1, English Bankruptcy Act, to two years. Again while the English Act counts the ten years from before the settlor "becomes bankrupt," that is, commits an available act of bankruptcy, the Indian Act makes the two years to commence from before the transferor is "adjudged insolvent."

By S. 51, Presidency Towns Insolvency Act of 1909, it is enacted that the insolvency of a debtor shall be deemed to have relation back to and to commence at the time of the commission of the act of insolvency on which the order of adjudication is made against him or the time of the first of the acts of insolvency (if there are more than one) committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition. Thus S. 51 of the 1909 Act follows the English law while S. 16, Cl. 6, Provincial Insolvency Act, dates the effect of the order of the adjudication from the date of the petition. S. 52, Cl. 2, Presidency Act, makes all the property of the insolvent vested in him at the commencement of the insolvency available to his creditors in insolvency. S. 55 of the same Act is worded in a similar manner to S. 36, Provincial Insolvency Act. Having considered these provisions together, it is clear to my mind that the Indian Legislature in its Act of 1907 enacted for the mofussil did not intend to depart from the principles of and the reasons for the provisions made in the English Bankruptcy Act of 1883 (superseded by the English Act of 1914), except in matters of detail and except that the date of presentation of the petition was substituted from which the Receiver was

(5) [1844] 6 Q. B. 20.

(6) [1875] 19 Eq. 253.
(7) [1904] 1 K. B. 451.
(8) [1912] 3 K. B. 6.

to calculate the period of two years mentioned in the Indian Act for the date of the available act of bandruptcy from which the ten years' period has to be calculated by the trustees in bankruptcy under the English Act; (while the English Act of 1883, S. 47, allows a donee to prove that the donor was able to pay all his debts without the aid of the gifted property, the Indian Act does not allow such proof to support the gift; thus the indulgence given to the donee in the Indian Act by reducing the ten years to two years is qualified by the refusal to allow him to prove that the donor was able to pay up his creditors, and therefore did not intend fraud against creditors in making the gift).

I find it difficult to believe that the right of the receiver under S. 36 to avoid transfers was intended by the legislature to be dependent upon the pressure of work in the insolvency Court or upon the cleverness of the insolvent in protracting the proceedings or upon the difficulty and delay in serving notices on all the creditors before the passing of the order of adjudication. Though the provision as to relation back in Cl. 6, S. 16, Provincial Insolvency Act, is not enacted as a separate section, while the analogous provision as to relating back is a separate S. (51) in the Presidency Towns Insolvency Act and the section as to relating back as to the trustee's title in the English Bankruptcy Act of 1883 is also a separate section (43) of that Act, I think the intention of the Indian Legislature was that S. 36 and S. 16 (6) should be read together and that the words "the transferor is adjudged insolvent" in S. 36 mean "the adjudication of insolvency against the transferor takes effect" and not "the order adjudicating that the transferor is insolvent is passed." Reliance was placed by the respondents on the difference of language between S. 36 and S. 37, Provincial Insolvency Act, in respect of the event from which the period before the transfer which the receiver wishes to annul has to be calculated. In S. 36, the expression is

"if the transferor is adjudged insolvent within two years after the date of the transfer,"

and in S. 37 the expression is

"if such person is adjuded insolvent on a petition presented within three months after the date thereof"

(that is of the transfer, etc.). It must, however be remembered that S. 37 relates to the fraudulent preference of a creditor and its language is adopted largely from S. 48, English Bankruptcy Act of 1883, wherein relevant words are

"is adjudged bankrupt on a bankruptcy petition presented within three months after the date, etc."

The provisions of S. 36, however vary very largely, as I have shown above, from the analogous S. 47, Bankruptcy Act, as regards the event from which the period has to be calculated to bar the receiver and other minor matters and hence the Indian legislature in framing its own language for S. 36 seems to have aimed at brevity and, as S. 16 (6) precedes S. 36, to have considered the words "adjudged insolvent" to be sufficient as indicating that the date was the date from which the adjudication takes effect by the foree of S. 16 (6). It is clear to my mind that a preferred creditor was intended to be more leniently dealt with than a voluntary, colourable or fraudulent donee and hence, while the former could escape S. 37 if his preference took place beyond the short period of three months before the date of the petition, the receiver was given two years to attack a mere gratuitous donee's transfer. This object of the legislature will be defeated in many cases if S. 36 is narrowly construed as contended for by the respondent. Suppose a creditor is preferred within three months before the presentation of the petition and there is also a voluntary gratuitous transfer within the same three months before the date of the petition; if the respondents' contention is upheld, the preferred creditor can be successfully attacked by the receiver under S. 37 even though the order of adjudication is passed more than two years after the transfer to the creditor while the fraudulent donee of the same date cannot be so attacked under S. 36.

(Though S. 42, English Bankruptcy Act of 1914 uses the words "void against the trustee in bankruptcy" and though in that section there is not found the expression "may be annulled by the Court" found in S. 36, Provincial Insolvency Act, it has been held even under the English statute that "void" means voidable: see Williams' Bankruptcy Practice, Edn. 11, pp. 289 and 290). Mr. T. M. Krishanaswami Aiyar for the respondents further relied upon certain

decisions passed under S. 34, Provincial Insolvency Act. That section however uses the words "before the date of the order of adjudication" and trelates to the cases of creditors who had realized assets in execution before the date of the order of adjudication. It may be argued plausibly that the legislature intended to favour creditors who realized assets through Court as against the receiver in insolvency and that it intended to make an exception in favour of such creditors by S. 34 notwithstanding S. 16 (6). That seems to have been the reason of the decision in *Madhu Sardar* v. *Khitish Chandra Banerjee* (1), in which case however the respondent was not represented, and in *Hemraj Champa Lall* v. *Ramkishen Ram* (2). Speaking for myself I am doubtful as to the soundness of these two decisions, and though they may be distinguished as decisions passed in respect of execution creditors who had realized assets through Court and as based on the special language of S. 34 mentioning "the date of the order of adjudication," I am not inclined to support my view as to S. 36 on any such distinctions.

Lastly, it was argued that the receiver is not without any remedy and that he could bring a suit under S. 53, T. P. Act. But as has been pointed out in *Muhammad Habibulah* v. *Mushtap Husain* (9), the person who is obliged to take up the task of bringing a suit under S. 53, T. P. Act, is in a much worse position than a receiver entitled to attack a transfer under S. 36, Provincial Insolvency Act, in several respects, such as the burden of proof and presumption of invalidity; and the legislature clearly intended to favour the receiver in insolvency more than an ordinary creditor relying on S. 53, T. P. Act. In the result I would allow the appeal and send the case back to the District Court for disposal of the other questions arising in the petition. Costs hitherto incurred will be provided for in the fresh order to be passed.

S.N./R.K. *Case remanded.*

(9) [1917] 39 All. 95=37 I. C. 684

A. I. R. 1919 Madras 477

SESHAGIRI AIYAR AND PHILLIPS, JJ.

S. Krishna Murthi Iyer—Plaintiff—Appellant.

v.

Taluq Board of Mayavaram—Defendants—Respondents.

Second Appeal No. 52 of 1918, Decided on 12th December 1918, against decree of Temporary Sub-Judge, Tanjore, in A. S. No. 138 of 1917.

Madras Local Boards Act (1884), S 95—Action for injunction against Taluk Board directing it to lop off branches spreading over plaintiffs land cannot be maintained in absence of proof of negligence—No action lies against public body for nonfeasance—Tort, Negligence.

No action for damages will lie against a public body for mere nonfeasance in the absence of proof of negligence or carelessness in the discharge of their duties. [P 448 C 1]

If however the acts done by a public body are only permissive, the private rights of parties must be respected and such body is liable in damages for injuries caused to private individuals [P 448 C 2]

In an action for an injunction against a Taluk Board directing it to lop off the branches of certain trees which spread over the plaintiff's land:

Held: that the action could not be maintained (1) as the Taluk Board was under an obligatory duty to plant and preserve trees on the sides of public roads, (2) as no carelessness or negligence in the discharge of its duties was proved and (3) the omission to remove the branches only amounted to a nonfeasance for which no action lay at the instance of a private individual. [P 479 C 1]

S. Rangachariar—for Appellant.

S. Srinivasa Aiyangar and *T. S. Rajagopala Aiyar*—for Respondents.

Judgment.—This is a suit for an injunction against the Taluk Board of Mayavaram, directing it to lop off all the branches of certain trees which have spread over the land of the plaintiff. Both the Courts below dismissed the suit as not maintainable. Before us it was argued by the learned vakil for the appellant that the burden of proving due care and caution in the exercise of public duties is on the defendants and that the Board should so exercise its powers as not to interfere with private rights. S. 95, Local Boards Act (5 of 1884), directs the Taluk Board to plant trees on the sides of roads and to preserve them. It is not disputed that the trees complained of were planted on the sides of the road. There is no allegation that there was any negligence in the doing of this act. The main argument for the

appellant was that, although the original act was done properly, the Taluk Board is under a liability to see that the results of that act do not injuriously affect private rights. *Gaekwar Sarkar of Baroda* v. *Gandhi Kachrabhai Kasturchand* (1), which was relied on only lays down that in exercising a duty, a public body should see that as little damage as possible is done to private individuals. In *Sankaravadivelu Pillai* v. *Secy. of State* (2), it was held that the duty was not obligatory on the Government to provide a byewash and that therefore in performing this self-imposed task the Government was bound to have respected private rights. It is not necessary to say whether this view of the functions of the Government is right or not. In our opinion these decisions are not applicable to the present case. As the learned Advocate-General contended, before fastening responsibility upon a public body for acts done by it, the first thing is to ascertain whether the act complained of was done in the discharge of a permissive right or of a compulsory duty. If corporations have been authorized to perform certain functions not solely in the interests of the public, their liability may not differ much from the liability of private individuals. But where the legislature imposes a statutory obligation on a public body, the duty prima facie is imposed in the interests of the public, and private individuals are expected to submit themselves to some inconvenience in order that the general convenience of the public may be furthered. For these reasons, it has been held that unless it can be shown that they have discharged their duties negligently and carelessly, public bodies are not liable in damages to private individuals. In *East Freemantle Corporation* v. *Annois* (3) Lord Macnaghten in delivering the judgment of the Judicial Committee stated:

"The law has been settled for the last 100 years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy, unless a remedy is provided by the statute."

In the present case there is no provision so far as we are aware, in the Local Boards Act giving a remedy to an injured individual in cases like the present. In another case *Canadian Pacific Ry. Co.* v. *Roy* (4) at p. 229 (of 1902 *A. C.*) of the same Volume the Lord Chancellor stated:

"The ground upon which the immunity of a raliway company for injury caused by the normal use of their line is based is that the legislature, which is supreme, has authorized the particular thing so done in the place and by the means contemplated by the legislature and that cannot constitute an actionable wrong in England any more than it can constitute a fault by the Quebec Code,"

These observations apply with equal force to the acts directed to be done by the Local Boards. In *Geddis* v. *Proprietors of Baun Reservoir* (5), which was quoted for the appellant, Lord Hatherly stated:

"If a company, in the position of the defendants there has done nothing but that which the Act authorized—nay, may in a sense be said to have directed—and if the damage which arises therefrom, is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done, must either find in the Act of Parliament something which gives him compensation, or he must be content to be deprived of that compensation."

In *Hammersmith & City Ry. Co.* v. *Brand* (6) Lord Cairns stated that:

"It would be a repugnant and absurd piece of legislation to authorize by statute a thing to be done; and at the same time leave it to be restrained by injunction from doing the very thing which the legislature has expressly permitted to be done."

The principle of these decisions was followed in *Aiyasami Aiyar* v. *District Board of Tanjore* (7), where a distinction between permissive and obligatory duties was pointed out. No doubt as was said in *Canadian Pacific Ry. Co.* v. *Parke* (8), even in the case of corporations, if the acts are only permissive, the private rights of parties must be respected. Reference may also be made to *Municipality of Pictou* v. *Geldert* (9), in which all the authorities on the subject are collected. Probably the nearest case in point is that reported as *Tregellas* v. *London County Council* (10). That was an action against the London County Council and the complaint was that by

(1) [1905] 27 Bom. 344=30 I. A. 60 (P. C.).
(2) [1905] 28 Mad. 72.
(3) [1902] A. C. 213=71 L. J. P. C. 39.
(4) [1902] A. C. 220=71 L. J. P. C. 51.
(5) [1878] 3 A. C. 430.
(6) [1869] 4 H. L. 171.
(7) [1908] 31 Mad. 117.
(8) [1899] A. C. 535=68 L. J. P. C. 89.
(9) [1893] A. C. 524=63 L. J. P. C. 37.
(10) [1898] 14 T. L. R. 55.

the neglect of the Council to lop off branches of trees, plaintiff suffered injury. In that case there was no duty cast upon the Council in plant and preserve trees. Still Lord Russel of Killowen, C. J., held that because the failure to lop off the branches was only nonfeasance no action lay against the County Council. It must be taken now as well established that for mere nonfeasance, no action for damages will lie against a public body : see *Municipal Council of Sydney* v. *Bourk* (11) and *Earl of Harrington* v. *Derby Corporation* (12). It was argued that, although the planting of the trees was done properly, a misfeasance was committed by the failure to prevent damage to plaintiff. In our opinion it would not be consistent with the duty to preserve trees that the Local Boards should cut off all their branches. The very recent case, a summary of which is reported as *Moul* v. *Telling Ltd. & Croydon Corporation* (13), gives a complete answer to this contention. In that case, the Corporation was charged with the duty of woodpaving roads. After 17 years, the wood blocks swelled and bulged and owing to the obstructions caused by such bulging an accident happened. Avory and Lush, JJ., held that it was not a case of misfeasance but only one of non-feasance, namely, neglect to repair the highway, and held that Corporation was not liable. The learned Judges are reported to have distinguished *Mc'Clelland* v. *Manchester Corporation* (14) on this ground.

In the present case, the Taluk Board, on which an obligatory duty to plant and preserve trees has been imposed, are exempt from liability on both the grounds namely, (a) that in the discharge of its duties it has not acted carelessly or negligently, (b) and that the omission to remove the branches, even if it ought to have been done, is only non-feasance for which no action at the instance of a private individual lies. We therefore agree with the Courts below that the suit was rightly dismissed. The second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(11) [1895] A. C. 433=64 L. J. P. C. 140.
(12) [1905] 1 Ch. 205=69 J. P. 62.
(13) [1918] 119 L. T. 318=34 T. L. R. 473.
(14) [1912] 1 K. B. 118=81 L. J. K. B. 98.

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A. I. R. 1919 Madras 479

SADASIVA AIYAR AND SPENCER, JJ.

Krishnaswami Iyer—Petitioner—Appellant,

v.

Seethalakshmi Ammal and *others*—Counter-petitioners—Opposite Parties.

Letters Patent Appeal No. 169 of 1917. Decided on 18th September 1918, against judgment of Ayling, J., D/- 2nd October 1917, in Civil Revn. Petn. No. 877 of 1916.

(a) Civil P. C. (1908), O. 1, Rr. 1 and 8 (2) and O. 22, R. 9—Suit by nearest reversioner to set aside widow's alienation—Plaintiff dying—Order declaring abatement of suit without hearing next surviving reversioner—Latter can apply to continue suit for himself and other reversioners—Application by him to set aside abatement may be treated as one to continue proceedings and is governed by Limitation Act (1908), Art. 181.

Where in a suit by the nearest reversioner to set aside a widow's alienation, the plaintiff dies and the Court declares an abatement of the suit suo motu without hearing the next reversioner, the latter can apply to the Court to continue the suit for himself and the other surviving reversioners and the Court can under O. 1. R. 8 (2), bring him on the record in place of the deceased plaintiff.

The right to apply to continue the suit is incidental to a reversionary suit, wherein the plaintiff represents the entire body of reversioners and such a suit should be decided, if possible in one litigation.

There is no necessity for the next reversioner seeking to step into the place of the deceased plaintiff to appeal against the order declaring the abatement: 31 *I. C.* 4 and 34 *I. C.* 372, *Dist.*

An application to set aside the order of abatement would be misconceiving the action but it may be treated as an application to continue the suit.

Obiter.—Such an application is governed by Art. 181, Lim. Act. [P 480 C 2]

The widest scope should be given to reversioners to agitate once for all and as early as possible all claims peculiar to the body of reversioners in one suit and the decision in such a suit will be binding on all the reversioners. Acting in that spirit Courts should, on the death of the nearest reversioner, give every facility to the next reversioner to have the matter in dispute finally heard and determined.

(b) Practice—Parties—Party is not bound by order passed behind his back—He may treat it as nullity unless made binding on him by statute.

Per *Sadasiva Aiyar, J.*—A party is not bound by an order passed behind his back and without his (or any person representing his interest) having been given an opportunity of being heard against it, and in the absence of a statutory provision which makes it binding on him, he might treat it as a nullity, so far as he is concerned. Such an order need not be set aside on appeal. [P 481 C 1]

(c) Civil P. C. (1908), O. 7, R. 4—Suit by reversioner is suit by plaintiff in representative character.

Per *Spencer, J.*—A suit by a reversioner is not only a representative suit but is also a suit by plaintiff in a representative character as mentioned in O. 7, R. 4. [P 482 C 1]

T. V. Venkatarama Aiyar and *K. S. Ganesa Aiyar*—for Appellant.

K. Rajah Aiyar—for Opposite Parties.

Sadasiva Aiyar, J. — This Letters Patent Appeal is against the order of Ayling, J., dismissing Civil Revision Petition No. 877 of 1916 filed by the next reversioner (or one of the next set of reversioners) who was entitled to continue a suit (Original Suit No. 27 of 1914, Temporary Sub Court, Tanjore) brought by a person who was then the nearest reversioner for setting aside certain alienatious effected by defendant 1 (a Hindu widow). The original plaintiff died in April 1914 and on 17th July 1914 (before the six months expired) the Subordinate Judge, without hearing the petitioner-appellant or any other among the surviving body of reversioners, passed an order declaring that the suit had abated. The petitioner was no doubt present in Court, intending at first to present an application when the order was passed but he thought it was useless to make such an application. The Subordinate Judge did not treat him as a person who was entitled to be heard on the question whether the suit had abated and his name did not appear on the record of the suit or in any proceedings connected with the suit, prior in date to the order of abatement. The Subordinate Judge's order was justified by the then current decisions of this Court, but in the beginning of 1915 the Privy Council decided the case reported as *Venkatanarayana Pillai* v. *Subbammal* (1), in which their Lordships held that a suit brought by the next revarsioner is a suit really brought on behalf of the entire body of the reversioners and that if the reversioner who was conducting the suit dies, the next man is entitled to come in for the purpose of continuing the conduct of the suit. Their Lordships express a doubt on the question whether the next reversioner, who has the right to continue the suit, comes within the definition of a "legal representative" in S. 2, sub-S. 11, Civil P. C. But they base their decision on a broader ground, namely, that he was already a party to the suit though the conduct of it was in the hands of the first reversioner and that therefore he was entitled to continue the suit after the plaintiff's death. Abdur Rahim, J., held in a case reported as *Sivagurunatha Chettiar* v. *Ramaswami Iyengar* (2) that a person who brings a suit on behalf of himself and others having the same interest (after having got permission under O. 1, R. 8) brings what is known as a representative suit, (which I think must be distinguished from a suit brought by a plaintiff in a representative capacity, i. e, as executor administrator, guardian or trustee for some other person having the beneficial or legal interest) and the learned Judge seems to think that when such a plaintiff dies, any person who has the same interest and on whose behalf also the suit was brought when he applies for liberty to continue the suit, does not fall within the definition of legal representative though he has got a right, as a person on whose behalf also the suit was originally brought, to continue the suit on the death of the plaintiff who had till then the conduct of the suit. The learned Judge also holds that there is no limitation at all for an application by such a person to continue the suit. I am however inclined to hold that Art. 181 might apply to such a case, and that such an application must be made, if the suit had been treated by the Court as having abated, within three years of the order so declaring. However it is unnecessary to express a final opinion on that question because in the present case, the application was made within two years of the death of the original plaintiff himself.

It was however contended on the side of the respondents by Mr. Rajah Iyer that the petitioner's only remedy was by way of appeal against the Subordinate Judge's order treating the suit as having abated. It has no doubt been held in *Subramania Iyer* v. *Venkataramier* (3) and *Suppu Nayakan* v. *Perumal Chetty* (4) that an order of the Court declaring a suit as having abated, not on the ground that six months had elapsed when the application was made by the legal repre-

(1) A. I. R. 1915 P. C. 124=38 Mad. 406=29 I. C. 298=42 I. A. 125 (P.C.).

(2) [1912] 15 I C 399.
(3) [1915] 31 I. C. 4.
(4) [1916] 34 I. C. 372

sentative but on the ground that the right to sue did not survive, is a decree and the only course open to the party aggrieved by such an order is to prefer an appeal against it. As regards the case of *Suppu Nayakan* v. *Perumal Chetty* (4), the person who claimed to be the legal representative and who applied for leave to continue the suit as such was heard and the order of abatement was then passed overruling his contentions. As regards the case of *Subramania Iyer* v. *Venkataramier* (3), I am unable to find out from the papers available to me just now whether that case also was not one in which the legal representative was heard before the order was passed.

Mr. Venkatarama Iyer for the appellant argued that if the Court passed such an order, the person interested (that is, the legal representative) not being given an opportunity to show cause against the passing of such an order, it is not binding on him and he need not have it set aside on appeal but could proceed by applying to continue the suit just as if no such order was in existence. I think that on the elementary principle of law that a party is not bound by any order passed behind his back and without his (or any person representing his interest) having been given an opportunity to be heard against it, (unless of course there is any statutory provision, whether substantive or processual, which makes it binding on him) such a person might treat it as a nullity, so far as he is concerned. Such an order need not be set aside on appeal Even orders of the nature of what are called "orders of course" need not be set aside on appeal but can be vacated on application to the Court which passed the order, such Court being bound to pass a fresh order after hearing both sides. The appellant is therefore entitled to treat the order of abatement passed on the Court's own motion without hearing him as one not binding on him and apply in the ordinary course to vacate it and to continue the suit. Doubtless in the present case his application was purported to be made under O. 22, R. 9, Civil P.C., to set aside the abatement order as one passed under O. 22 and if a very strict technical view is taken by us in arriving at our decision in this case the petition itself having been misconceived may be treated as having been properly dismissed by the lower Courts and this Court was not bound to interfere under S. 115, Civil P. C. I might also state that not only did the petitioner misquote the provision of law under which he was entitled to apply to continue the suit, but he persisted in that mistake both in the appeal to the District Court and in the revision petition argued before Ayling, J. In the arguments advanced before us in this Letters Patent appeal, more time was spent in arguing that mistaken point than the point on which he is, in my opinion, really entitled to succeed.

The question whether the application to the Subordinate Judge cannot be treated as a petition for review was also put forward and argued at great length before us and before Ayling, J. I might state that if the question is whether the discretion of the lower Court in refusing to excuse the delay in applying under O 22, R. 9, to set aside the order of abatement or the delay in applying for review (treating the petition as one for review) should be interfered with in revision, I would have little hesitation in holding that under S. 115 the discretion of the lower Court in refusing to excuse the delay should not be interfered with by this Court. However their Lordships of the Privy Council indicate in *Venkatanarayana Pillay* v. *Subbammal* (1) that to save the widow and all the reversioners' repeated harassments, it is advisable to have a declaration suit permitted to be brought by the next reversioner (in order that evidence as to the character of the alienation made by the widow may not be lost by the lapse of time), that such a suit should be decided, if possible, in one litigation and that the questions usually raised in such a suit should not be allowed to be fought out repeatedly in a multiplicity of suits. I would therefore allow this Letters Patent appeal, treating the provision of law under which this application was put in as amended in the proper manner and remand the case for disposal of the petition afresh in the light of the above observations. Having in view the mistaken view of the right procedure into which the appellant fell, and in which he persisted, I would direct that he should pay all the costs incurred by the respondents up to this date in all the Courts within two months from the date of the receipt of the records in the Subordinate Judge's Court the (same to be paid in any event to the respondent) and

if he fails to do so, this appeal will stand dismissed.

Spencer, J.—I agree with the judgment just pronounced by my learned brother and the order proposed to be made. Only I am inclined to think that a suit by a reversioner is not only a representative suit but is also a suit by a plaintiff in a representative character as mentioned in O. 7, R. 4. It is true that the illustrations to the old S. 50 are illustrations of suits brought by executors, administrators and guardians. But these illustrations are not repeated in the new Code, and, as a rule, illustrations are not necessarily exhaustive of the words of the section. In *Gansavant Balsavant* v. *Narayan Dhond Savant* (5) certain redemption suits brought by members of an undivided Hindu family were treated as suits brought in a representative character within the meaning of this section. In *Venkatanarayana Pillay* v. *Subbammal* (1) the Judicial Committee of the Privy Council at p. 411 (of 38 *Mad.*) speak of a suit brought by a presumptive reversioner to declare an adoption made by a widow to be invalid has being brought in a representative capacity and on behalf of all reversioners. But I feel no doubt that the Privy Council intended to give the widest scope to reversioners to agitate once for all and as early as possible all claims peculiar to the body of reversioners in one suit and that the decision in such a suit should be binding on all the reversioners. Acting in that spirit I think that Courts should, on the death of the nearest reversioner, give every facility to the next reversioner to have the matter in dispute finally heard and determined. At the time when the appellant put in his Petitions Nos. 384 and 385 on 2nd August and No. 386 on 16th August 1915, asking the Subordinate Judge to restore the suit by setting aside the order of dismissal and abatement, and at the time when the Subordinate Judge passed his order thereon dated 11th October 1915, the prevailing law on the subject was that contained in the Privy Council decision of 15th March 1915; and following the law there laid down, the appellant should have been allowed to revive or rather to continue the suit which had been filed by the deceased plaintiff as representing the body of reversioners, and O. 1, Rr. 1 and 8 (2). the Court that tried the suit had full power to bring the appellant on the record as a plaintiff in the place of the deceased plaintiff. I agree and have nothing to add on the question of limitation and the maintainability of the revision petition.

S.N./R.K. *Appeal allowed.*

(5) [1883] 7 Bom., 467.

A. I. R. 1919 Madras 482

SESHAGIRI AIYAR AND PHILLIPS, JJ.

K. Pathumma Umma and *others*—Defendants—Appellants.

v.

M. Thittu Umma and *another*—Plaintiff—Defendant—Respondents.

Second Appeal No. 2521 of 1917. Decided on 18th November 1918, against decree of Dist. Judge, South Malabar, in Appeal Suit No. 339 of 1917.

Mahomedan Law—Gift of property in possession of licensee to third party is valid—Authorization to take possession from licensee is sufficient delivery..

Under the Mahomedan law the possession of a licensee from the owner is virtually the possession of the owner and a gift of property in the possession of a licensee to a third party is valid: 14 *I. C.* 993, *Foll.*

Authorization by the donor to the donee to take possession from the licensee constitutes sufficient delivery and the gift is not invalid for want of seisin. [P 488 C 1, 2]

P. V. Parameswara Aiyar for *C. V. Ananthakrishna Aiyar*—for Appellants.

A. V. Krishna Menon—for Respondents.

Judgment.—The donor in this case was the mother of the plaintiff. She had a son who was the husband of defendant 1; defendants 2 to 6 are their children. The property in suit came to the donor under a deed of settlement. She was in possession and she allowed her son, his wife and children to live with her. Her son died in May-June 1914. She then left the house temporarily and executed a deed of gift to plaintiff while she was living in the latter's house. This was on 23rd July 1914. She directed her daughter to take possession from the defendants. When the daughter's husband attempted to enter the house on behalf of his wife, he was resisted. Hence this suit.

It is clear from the judgment of the District Judge that the defendants were licensees who were permissively in occupation. There can be no doubt that this finding is based on legal evidence. Ex. 1 a petition sent by the defendants to the Registrar practically admits that they

were in the house with the permission of the donor, Beevi Umma. The question is whether, as the licensees were physically in occupation of the house, the owner should be regarded as being out of possession. Abdur Rahim, J., in *Fakir Nynar Muhamed Rowther* v. *Kandasawmi Kulathu Vandan* (1) says this:

"For instance, if the thing is in the hands of a pledgee or a hirer or lessee or any other person whose possession is attributable to the existence of some right or interest of his own in the property or in the hands of a ghasib, that is, a person who has obtained possession of the property without the consent of the owner, the owner in all such cases cannot make a valid gift."

It is pointed out by this learned Judge in his book on Mahomedan Jurisprudence that such a consideration conld not apply to the possession of a licensee. This is what he says in p. 276:

"Suppose a friend comes into my house to see me, it cannot be said that he is in possession of the house as he has no intention to exclude me from it. Hence it is that the law speaks of the possession of a licensee as possession of the owner."

It is clear therefore the donor was in law in possession on the date of the gift. The cases quoted by Mr. Parameswara Aiyar are those in which the person in possession had a legal right to continue in possession before eviction in due course of law. The case of a licensee is not analogous to them. The next question is whether the donor has given such possession as Mohamedan law requires; of course mere registration of the document by itself is not enough. If the donee has been enabled to take possession, the fact that possession was not physically delivered would not matter. Mr. Ameer Ali in his bcok, Vol. 1, p. 114, says:

"Power to take possession is equivalent in certain instances to actual delivery of possession."

We think in this case there was authorization by the donor to take possession from persons whom she had out of affection allowed to reside with her. They were bound to go out if the donor asked them to vacate, and we think the donee who was authorized to take possession, was similarly entitled. Mr. Tyabji in his book states the rule as regards the nature of the possession that should be given in the same terms as Mr. Ameer Ali has stated it. In our opinion all that was necessary to give possession was done by the donor and that consequently the gift is not invalid for want of seisin. We think the District Judge was right in the view of the law he has taken; we dismiss the second appeal with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1912] 14 I. C. 993=35 Mad. 120.

A. I. R. 1919 Madras 483

WALLIS, C. J. AND SPENCER, J.

Elliot & Co. Ltd., Birmingham—Plaintiff—Appellant.

v.

V. K. Abdul Sahib and *others*—Defendants—Respondents.

Original Side Appeal No. 57 of 1917, Decided on 17th April 1918, from decree and judgment of Coutts-Trotter, J., D/- 14th August 1917.

(a) Contract—C. I. F. — Goods shipped — Tender by vendor of shipping documents is good tender—Bills of lading dissolved owing to outbreak of war—Tender of those bills is not such tender as vendee is bound to accept.

In a c. i. f. contract, for purchase of goods tender by the vendor after the goods had been shipped, of shipping documents, including bills of lading which represent the goods, is a good tender and performance by the vendor. [P 484 C 1]

Where however the bills of lading as contracts of affreightment between the shipper andthe shipowner are dissolved owing to the outbreak of war, the tender of them is not such a tender as the vendee is bound to accept under a c. i. f.. contract. [P 484 C 1]

(b) Contract—C. I. F. — Goods purchased from commission agent under c. i. f., terms—Agent to supply goods "on account and at risk of buyer"—Outbreak of war after shipment of goods on enemy vessel—Risk is thrown on buyer and vendor's agent is entitled to recover price.—Contract Act (1872), S. 222.

Where goods are purchased from a commission agent under a c. i. f., contract whereby the latter is to supply goods "on account and risk of the buyer" and war breaks out while goods are in transit on board an enemy ship, the relationship of principal and agent subsists between the parties even though the agent is regarded for some purposes as a principal and as any other vendor under a c. i. f. contract. In such a case, on the outbreak of war after shipment of the goods on an enemy vessel, the risk is thrown on the buyer pursuant to the principles of S. 222, and the vendor's agent, is entitled to recover the price of the goods sold: *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (1916) and 1 *K. B.* 495 and 40 *I. C.* 383, *Dist.* [P 484 C 2 P 485 C 1]

W. Barton—for Appellant.

A. Suryanarayaniah — for Respondents.

Wallis, C. J.—This is an appeal by the plaintiff from the judgment of Coutts-Trotter, J., dismissing the suit brought by the plaintiff as liquidator of Messrs. J. H. Elliot and Co., to recover damages for breach of certain contracts made with

the defendants by which Elliot and Co. undertook to purchase and ship certain goods "on account and risk of the defendants", and did ship them under c. i. f. c. i., contracts on board a German ship. War broke out while the goods were still in transit, and the contracts of affreightment between the shippers and the German ship-owners were thereupon dissolved with the result that if these were ordinary c. i. f. contracts between vendors and vendees, then as held by the learned Judge in accordance with the decision of the Court of appeal in England in *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (1), the tender of the shipping documents including these bills of lading which had been dissolved as contracts of affreightment was not such a tender as the defendants were bound to accept under the c. i. f. contract and the goods were thrown on to the vendor's hands. The only serious attempt to distinguish that case at the trial was on the ground that in the present case the bills of lading had been endorsed over to the defendants before the outbreak of war. As observed by the learned Judge that fact is not proved. On the contrary the Captain's copies which have been filed are to order of the shippers, and the fact that the National Bank on behalf of the plaintiff was able to recover the goods goes to show that there never was any such endorsement. Even if there were, I agree with the learned Judge that that would not make any difference. What I understand the Court of appeal to have decided was that tender by the vendors after the goods had been shipped of shipping documents including bills of lading which represent the goods was a good tender and performance by the vendor in a c. i. f. contract, but that he did not so perform his contract by delivering bills of lading which as contracts between the shippers and the ship-owner had become dissolved owing to the outbreak of the war.

No serious attempt seems to have been made at the trial to distinguish the present case on the more substantial ground that, under the contract, the goods as pleaded in the plaint, were to be purchased and shipped on account and risk of the defendants and consequently the learned Judge has not dealt with that aspect of the case. As however the question arises on the pleadings and is purely one of law, and as cases of this kind are of frequent occurrence in our Courts, we have allowed it to be taken before us. Now it is well settled that where goods are purchased in this way from a commission agent under a c. i. f. contract though the agent is regarded for some purposes as a principal and as any other vendor under a c. i. f. contract, yet the relation of principal and agent still subsists. *Ireland* v. *Livingstone* (2) in which Blackburn, J., (as he then was) gave his well-known explanation of the nature of a c. i. f. contract, when advising the House of Lords, was a case of this kind and was disposed of by the House of Lords on a principle of the law of agency, viz., that as the error arose from the principal's indistinctness of expression, he must bear the loss. The first case in which such an agent was assimilated to a vendor was in *Feise* v. *Wray* (3) where he was allowed to exercise the right of stopping in transit in respect of goods which he had bought and paid for; and the true principle would appear to be that the assimilation is only to be carried so far as is necessary to give business efficacy to the transaction. This I gather to have been the view of Brett, M. R., and Fry, L. J., in *Cassaboglou* v. *Gibbs* (4), where Lord Blackburn's observations in *Ireland* v. *Livingstone* (2) were considered. Otherwise, the relation remains one of principal and agent, as held in the lastmentioned case, in assessing damages; and the agent remains accountable, as held in *Williamson* v. *Barbour* (5), which has recently been applied to similar cases in this Court.

Now where as in the present case, an agent is requested by his principals in the terms of the indents, Ex. A series, "to purchase for us the undermentioned goods on our account and risk" and does so, it appears altogether opposed to the principle of the law of agency to throw upon him the risk of the outbreak of war, while the goods are in transit on board a foreign ship, dissolving the contract of affreightment between the shipper and ship owner, and making it impossible for him to do what, according to the recent decision, a vendor under a

(1) [1916] 1 K. B. 495.

(2) [1872] 5 H. L. 395.
(3) [1802] 3 East. 93
(4) [1883] 11 Q. B. D 797.
(5) [1878] 9 Ch. D. 529.

c. i. f. contract is bound to do, viz., in the absence of a special contract to tender among the shipping documents bills of lading which are still valid contracts and will be enforceable by the vendee against the ship-owner. It was contended in that case that under the particular contract it was the duty of the buyers to take up and pay for the documents when tendered, because the events that had happened consequent upon the war were at their risk. That as observed by Swinfen Eady, L. J., at the beginning of his judgment, was dependent entirely upon the true construction of the particular contract. In that case the Court was of opinion that it did not throw this risk upon the buyer. In this case there is the express stipulation that the goods are to be purchased and supplied on the buyer's account and risk. The whole transaction being thus at the risk of the buyer, I can see no reason for relieving him from the risk of what has happened, even if the word "risk" were not mentioned in the contract. I think a special contract throwing this risk on the buyer could be inferred from the fact that the goods were to be purchased and shipped on account of the buyer, pursuant to the principle embodied in S. 222, Contract Act, that

"the employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in the exercise of the authority conferred upon him."

To throw these goods on the agents' hands and leave them to bear the loss which has arisen by reason of the outbreak of war while the goods were in transit appears to be entirely opposed to and inconsistent with the general principles of the law of agency. The cause of action is stated in the plaint to have arisen on 10th and 7th August 1914, when the defendants refused to accept the drafts, and on 23rd June 1914, when the defendants were informed the goods had arrived and on 29th August 1916, when the goods were resold. On 1st June 1916 the National Bank of India, who held the shipping documents for the plaintiffs, entered into the agreement Ex. J with Messrs. Graham and Co., therein called the representatives who had been chosen with the sanction of the British Government to enter into an arrangement with the owners of the ship which was sheltering at Caglian to obtain and tranship the goods, and in this way the National Bank obtained possession of the goods on payment of the charges incurred in releasing and forwarding them. This was the system resorted to in a very large number of cases and was apparently the only means by which the goods could have been recovered and forwarded to their destination on behalf of the plaintiffs. The defendants at first expressed their willingness to take the goods at the invoice price, but afterwards repudiated all liability, and the plaintiffs, in the exercise of powers reserved to them in the contract, sold the goods and now seek to recover shortfall of Rs. 3,259-0-3. The particulars have not been questioned and I am of opinion that the plaintiffs are entitled to recover them, and that the appeal must be allowed and the suit decreed with costs throughout.

Spencer, J.—I am also of opinion that in the case we are dealing with, there was a contract of agency and that this is sufficient to distinguish it from the cases of *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (1) and *Madhoram Hurdeodass* v. *G. C. Sett* (6), which had to do merely with contracts between buyers and sellers. I think that we must dispose of this appeal upon a consideration of the nature of the contracts existing between the parties as it appears from the documentary evidence before us and my grounds for thinking that Messrs. J. H. Elliot and Co., Ltd., were agents or brokers for the respondents are: (1) that in the indents, Exs. A, B and C, the respondents requested Elliot and Co., "to purchase and ship for us if possible, the undermentioned goods on our account and risk"; (2) that there is a column in the indent providing for agent's commission and another column for the mark to be placed in the goods which was to be the mark of the respondent's firm; (3) that in two out of three indents the price of the goods is not stated; (4) that the bills of lading, Ex. H series, show that the real shippers were Messrs. Voller and Trummer, apparently a German firm carrying on business at Gottenburg in Sweden. As in *Ireland* v. *Livingstone* (2) I think that this transaction began as a contract of agency, although for certain purposes the agents may have been in the position of vendors when shipping goods to their principals. Therefore al-

(6) [1917] 45 Cal. 28=40 I. C. 383.

though the contract of affreightment became impossible of performance owing to the goods being in an enemy ship at the outbreak of war and was thus dissolved, the contract of agency did not thereby come to an end, and this being so as between the parties to this suit the loss must fall upon the defendants both under the special terms of their contract and under S. 222, Contract Act, rather than upon the innocent agents who honestly executed the orders of their principals. I agree that the appeal should be allowed with costs.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 486

SPENCER AND KRISHNAN, JJ.

Secy. of State—Defendant—Appellant.

v.

T. Ramanujam Chetty and *others*—Plaintiffs—Respondents.

Appeal No. 202 of 1917, Decided on 30th July 1918, against order of Sub-Judge, North Arcot, D/- 20th November 1916 in Appeal Suit No. 124 of 1916.

(a) Madras Land Encroachment Act (1905), Ss. 6, 7 and 14—Notice for eviction by Sub-Collector—Variation of order on appeal—Suit for injunction against Government is maintainable within six months from final order—Specific Relief Act (1877), S. 54.

The Sub-Collector gave notice to plaintiffs to demolish four anicuts erected by them on a river and threatened to evict them on default. On appeal, the Collector varied the order by directing demolition of only three anicuts and the levy of the penal water rate in respect of the fourth. Plaintiffs sued Government for an injunction restraining them from resort to eviction proceeding.

Held: that plaintiffs had a cause of action under S. 14 of the Act and were entitled to sue for an injunction under S. 54, Specific Relief Act, within six months from the date of the final order by the Collector: 32 *I. C.* 755, *Dist.*

[P 486 C 2]

(b) Madras Land Encroachment Act (1905), S. 14—S. 14 is not restricted to causes of action in Cls. (a) and (b) to explanation.

Section 14 is not restricted to the two classes of causes of action mentioned in Cls (a) and (b) of the explanation to the section [P 587 C 1]

V. Ramesam—for Appellant.

C. V. Ananthakrishna Ayyar—for Respondents.

Judgment.—The first question raised for our decision in this civil miscellaneous appeal is whether the plaint discloses a proper cause of action. The learned Government Pleader for the appellant relies on the Full Bench ruling in *Secy. of State* v. *Illikkal Assan* (1) and contends that it does not. The plaint, as now amended, bases the cause of action on a notice given to the plaintiffs by the Sub-Collector of Tirupattur, Ex. 1 under S. 6, Cl. 2, Act 3 of 1905, as modified in appeal under S. 20 of that Act by the District Collector. Ex. 1 directed the plaintiffs to demolish within 20 days four anicuts which they had erected in the Pachal river and to

> "withdraw from the said unauthorized occupation" and stated "if you fail to do so, you will be evicted from the said anicuts and they will be demolished."

The Collector modified this notice by confining the order to demolish three anicuts and by directing the levy of penal water rate on irrigation from the one anicut which was allowed to remain. The plaintiffs allege in their plaint that they are entitled to the Pachal river or Kalvai and to the dams and the water in it in various ways, viz, as absolute owners, by prescription, by easement, and as riparian owners. They ask for a declaration of their title, and for an injunction restraining the Collector from carrying out the order above mentioned. It was no doubt held by the Full Bench in *Secy. of State* v. *Illikkat Assan* (1) that a notice under S. 7, Act 3, of 1905 gives rise to no cause of action. But a notice under S. 6 differs very materially from a notice under S. 7. The former is a step in eviction itself, whereas the latter only called upon the person concerned to show cause why proceedings should not be taken against him under S. 5 or S. 6 of the Act. In it there is no threat of invasion of the rights of the person in possession, whereas there is clearly such a threat in the former as shown by the notice in the present suit. Plaintiffs are therefore entitled to ask for an injunction under S. 54, Specific Relief Act The Full Bench ruling relied on is thus clearly distinguishable: it is not applicable to a notice under S. 6 of the Act. S. 14 of the Act expressly saves the right of parties to resort to the civil Court for redress when they consider themselves aggrieved by any proceedings under the Act. The service of notice under S. 6 is such a proceeding and therefore plaintiffs' suit is clearly maintainable.

The next question raised is one of limitation. There can be no doubt that the present suit is one clearly falling within S. 14 of the Act and the limita-

(1) [1916] 39 Mad. 727=32 I. C. 755.

tion applicable to it is the one provided by that section. The words of the section are very wide and include all suits where persons alleging that they have been injuriously affected by proceedings uuder the Act claim relief, whatever the form of that relief may be. The Subordinate Judge's view that only two classes of causes of action mentioned in S. 14, apparently meaning those dealt with in Cls. (a) and (b) of the explanation, are the only ones that fall within the scope of the section and to them alone the six months' rule will apply, is erroneous: see the observations in *Secy. of State* v. *Sami Chettiar* (2) and the case cited there.

In the present case if the date of the cause of action is taken to be the date of the notice by the Sub-Collector, the suit would be barred by limitation as it was brought more than six months after it. But, as already stated, the plaintiffs had appealed to the District Collector against the order under which that notice was issued and that officer had suspended the execution of the order and had finally varied it on 9th July 1914. The appellate order was communicated to the plaintiffs on 11th August 1914, and their suit was filed eight days after. The suit is within time, whether we take the date of the Collector's order or the date when it was communicated to the plaintiffs as the date of their cause of action in the plaint. Though plaintiffs had originally based their cause of action on the Sub-Collector's order, they were allowed to amend their plaint and make the appellate order their cause of action and no objection has been taken before us to this course by the learned Government Pleader. In fact, when the Sub-Collector's order was varied in appeal it was no longer subsisting; the real order in the case now is the final order of the Collector. It seems therefore that the plaintiffs were entitled to treat that as their cause of action. It may be that when the plaintiffs received the first notice, Ex 1, they were entitled to treat it as a cause of action and sue; but they were not bound to do so. The appellate order by the Collector, followed by its being communicated to them, gave them another cause of action which they are entitled to take advantage of. They might have waited till they were actually evicted and their anicuts demolished when they would have got still another cause of action: see *Bhaskarudu* v. *Subbarayudu* (3). The question we have to decide however is whether on the cause of action alleged in the plaint the suit is barred or not, and not whether plaintiffs had any other cause of action. The suit must therefore be held to be in time.

In *Secy. of State* v. *Sami Chettiar* (2), above cited, it was observed that the appeal to the Collector in that case did not affect the question of limitation. But that was a case where the plaintiff had been actually evicted from the land and his building demolished. In such a ease the cause of action arises on the date of eviction under the explanation to Cl. (b) S. 14, and subsequent proceedings cannot affect it. In the present case no eviction has yet taken place and it is thus distinguishable from that case. The order of remand must therefore be upheld though for reasons other than those given by the Subordinate Judge. The appeal is dismissed, but in the circumstances the costs in this Court will abide and follow the final result.

S.N./R.K. *Appeal dismissed.*

(2) A. I. R. 1919 Mad. 47=49 I. C. 180.

(3) A. I. R. 1914 Mad. 659=38 Mad. 674=21 I. C. 840.

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* A. I. R. 1919 Madras 487

SADASIVA AIYAR AND NAPIER, JJ.

Kumaramuthu Pillai and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 574, 601, 695, 761 and 351 of 1918, and Criminal Revn. Petns. Nos. 462, 487, 561, 613 and 276 of 1918, Decided on 7th February 1919.

(a) Criminal P. C. (1898), Ss. 154, 156, 162, 221, 232, 233, 234, 235, 239 and 551—Dacoity case committed to Sessions withdrawn at instance of Superintendent of Police—Matter investigated by Superintendent and statements of witnesses recorded—Police officers and constables committed to Court of Session—Charges of extortion and wrongful confinement—Offences committed by different accused at different places, and on different dates—Single charge against all accused and conviction under Ss. 348 and 380, Penal Code—Statements of witnesses recorded by Superintendent used as corroborative of their evidence—(Per *Curiam*)—Statements are wrongly admitted—(Per *Sadasiva Aiyar, J.*)—Joint trial of all accused is bad. (*Napier, J.*, Contra)

The police put up a case of dacoity, which was committed for trial to the Sessions Court. The

Superintendent of Police, suspecting that the case was concocted by the police, had it withdrawn by the District Magistrate. He then reported to the police station at *K* that five police officers and a police constable had prepared false records, wrongfully confined certain persons and caused them hurt to extort confessions. The Superintendent afterwards investigated the matter under S. 551, Criminal P. C., recorded statements of witnesses and submitted a report and charge sheet. The police officers and the constable were tried under Ss. 348 and 380, I. P. C. and committed to the Court of the Assistant Sessions Judge. Accused 1 was charged with having wrongfully confined some persons, and tortured them in a certain place. Accused 2 and 3 were charged with wrongful restraint and torture of a different set of persons in another place. Accused 1, 3, 4 and 5 were charged with having together restrained and tortured certain other persons in a different place. The occurrences took place on different dates. The Assistant Sessions Judge framed a single charge containing a single count against all the five accused, to the effect that they had wrongfully confined different persons for the purpose of extorting a confession that might lead to conviction for an offence. The accused were eventually convicted under Ss. 348 and 380, I. P. C. In the course of the trial the statements of witnesses recorded by the Police Superintendent during his investigation were used as corroborative of their evidence at the Sessions trial:

Held, per *Curiam*: that the statements recorded by the Police Superintendent were wrongly addmitted in evidence and that a retrial of the accused was necessary. [P 492 C 1]

Per *Sadasiva Aiyar*, *J.* and *Napier*, *J.* (dissenting)—That the joint trial of all the accused was illegal as the part played by each or some of the accused was distinct from that of the others and the wrongful restraint was of different persons at different places by some of the accused acting independently of the others, but that the charge, as framed, though objectionable, was at the most an irregularity that did not vitiate the trial. [P 491 C 1]

Per *Napier*, *J.*—That the trial was not bad for misjoinder as the acts of the accused were founded on a common purpose or design and were so linked together as to form one and the same transaction: but that the charge framed was a distinct violation of Ss. 221 and 222, Criminal P. C., so as to altogether vitiate the trial. [P 497 C 1]

(b) Evidence Act (1872), S. 157—S. 157 is controlled by Criminal P. C. (1898), S. 162.

Per *Sadasiva Aiyar*, *J.*—The words "legally competent" in S. 157, Evidence Act, mean having power under some law, statutory or otherwise. The section is controlled by S. 162, Criminal P. C. Even in the case of statements of witnesses recorded in departmental enquiries by police officers, not only should the writing not be used in evidence at a subsequent trial of an accused person, but even oral evidence should be disallowed as to the particulars of such statements, as the use of even oral evidence is opposed to the spirit of the law: 14 *I. C.* 896, *Considered*. [P 492 C 1, 2]

(c) Criminal P. C. (1898), S. 537 (a)—Scope of, indicated.

Section 537 (a) is wide enough to cover an omission to frame a charge properly and also an omission to frame distinct and separate charges: 25 *M*, 61, (*P. C.*), *Expl.* [P 490 C 2, P 491 C 1]

(d) Criminal P. C. (1898), Ss. 234 and 235—Person includes persons acting together—General Clauses Act (1897), S. 13 (2).

The words "a person" in Ss. 234 and 235 include a set of persons acting together, having reference to S. 13 (2), General Clauses Act; 33 *Cal*, 292. *Diss. from.* [P 493 C 1]

*** (e) Criminal P. C. (1898), S. 239—Same transaction — In order to constitute single transaction there should be such continuity of action, unity of purpose and such proximity of time in happenings as would lead trained judicial mind to grant them as forming single transaction.**

Section 239 enables a joint trial to be held of several offenders or sets of offenders only if the offences were all committed in the same transaction. Where however the offences are different (falling under different sections), the dates of the offences are different, the sets of persons committing the offences are different and the persons or sets of persons against whom the offences are committed are different, they cannot ordinarily be held to have been committed in the same transaction. In order to constitute one transaction there should be such unity of purpose, such continuity of action and such proximity of time in the happenings as would lead a trained judicial mind to grasp them as forming a single transaction. [P 493 C 2]

Per *Napier*, *J.* — To constitute acts as one transaction, prior conspiracy among the actors is not required. So long as the actions flow out from one another in a continuous stream, the doctrine applies. Proximity of time is one of the essentials, but it is not necessary that all the acts should be completed on the same day. [P 496 C 2]

T. Rangachariar and *K. S. Ramabadra Aiyar*, *A. Srirangachari* and *L. S. Veeraragava Aiyar*—for Petitioners.

E. R. Osborne—for the Crown.

Sadasiva Aiyar, J.—These are five connected revision petitions. In Criminal Revision Case No. 351 of 1918, the Public Prosecutor moves this Court for enhancement of the sentences passed upon the five accused, accused 3, 4 and 5 being police constables while accused 1 and 2 are a Sub-Inspector of Police and a head constable. The Assistant Sessions Judge of Tinnevelly convicted them under Ss. 348 and 330. I. P. C., and sentenced them to imprisonment till the rising of the Court and to pay fines of Rs. 1,000, 200, 25, 25,25 respectively. The Sessions Judge on appeal, while confirming the convictions and sentences, remarked at the end that "the sentences for such grave offences are in my opinion wholly inadequate." There vision petition filed by the Public Prosecutor for enhancement of the sentences had been made to this Court on

8th July 1918 before the Sessions Judge pronounced his appeal judgment in August 1918. The Sessions Judge says in a note at the end of his judgment that he did not therefore make any separate reference on the question of sentences. The other four revision petitions Nos. 574, 601, 695 and 761 are by four of the five accused (that is, excepting accused 3) for setting aside the convictions and sentences both on the merits and on the ground of grave irregularities and illegalities in the trial. As I have come to the conclusion that the joint trial of all the five accused was illegal and ought to be set aside, the question of enhancement of sentences applied for by the Public Prosecutor in No. 351 of 1918 does not arise. The facts are very complicated, but it is necessary to detail many of them to render intelligible the grounds for my opinion as to the illegality of the trial.

On 27th April 1917. there was a dacoity at Kichilapuram, a hamlet within the jurisdiction of the Koilpatti police station The Probationary Sub-Inspector of Police at Koilpatti Station began the investigation on 28th April, but on 30th April he was superseded by accused 1 who was the Sub-Inspector of Vilatikulam and was placed on special duty to investigate the case. Accused 2 was the head constable at Koilpatti Station and accused 3 to 5 are the police constables who acted under the orders of accused 1 in the in vestigation. The prosecution case may be stortly stated thus: P. W. 4 Gurusami Kone. was arrested on 2nd May at a village called Iyvapulipatti.

He was then marched through three different places one of which is Sankaranainarkoil; he was not produced before a Magistrate within 24 hours of the arrest on 2nd May, he was illegally confined after the expiry of the 24 hours in these three places; he was beaten and tortured by the first four accused at Sankaranainarkoil; he was then taken to Koilpatti and illegally confined there and was tortured also on 5th May 1917 and was continued to be kept in illegal confinement and wrongfully restrained till 7th May, when he was produced before a Magistrate. Another part of the prosecution case is that P. Ws. 11. 12, 13, 14 and 22, who were arrested at a village called Pandavamangalam by accused 2, 3 and 5 on 4th May 1917, were not produced before a Megistrate within 24 hours but were kept in illegal confinement at Koilpatti and at other place till 7th May, when they were produced before the Magistrate. P. W's. 4, 11 and 12 were also tortured by accuseds 1, 3, 4 and 5 acting together at Koilpatti on 5th May.

It will thus be seen that the case against these five Police officers tried by the Assistant Sessions Judge in one trial relates to several events which took place between 2nd and 6th May 1917. It also appears that several acts injuring the body and affecting the liberty of P. W. 4 were committed between 2nd and 5th May, which had nothing to do with the offences committed against the persons of P. W's. 11, 11, 13, 14 and 22 in confining them for more than 24 hours after their arrest on 4th or with the torturing of P. W's, 4, 11 and 12 on 5th May 1917. The places where illegal confinement or wrongful restraint took place were also various, P. W. 4 having been wrongfully restrained and wrongfully confined before 5th May in several places with which P. W's. 11, 12, 13, 14 and 22 had connexion. Further accused 5 had nothing to do with the torture and confinement of P. W. 4 so far as such torture and confinement took place before 5th May. Accused 2, though he arrested P. W's. 11 to 14 and 22, had nothing to do with their illegal confinement after the expiry of the 24 hours from the time of their arrest which took place on the evening of 4th May, or with the torture of P. W's. 4, 11 and 12 at Koilpatti on 5th May. The Assistant Sessions Judge framed only one charge containing a single count against all the five accused as follows:

"I, Muhammad Fuzluddin Sahib Bahadur, B.A. B. L., Assistant Sessions Judge of Tinnevelly, hereby charge you, 1. Kumaramuthu Pillai 2. Kandaswami Pillai. 3. Subbayya Pillai, 4. Muthuramalingam Pillai and 5. Shanmuga Kone, as follows:

That you, on or about 2nd to 6th days of May 1917, wrongfully confined Gurusami Kone, Karuppanna Thevan, Kathappa Thevan, Chinnakaruppa Thevan, Pulu Naik and Veerappa Naik for the purpose of extorting from Gurusami Kone, Karuppanna Thevan and Kathappa Thevan any confession or information which may lead to the detection of an offence of dacoity that occurred in Kechilapuram and that you also voluntarily caused hurt to Gurusami Kone, Karuppanna Thevan and Kathappa Thevan for the purpose of extorting from them a confession which may lead to the detection of the said offence of dacoity and thereby committed offences punishable under Ss. 348 and 330, I. P. C. and within my cogni-

zance. And I hereby direct that you be tried on the said charge.

(Sd.) Muhammad Fuzluddin.
Assistant Sessions Judge"

I must say that the framing of a charge like this on the facts alleged by the prosecution as above set out is wholly opposed both to the spirit and the letter of the provisions of Criminal Procedure Code relating to the framing of charges. The charge sounds as if all the six P.W's. 4, 11, 12, 13, 14 and 22 had been confined and tortured together, in the same place or places during the same period by all the five accused acting together whereas the prosecution case itself discloses several events of which two at least are quite distinct both in time and place and also events differently constituted in the personalities of those offending and those offended against. I refer to the event at Sankaranainarkoil on the night of 2nd May when accuseds 1 to 4 alone tortured P. W. 4, and to the other distinct event of 5th May at Koilpatti where P. W's. 4, 11 and 12 were tortured by accuseds 1, 3, 4 and 5 alone excluding accused 2. S.221, Criminal P. C., says:

"Every charge shall state the offence with which the accused is charged."

Section 222 says:

The charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged."

Section 233 says:

"For every distinct offence of which any person is accused there shall be a separate charge."

According to these provisions, it is clear that against every one of these 5 accused there should have been a separate charge in respect of each of the two offences under Ss. 348 and 330 and thus there ought to have been 10 charges framed. Again each of the two charges against accused (the Sub-Inspector) should have contained several counts relating to the events with which he was concerned (according to the prosecution case) in Sankaranainarkoil in Koilpatti and in other places where P. W. 4 was confined and tortured and also counts as to what was done by him in torturing P. Ws. 4, 11 and 12 and in wrongfully confining P. Ws. 11, 12, 13, 14 and 22. I need not take the trouble at this stage to detail the manner in which the counts should have been entered in the two charges which had to be framed for the two distinct offences under Ss. 348 and 330, which ought to have been framed against each of accused 2,3, 4 and 5 similarly. It has however to be remarked that this most serious error of the Assistant Sessions Judge, in not framing the proper and necessary charges seems not to have been a made a grievance of by the accused in either of the lower Courts nor could I find any point taken in the grounds found in the four revision petitions put in by accuseds 1, 2, 4 and 5. (Accused 3 has not filed a separate revision petition, but we have considered his case also suo motu in revision as inextriably connected with the case of the other four.)

Mr. Rangachariar however very strenuously argued that the omission to frame proper charges as required by law made the whole trial illegal and referred to several cases on the point, mostly decided by the Calcutta High Court. I shall refer only to one of those Calcutta cases, namely *Asgar Ali* v. *Emperor* (1). There, two distinct offences were joined in one charge. Sir Richard Harrington and Coxe, JJ., set aside the conviction and sentence on the sole ground that the joining of two distinct offences under one charge is an illegality opposed to S. 233, Criminal P. C., and that that illegality was fatal to the whole proceedings. Coxe, J., says:

"I agree that the rule should be made absolute, though with great reluctance, as it is perfectly clear that the defect in the charge has never made the least difference to the petitioner. We are bound however by the decision in *Subrahmania Ayyar* v. *King-Emperor* (2) and the charge framed being illegal, the conviction cannot be sustained."

With the greatest respect, I am inclined to hold that the decision in *Subrahmania Ayyar* v. *King-Emperor* (2), notwithstanding some of the general observations made by their Lordships of the Privy Council in their judgment, was confined to the illegality due to one trial of more than three offences contrary to the provisions of S. 234 and did not go to the length of deciding that the omission to frame two distinct charges for two distinct offences was fatal to the trial. I think that S. 537 (a), which mentions, among other things, of "error, omission or irregularity in the charge", is wide enough to cover omission to frame the charge or charges properly

(1) [1913] 40 Cal. 846=20 I. C. 609.
(2) [1902] 25 Mad. 61=28 I. A 257 (P.C.).

and also omission to frame distinct and separate charges. S. 225 also says:

"No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice."

Illustration (e), S. 225 is instructive on this point:

"A is charged with the murder of Haidar Baksh on 20th January 1882, and Khoda Baksh (who tried to arrest him for that murder) on 21st January 1882. When charged for the murder of Haidar Baksh, he was tried for the murder of Khoda Baksh. The witnesses present in his defence were witnesses in the case of Haidar Baksh. The Court may infer from this that A was misled and that the error was material."

This illustration shows that even an entire omission to frame a charge for the murder of Khoda Baksh would not have vitiated the trial unless the accused was misled and the error was material. It seems to me that the framing of one joint charge for two offences instead of two separate charges, one for each offence, is a much less serious thing and I do not think that this is more than an irregularity and it cannot be held to vitiate the trial. Before dealing with the material illegality on which in my opinion the trial must be held to be bad, I shall deal shortly with two other less important points argued by Mr. Rangachariar. One of these points was that the committing Magistrate took cognizance of the case illegally and hence had no jurisdiction to make the commitment. To understand this argument, I have to state some other facts shortly. P. W. 3, Mr. F. Sayers, who was the District Superintendent of Police, suspected in August 1917 that accused 1, the Sub-Inspector, made false entries in his diaries, to the effect that he arrested P. Ws. 4, 11, 12, 13, 14 and 22 on 6th May. He also suspected that the confessional statement of P. W. 4, obtained by accused 1, was due to torture. He accordingly took steps to have the case of dacoity against P. W. 4 and others launched in the Sessions Court withdrawn. On 13th August 1917 he reported to the police station at Koilpatti that these five police officers and another police constable prepared false records, wrongfully confined certain persons and caused them hurt in order to extort confession or statement leading to detection of an offence: see Ex. E. This information is stated to have been given under S. 154, Civil P. C. The District Superintendent of Police having thus given the information on 13th August 1917 to the Koilpatti Station under S. 154 the officer in charge of the police station had the power to investigate that case under S. 156, Civil P. C. But what happened was that that officer never made any such investigation, but the District Superintendent of Police, that is the complainant himself, began to make the investigation. I do not say that he had no power to do it because under S. 551, Criminal P. C., every officer superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station. But still it is rather startling that the complainant himself should have made the investigation.

The District Superintendent of Police, after he had made a lot of investigation partly by himself between 22nd August 1917 and 1st September 1917 (see Ex. F series), and partly through his personal assistant on 4th September 1917 (see M. series), seems to have signed Ex. E on 12th September 1917 as the complainant or informant whose first information—report of 13th August 1917 orally given—was for the first time reduced to writing on 12th September 1917 under S. 154, Criminal P. C. Then on that same date a charge sheet, Ex 2, was sent under S. 173 to the Magistrate empowered to take cognizance of the case I do not know whether the personal assistant to the District Superintendent of Police, P. W. 1, had any jurisdiction over Koilpatti. If he had none, his investigation on 4th September could not have been under S. 156. As regards his District Superintendent of Police's own investigation, he and his personal assistant seem to have been at one time inclined to treat it as a departmental enquiry (see Col. 4, Ex. E) and at other times as an investigation held under S. 156. I have no reasonable doubt from the records that Mr. Sayers, when he examined witnesses to incriminate these police officers after the 13th August 1917 (when he gave his oral information to the Koilpatti Police Station), should be deemed to have been acting as the investigating police officer under S. 156 read with S. 551. If so the Magistrate had the legal power under S. 190 (b) to treat the

charge sheet as a police report and to take cognizance of the offences and to commit to the Sessions. This contention of Mr. Rangachariar therefore fails.

Another contention of Mr. Rangachariar was that the lower Courts were wrong in having acted upon the statements (F series and M series) obtained from P. Ws. 4, 5, 7, 9 and 11 to 20 and 22 (F series and M series) by the District Superintendent of Police and his assistant during their investigation between 22nd August 1917 and 4th September 1917 as corroborative of the evidence of those witnesses at the Sessions trial. Two provisions of law, namely S. 162, Civil P. C., and S. 157, Evidence Act, have to be considered in this connexion. S. 162, Civil P. C., prohibits the using as evidence of any writing taken down by a police officer in the course of his investigation. As these depositions were taken by P. W. 1 and P. W. 3 as investigating police officers, and not as persons holding a departmental inquiry, and as under S. 156 (2), even though P. W. 1 may not have been empowered to investigate, his proceedings could be called in question on that ground, and as the statement made to him also does fall under S. 162, I think that the lower Courts were not justified in using these documents as corroborative evidence. On this ground alone, a retrial seems to be necessary.

As regards S. 157, Evidence Act, the question whether a person holding a departmental inquiry (assuming that these depositions Exs. F and M series were taken in a departmental inquiry) is a person legally competent to investigate the fact of the commission of the alleged offences by his subordinate, has not formed the subject of any decision placed before us. I am inclined to agree with Sundara Aiyar, J., in his opinion in the Full Bench case in *Muthukumarasami Pillai* v. *Emperor* (3) that "legally competent" means having power under some law, statutory or otherwise. If the District Superintendent of Police has power under some law or other to hold a departmental inquiry he must be held competent to investigate. I do not agree with the Public Prosecutor that a private person like the head of a bank holding inquiries into offences committed by his subordinates unofficially can be said to be a person legally competent to investigate the fact of the offences, though it may be the usual thing to make such departmental inquiries before sending on the suspected persons to the police. However S. 157, Evidence Act, is clearly controlled by S. 162, Criminal P. C., and even if the statements are admissible under S. 157, they can only be proved by oral evidence to the effect that such and such statements were made, but the writings themselves cannot be used according to the Full Bench decision in *Muthukumaraswami Pillai* v. *Emperor* (3). In the present case these writings themselves have been used and this should not have been allowed. I think that even if these statements were not taken in the course of an investigation under S. 162 but only in a departmental inquiry in which P. Ws. 1 and 3 were legally competent to investigate facts and even if oral evidence (without the writing) as to the particulars of the statements can be given under the Full Bench ruling, all such evidence should be excluded in the retrial of these cases which I have resolved to order, as the use of even oral evidence is opposed to the spirit of the law and the witnesses who gave evidence before the high police officers could not be expected to have known or to have made any distinction in their minds between a departmental inquiry and a police investigation.

Having thus dealt with what I have called minor points though those points also raise very difficult and interesting questions of law, I shall now proceed to the final and important point, namely, whether the whole trial has not been vitiated by jointly trying in one trial the five accused in respect of at least two distinct transactions which took place on two different dates, accused 5 not being involved in the earlier transaction of 2nd May and accused 2 in the later transaction of 5th May. In this connexion, Ss. 233, 235 and 239 have to be carefully considered. S. 233 lays down the general rule that for every distinct offence of which any person is accused, there should be a separate charge and every such charge should be tried separately except in the cases mentioned in Ss. 234, 235, 236 and 239. If we ignore the exceptions for one moment, as there are 5 accused and 2 separate offences charged against each, there should not only be ten separate

(3) [1912] 35 Mad. 397=14 I. C. 896.

charges but ten separate trials. The exceptions under Ss. 234 and 236 may be ignored as they have no relation to the facts of the present case. The remaining question therefore is whether S. 235 or S. 239 or both together could enable the ten charges, some against one set of 4 persons and some against another set of 4 persons, to be tried together in one trial. In S. 235, sub-S. (1) alone has to be considered. It is as follows:

"If in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence."

Literally construed, one trial is allowed only where one person is charged at that trial. According to *Budhai Sheik* v. *Emperor* (4) only such a literal interpretation, namely that S. 235 (1) as also S. 234 relates to the trial of a single person for several offences is permissible. In that case, the learned Judges held that Ss. 234 to 238 by their terms referred to the case of a single accused and that where there are more than one accused, S. 239 alone permitted a single trial. I am however satisfied in my mind that S. 13 (2), General Clauses Act, which says that words in the singular shall include the plural and vice versa unless there is anything repugnant in the subject or context is applicable in the construction of these sections. I can find nothing repugnant in the subject or context of Ss. 234 to 238 in holding that the words "a person" include a set of persons acting together. That the word "person" in S. 234 might include "a set of persons" has been assumed in *Nanda Kumar Sirkar* v. *Emperor* (5), which thus differs from *Budhai Sheik* v. *Emperor* (4). The questions for consideration under S. 235 (1) are (1) whether more offences than one were committed by the same person (which in my opinion as I said, includes the same set of persons acting together), and (2) whether, the series of acts in the present case were so connected together as to form the same transaction. If either of these conditions fails, S. 235 (1), cannot be availed of to justify a single trial. As regards the events between the 2nd and 4th May which relate to acts done against P. W. 4 alone the set of persons concerned consisted of accused 1 to 4 alone, as regards the events of the 5th May and later dates against the six prosecution witnesses already referred to the set of offenders consisted of accused 1, 3, 4 and 5, excluding the second. Therefore the first condition fails and hence S. 235 (1) cannot be invoked to cure the illegality of the single trial. Coming to S. 239 it is as follows:

"When more persons than one are accused of the same offence or of diffrent offences committed in the same transaction, they may be charged and tried together or separately, as the Court think fit; and the provisions contained in the former part of this chapter shall apply to all such charges."

This section enables a joint trial to be held of several offenders (or sets of offenders) only if they were all committed in the same transaction. When the offences are different, (that is falling under different sections) when the dates of the offences are different, when the sets of persons committing the offences are different when the persons or sets of persons against whom the offences are committed are different, to hold that they were all committed in the same transaction can in my opinion be justified only in very exceptional cases if at all. I am free to admit in limine that different judicial minds might where the facts are complicated, arrive at different conclusions as to whether a particular complicated series of acts were committed in the same transaction or not and one can very well conceive many sets of facts which are on the border line. Under these circumstances, the case-law cannot be of much assistance. The general principles as laid down in important cases may be shortly stated thus. In order that a series of acts, done by the same person or set of persons or by different persons or different sets of persons might form the same transaction, there should be such unity of purpose, such continuity of action and such proximity of time in the happenings as would lead a trained judicial mind to grasp them as forming a single transaction. The rule as thus laid down is no doubt indefinite but the cases have not made it more definite and as Abdur Rahim, J., and my learned brother said in *Krishna Ayyar* v. *Emperor* (6) as to the scope and interpretation of S. 235, the matter was considered recently by a Bench of this Court in *Choragudi Venkatadri* v. *Emperor* (7). There

(4) [1906] 33 Cal. 292.
(5) [1907] 11 C. W. N. 1129.

(6) [1919] 49 I. C. 337.
(7) [1910] 33 Mad. 502=5 I. C. 847.

it is pointed out that it is hardly possible to lay down in abstract terms which would be any more definite than the language of the section itself, what would amount to one and the same transaction. Each case must depend upon its own facts, the general test being whether the acts charged were so connected together as to amount to one transaction. The connexion in some cases would have to be sought in a common purpose running through all the acts or in the nature of the occurrence, having regard to the cause and to the time and to the place. It is pointed out in *Choragudi Venkatadri* v. *Emperor* (7) that the effect of the decisions on S. 235 is that at least in a certain class of cases—the case there under consideration being one of them—

"community of purpose or design and continuity of action are essential elements of the connexion necessary to link together different acts into one and the same transation."

This proposition, be it noted, was not intended to cover all cases and this is expressly mentioned. Then it goes on:

"In such cases, the acts alleged to be connected with each other must have been done in pursuance of a particular end in view and as accessory thereto or perhaps as suggested by the circumstances in which the acts in pursuance of the original design were done and in close proximity of time to those acts. But mere community of purpose is not sufficient; there must also be continuity of action."

In that case I might state that the trial related only to acts which took place on one and the same date, namely 20th May 1917, though at different places by different sets of persons in pursuance of the common object, that object being the preventing of the carrying out of any search by the police in the houses of persons within the limits of the Annur Police Station. A vague continuity of purpose is of no avail. In *Subrahmania Ayyar* v. *King-Emperor* (2) the purpose to get bribes wherever possible ran through the alleged acts of the accused in that case, but that was clearly held not to make all the acts of bribery the same transaction. In *Shanker* v. *Emperor* (8) six persons were charged under one charge with having on 17th August 1912 at Amura

"committed murder by intentionally causing the death of Sheoratan and Madhava Pasis and in connexion therewith having caused injuries to Mt. Maike, wife of Madhava, and Gauri, and having thereby committed an offence punishable under Ss. 302 and 323, I. P. C."

(8) [1913] 18 I.C. 676.

The learned Judges began by saying:

"We have seldom come across a charge sheet so carelessly and badly drawn up as the present."

Then they say in another portion of the judgment:

"The charge sheet is a very important document and the drawing up of it a very important act in a criminal trial, and Magistrates cannot exercise too much care when they proceed to frame a charge, etc."

Then they hold that the causing of hurt to Mt. Maike was a perfectly distinct and separate transaction from the murders and could not be tried in one trial with the murders, though all the offences took place on the same date, 17th August 1912, and though Maike was the wife of one of the murdered persons. In *Raghavendra Row* v. *Emperor* (9) the accused cut a large number of trees on 8 or 9 separate occasions misappropriating the complainant's property. One purpose evidently ran through all the fellings, but it was held that, as the occasions were different, the transactions were different. I shall take the following illustration. 20 Maravars have the common purpose of beating Nadars whenever they pass in marriage procession through the Maravar Street.

In the month of May a procession passes and 10 of the Maravars then present out of the 20 assaulted the Nadars then going in procession. Five days afterwards another procession of Nadars goes and (say) 15 of the 20 Maravars assault that procession; then five days afterwards all the 20 assault a similar procession. Even in such a case, can we treat all these events as the same transaction and can the different acts against the different persons committed by the different sets of persons be held to form part of the same transaction so as to justify a single trial, especially if grievous hurt was caused on one of the three days, but not on the other two days and wrongful confinement on another of the three days and not on the other two days and so on? I must add that in the present case, there is no evidence that there was any common purpose or conspiracy arrived at by all the five accused on or before 2nd May, to which purpose or conspiracy, the acts up to the 6th might all be referred. [In *Nanda Kumar Sirkar* v. *Emperor* (5) the origin and the preparations for the commissions of the separate offences were the same,

(9) [1911] 12 I.C. 655.

namely to prevent foreign salt from being sold at a private fair on the same day. Still it was held that where the persons offended against were several distinct stall holders, the transactions were separate. I am however not prepared to go so far, as I think that as the date was the same and the accused were the same and the object was the same, the transaction might be held to be the same; I feel some doubts also about the decision in *Mussalappa* v. *Emperor* (10), where the grazing of cattle in a reserved forest by 12 accused and the rescuing of the cattle by those 12 and 4 others on the evening of the same day were held not to form the same transaction.]

In *Queen-Empress* v. *Fakirapa* (11), in which the whole matter is fully considered by two learned Judges (Birdwood and Jardine, JJ.), all the four accused, who were members of the Dharwar Police Force, were charged with an offence under S. 330 for acts committed against one Hanma, again under S. 348 for an offence committed against the same Hanma between 5th and 18th January 1889, two of the three alone for an offence under S. 348 against Rakhma on 5th January 1889, accused 3 alone for an offence under S. 330 committed against Rakhma on 14th January 1889, all the accused for an offence under S. 330 committed against Yellia between 15th and 23rd Jauuary 1889, all the accused for an offence under S. 348 committed against Yellia during the same period and accused 1, 2 and 3 for an offence under S. 346 committed against Yellia between 8th February and 9th March 1889. In fact, this case in *Queen-Empress* v. *Fakirapa* (11) resembles closely the present case and both the learned Judges were quite clear that the several acts which were done by the four police officers, the accused in that case, (in pursuance of the common purpose of detecting an offence of theft) on different dates against different sets of persons by different sets of the accused could not form the same transaction.

Birdwood, J., says at p. 496 (of *I. L. R.* 15 *Bom.*):

"It would, I think, be an undue straining of the law to apply S. 239 of the Code to several different thefts committed on different days and at different places by different members of a gang of thieves, who were all out on the same marauding expedition. Such a case would go far beyond Illus. (e), S. 239. Of course these illustrations are not exhaustive. Yet they furnish some indication of the presumable intention of the legislature. They seem to show that a wider discretion is given to the Courts in British India than in England as regards the trial of more offences than one at one trial, yet it may well be doubted whether it was ever intended that S. 235, para. 1 and S. 239 of the Code should be applied, except in such cases as Illus. (e) and (f), S. 235, to cases where the alleged criminal acts are separated by distinct intervals of time or place and must be proved by distinct evidence. I will not say that members of a police force who had conspired to maltreat suspected persons in the course of an investigation could, in no circumstances, be dealt with under the provisions of the Code now under consideration for a series of oppressive acts of which they were guilty in the prosecution of their common object; but in all such cases it would be necessary to consider carefully whether the alleged acts were, as a matter of fact, so connected together in one series as to form essentially and strictly the same transaction. In any case, if either the accused are likely to be bewildered in their defence by having to meet many disconnected charges, or the prospect of a fair trial is likely to be endangered by the production of a mass of evidence directed to many different matters and tending by its mere accumulation to induce an undue suspicion against the accused, then, in any such case, the propriety of combining the charges might well be questioned."

Jardine, J., says at p. 501 (of *I. L. R.* 15 *Bom.*):

"The question is, whether the Judge is right in treating all the offences charged as forming the 'same transaction' in the sense in which these words are used in these sections. After two arguments, I am of opinion that the hurting of Rakmava and the wrongful confinement of Yellia in February and March were not part of the 'same transaction' as the hurting of Hanma and Yellia and the wrongful confinement of Hanma and Yellia. The identity of circumstance is impaired by the differences of time, place and persons present. The fact that all the offences charged are said to have occurred in one police investigation conducted by the prisoners is, in my opinion, a very artificial bond of union. This investigation was conducted, it appears, at different times by different policemen tried at this trial; they did not act all four together. A reference to Taylor on Evidence (Edn. 4), Ss. 307 to 309, or to 3 Russell on Crimes, (Edn. 5), p. 368, helps us to understand what is meant by the same or one entire transaction. In the cases cited in S. 309 of Taylor on the Doctrine of Election, the existence of concurrence or proximity of time appears to have been the general criterion as to whether several felonies could be tried at the same trial."

In *Emperor* v. *Jethalal* (12) the above case in *Queen-Empress* v. *Fakirapa* (11) was followed by Batty, J., agreeing with Russell, J. In the result I hold that on

(10) [1910] 6 I. C. 242.
(11) [1891] 15 Bom. 491.
(12) [1905] 29 Bom. 449.

the facts of this case there was a clear misjoinder of different transactions constituting different offences by different persons. I would therefore set aside the whole proceedings. A retrial is or rather at least two retrials are, necessary as regards accused 1 and 2 who are responsible police officers against whom serious charges have been made. As regards accused 3, 4 and 5, they are ordinary police constables who must have acted under the orders of accused 1 and 2 and I do not think their retrial is necessary. Their sentences in the illegal trial having been set aside, the fines paid will be refunded to them if recovered. As regards accused 1 and 2, I think that this complicated case should be retried in the Sessions Court by the Sessions Judge himself, who is presumably more experienced in criminal trials than the Assistant Sessions Judge. Detailed charges (one charge for each separate offence against each accused) should be framed, each charge containing detailed counts necessary to make the accused acquainted with the particulars of the acts with the commission of which he is charged. There should be at least two separate trials, one for the acts against P. W. 4 between the 2nd and the 4th, and another for the acts against P. W. 4, 11, 12, 13, 14 and 22 between the 5th and 7th May. As pointed out by the learned Public Prosecutor, I do not see why charge for offences under S. 220, I. P. C., should not be added in each trial against each of the accused with subsidiary counts under that charge. S. 220 is as follows:

"Whoever, being in any office which gives him legal authority . . . . to keep persons in confinement, corruptly or maliciously . . . . keeps any person in confinement, in the exercise of that authority, knowing that in so doing he is acting contrary to law shall be punished with imprisonment of either description for a term which may extend to seven years or with fine or with both."

The facts appearing in the evidence seem to make S. 220 apply applicable. If S. 220 is added, there should be at least three charges for the three effences in each trial against each accused. It is the province of the Sessions Judge to frame the charges for each offence against each accused with subsidiary counts in full detail, and I think it is not advisable for me at this stage to undertake the task of formulating all the charges and accounts.

Napier, J.—Three questions arise on this petition. The first is, whether the whole trial of the accused is bad for misjoinder; the second, whether the charge is bad; and the third, whether certain statements taken by the Superintendent of Police and the Deputy Superintendent of Police from the witnesses in the case were wrongly admitted in evidence. In my opinion the first objection fails. I quite agree with the view expressed by Abdur Rahim, J., in two cases, namely in *Choragudi Venkatadri* v. *Emperor* (7) and Criminal Appeal No. 661 of 1917, reported as *Krishna Ayyar* v. *Emperor* (6), that the question whether events form part of the same transaction must eventually depend upon the facts of each particular case. I am of opinion however that this is one of the cases where such community of purpose or design and continuity of action exist as are required to link together the different acts into one and the same transaction as stated in *Choragudi Venkatadri* v. *Emperor* (7), the principle being founded on the language to be found in *Emperor* v. *Sherufalli* (13). It is true that there is no evidence that the two chief officers of police, the Sub-Inspector and the Head Constable, conspired together prior to any action being taken to arrest certain persons and get information out of them legally or illegally. But, in my opinion, prior conspiracy is not required. As long as the actions flow out from another in a continuous stream, I am of opinion that the doctrine applies. I can find nothing in principle which requires that all the acts should be completed on the same day.

The language used in the case is that proximity of time is one of the essentials. I quite agree; because, if there is not proximity of time, there is nothing to show that subsequent actions were part of the train of events. But in this case it is proved that the Sub-Inspector and the Head Constable arrested P. W. 4 and brought him back to Koilpatti; and that the Head Constable left Koilpatti the next day and arrested all the rest of the accused. Three of them, namely P. Ws. 4, 11 and 12 were then brought together and it is charged that each of them was tortured to implicate both himself and the others. These proceedings, which extended over 5 or 6 days, seem to me to be connected together by a natural

(13) [1903] 27 Bom. 135.

sequence of events and thus to be a series of acts forming the same transaction within the meaning of Ss. 235 and 239, Criminal P. C. I must express my dissent from some of the observations to be found in the case strongly relied on by the petitioners, namely, *Queen-Empress* v. *Fakirappa* (11), though I express no opinion as to the correctness of the decision. I am therefore of opinion that the trial is not bad for misjoinder.

I am however strongly of opinion that there has been a violation of the provisions of Ss. 221 and 222, Criminal P. C. Those sections require that the charge shall state the offence of which the accused is charged and shall contain such particulars as to the time and place and the persons against whom it was committed as are reasonably sufficient to give the accused notice of the matter of which he was charged. In this case there is but one charge consisting of two paragraphs. The first charge is, that all the five accused on or about the 2nd to the 6th days of May wrongfully confined six persons for the purpose of extorting from three of them information which might lead to the detection of an offence. Para. 2 charges that all the five accused caused hurt to the latter three persons for the purpose of extorting a confession. No date is mentioned in para. 2, but it must be assumed that the dates intended are the 2nd to the 6th. Now it is not suggested that all the five accused did anything in concert prior to 5th May, nor is it suggested that all of them arrested all of the persons named in the charge, nor is it suggested that all of them caused hurt to all three of the persons named in the charge. It was impossible for the accused to know what acts on what particular dates were attributed to each or any of them, and it seems to me that they must have been prejudiced in their defence by this charge. Not only that, but the charge does not even contain the words "or any of them" after the persons alleged to have been confined or hurt, so that the conviction amounts to a finding that all of them confined all the persons stated to have been confined and caused hurt to all the persons to whom hurt was caused. I cannot conceive a charge which would be in grosser violation of the principles of the Code. There would have been no difficulty in framing specific charges against each of the accused with reference to each act in which he took part. In a case which came before this Court quite lately and is reported as *Krishna Ayyar* v. *Emperor* (6), a considerable number of people were charged with rioting and hurt to several members of the police force. The greatest care was taken to make the charge specific with regard to each of the accused and no less than 32 charges were framed against the accused, with the result that no question of improper charge could be raised. The only answer to be found to this serious objection is that the vakils for the accused never raised the objection, but confined their objection to misjoinder. I am inclined to think that in taking the point of misjoinder they had in mind the badness of the charges and did not realize that if the charges were properly framed they might in a proper case be tried together. But even if no objection was taken, I cannot but think that the accused must have been prejudiced.

The last point is as to the statements taken from witnessess by the Superintendent of Police and his Deputy. In my opinion it is impossible to say, nor do I think that either the Superintendent or his Deputy ever formulated in their mind, the positions in which at any time they were acting. The proceedings were initiated by the District Superintendent because he suspected that there had been concoction in the charge of dacoity laid against certain accused persons. He acted promptly and rightly in at once taking steps to get at the truth and he examined a certain number of witnesses, with the result that he was satisfied that the charge was false and in consequence asked the District Magistrate to instruct the Public Prosecutor to apply for leave to withdraw the case, for which leave was granted by the Sessions Judge. He then made a few further inquiries himself and left his Deputy to examine other witnesses. In the end he filed before the Magistrate on 12th September two documents, Exs. E and II. It is suggested that Ex. E is the report required by S. 157, Criminal P. C., and Ex. II, the final report under S. 173, namely, the charge sheet. In Ex. E we find that he puts himself down as the informant at the police station and also as the investigating officer. I am quite clear that he did not consider seriously what the legal

bearing of Ex. E was, and that when he filed both Exs. E and II on 12th September, he was merely putting the result of all his inquiries into the form required by the Code for the institution of proceedings. I am sure that he could not say at what stage he was holding a departmental inquiry and at what stage he began to investigate, nor do I think that the Deputy Superintendent could be more definite.

The confusion arises naturally from the fact that the persons, the subject of the inquiry, were his departmental subordinates and from the fact that he was obviously anxious to inquire into the matter himself so that there should be no further miscarriage of justice. It would be sufficient to my mind to say that having signed as investigating officer he cannot now be heard to say that he was not investigating. But even if that is not so, I am satisfied that the statements taken from the witnesses and signed by them come within the mischief of S. 162, Criminal P. C. S. 160 empowers police officers making an investigation to require the attendance of persons acquainted with the circumstances of the case, but S. 162 protects such persons from being pinned down to the statements recorded by the police. The date of the information is given as 12th August, and S. 157 requires that investigation shall at once proceed. It is admitted that no person other than the Superintendent and his Deputy did investigate, and I therefore feel bound to hold that the statements were recorded in the course of the investigation. I am therefore of opinion that Exs. F, M and K are inadmissible in evidence and their reception vitiates the trial. As my learned brother is of opinion that the trial is bad for misjoinder I agree that there should be a retrial of accused 1 and 2 in the manner indicated by him. Specific charges should be framed against the accused in those trials and Exs. F, M and K should be excluded from evidence.

S.N./R.K *Order accordingly.*

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* A. I. R. 1919 Madras 498

OLDFIELD AND SADASIVA AIYAR, JJ.

Subbu Reddi—Decree-holder—Appellant.

v.

Ponnambala Reddi and *others*—Respondents.

Misc. Second Appeal No. 51 of 1917, Decided on 8th March 1918, against order of Sub-Judge, Trichinopoly, in Appeal Suit No. 153 of 1916.

*** Civil P. C. (1908), O. 21, Rr. 91, 92 and 93, —Sale declared invalid—Refund to auction-purchaser without application to set aside sale, cannot be allowed.**

A purchaser an execution sale which has been held to be invalid is not entitled to a refund of the purchase-money deposited by him in Court, unless he gets the sale set aside under O. 21, R. 92. Court sales are held without warranty of title and when a sale is deelared to be invalid, the purchaser will not be relieved from the loss unless he has availed himself of his statutory right to get an order in execution proceedings for re-payment of the purchase-money. 17 *I. C.* 437, and 37 *I. C.* 9, *Foll*; 30 *I. C.* 827; 7 *I. C.* 955 and 26 *I. C.* 59, *Expl.* and *Dist.* [P 499 C 2, P 500 C 1]

M. S. Vaithianatha Ayyar—for Appellant.

T. R. Vaithianathan for *T. V. Venkatarama Ayyar*—for Respondents.

Judgment.—The order under appeal is one dismissing an execution petition by a transferee, a decree-holder, for recovery by sale of certain items of property in which the counter petitioners, respondents are interested. The decree, one for maintenance, was executable against those items and another No. 11, which was actually brought to sale and purchased by one Umapathy Reddi. This sale was confirmed on 9th April 1913 and the District Munsif made an entry in the diary that satisfaction of the decree to the extent of the proceeds was recorded. On 26th February 1914, however one Veerama Reddi had filed Original Suit No. 154 of 1914 for a declaration that the items sold belonged to him and that the decree charging it and the sale were invalid against him. The defendants originally impleaded were the decree-holder, the judgment-debtor interested in the property, who is respondent 6 here, Umapathy Reddi and another person, not concerned in the present proceedings. During the pendency of the suit, the decree-holder died; but as the judgment (which we have called for) shows, plaintiff's pleader stated that no one need be impleaded as her representative. The suit accordingly ended on 17th December 1914 in a decree, to which

only the present respondent 6 and Umapathy Reddi were parties, granting the declaration asked for. Meanwhile however on 16th February 1914or 10 days before the institution of the suit, the present appellant, respondent, 6 and the other respondents, judgment-debtors interested in other items charged by the maintenance decree, had joined with Umapathy Reddi in a joint statement, which was filed in Court as the basis of an application for (1) recognition of the first mentioned as transferee-decree-holder; (2) an order permitting him to receive the sale-proceeds of item No. 11 which were in Court on furnishing proper security; (3) execution by him of the decree for the sum of Rs. 50 representing the maintenance due for the year 13th June 1912 to 13th June 1913. This was filed in connexion with an application already made by appellant for execution; and the order passed recognized him as transferee, allowed him to take out execution for the amount due up to 13th June 1913 and (unnecessarily) directed him to take further steps by fresh petition.

This order however notwithstanding, he was not impleaded in Original Suit No. 154 and after judgment therein Umapathy Reddi in Civil Miscellaneous Petition No. 673 of 1915 obtained refund of the purchase money he had paid, on the ground that the sale had conveyed nothing to him, without notice being issued to anyone interested in the disposal of the money, either to appellant or to any of the judgment-debtors. Appellant has now applied again for execution of the maintenance decree in accordance with the terms of the joint statement above referred to; and his application is resisted by respondents, the judgment-debtors other then respondent 6th, on the ground that the money realized by sale of item No. 11 having been available towards the decree amount and having been diverted from its discharge through no fault of theirs and in proceedings to which they were not parties, appellant should be allowed to execute further only after giving credit for the amount thus foregone. The lower appellate Court's ground of decision against appellant was that the judgment in Original Suit No. 154 was obtained behind respondents' backs and cannot bind them, the implication apparently being that they should not be prejudiced by what followed on it. The same argument however is available in favour of appellant, who also was not a party to that judgment. Here the case has been argued also on the ground that the money in Court was available for payment to appellant and that his right to it is still valid, since it can be terminated only by an order for re-payment to the purchaser under O. 21, R. 93, Civil P. C., which could not and cannot legally be passed, because the sale has not been set aside in proceedings of which the persons affected thereby have had notice under R. 92. Appellant therefore is at liberty to recover from the purchaser the money which he has irregularly been allowed to draw, not to execute for the amount a second time. Contra it is argued that, even if appellant had known of the with drawal of the money, it would have been futile as it was not obligatory on him to wait for an application by the purchaser for repayment under R 93, which, in view of th eresult of Original Suit No. 154, he couldnot have resisted.

Of this view the former commends itself. In *Mohidin Ibrahim* v. *Mahamed Meera Levai* (1), Napier, J., held under the present Code that the auction-purchaser has no longer a substantive right to recover his money, but with reference to the wording of R. 93 only a statutory right to get an order in execution proceedings for its repayment, if he discovers the absence of interest before the confirmation of sale, and he did not do so in the case before us. This conclusion was merely obiter. But the point was raised directly and the conclusion was the same in *Nannu Lal* v. *Bhagwan Das* (2), and the reasoning in these two cases is, in our opinion correct. On the other hand we have been referred to *Parvathi Ammal* v. *Govindasami Pillai* (3), in which Napier, J.'s views were criticized although their correctness was not directly relevant, on the ground that general principles entitle a purchaser who loses the land to recover the purchase money. But, with all respect, this disregards the fact that Court sales are held without warranty of title and that when, as in the recent case, the purchaser has not availed himself of his right under R. 91 to have the sale set aside, there is no reason for relieving him from his loss.

(1) [1912] 17 I. C. 437.
(2) [1917] 39 All. 114=37 I. C. 9.
(3) [1915] 39 Mad. 803=30 I. C. 827.

Against the decision in *Nannu Lal* v. *Bhagwan Das* (2) we have been asked to set the earlier decision in the authorized reports of the same High Court, *Muhammad Najib Ullah* v. *Jai Narain* (4) and *Prasanna Kumar Bhattacharjee* v. *Ibrahim Mirza* (5). But Richards, C. J., who took part in both the Allahabad decisions and delivered the judgment in the latter, stated in doing so that the attention of the Court was not called in the earlier case to the alteration in the Code, the effect of which was the basis of Napier, J 's reasoning and which we regard as decisive of the purchaser's rights. The Calcutta case (5) is no doubt directly in appellant's favour. But the ground of decision was similar to that in *Parvathi Ammal* v. *Govindasami Pillai* (3) and is open to similar objection; and the references to authority in connexion with the effect of the change in the law introduced by the present Code are, with all respect inconclusive. For of the two cases referred to, *Rustomji* v. *Vinayak Gangadhar* (6) was not clearly decided on that Code, the head-note of 35 *Bom.* 29, being misleading, since the sale had been held before 1904, when an application for the removal of obstruction was rejected; and *Muhammad Najib Ullah* v. *Jai Narain* (4) has been dealt with supra. In these circumstances we adhere to the opinion expressed by Napier, J., and eventually by the Allahabad High Court and hold that the purchaser had no right to a refund of the purchase money, if only because he had not complied with R. 92 and had the sale set aside.

The result is that the money was removed from Court irregularly or illegally without notice to either appellant or respondent, and the question is which of them is to bear the loss. The answer is plain: its owner at the time of its removal. It is not disputed that it belonged to one side or the other; and it is in our opinion clear that quite apart from the Court's order of 9th April 1913 regarding satisfaction already referred to, the legal authority for and the effect of which is doubtful, it belonged to appellant. It represented respondent's property, which had been sold for appellant's benefit. Nothing respondents could have done, could have made it payable to them or, after the sale had been confirmed, could have entitled them to restoration of the property. That it was appellant's was recognized by all parties in the joint statement already referred to; and the only inference from the provision in it for his giving security before drawing it is that with reference to the pending Original Suit No. 154 he admitted his responsibility to respondents for crediting it in their favonr. It was presumably because of his inability to fulfil that obligation that he delayed in drawing the money, and although his delay was not the cause of the irregularity which effected its removal, *if the* delay had not occurred, that removal could not have been effected. In these circumstances the money must be regarded as appellant's and respondents' contention must prevail.

The lower appellate Court has overlooked the fact referred to by the District Munsif that appellant is, in any case. entitled to execute against respondents for Rs. 50, the amount ssttled in the joint statement as due for the period 13th June 1912 to 13th June 1913. The appeal against order must therefore be allowed to this extent, the lower appellate Court's order being modified accordingly, the petition being remanded to the District Munsif for re-admission and disposal according to law in the light of the foregoing. The appeal is,. in other respects, dismissed. The parties will pay and receive proportionate costs throughout provision being made for them in the final order.

S.N./R.K. *Appeal partly allowed.*

(4) A. I. R. 1914 All. 252=36 All. 529=26 I. C. 59.
(5) [1917] 41 I. C. 924.
(6) [1911] 35 Bom. 29.

A. I. R. 1919 Madras 500

ABDUR RAHIM AND OLDFIELD, JJ.

P. K. Nanjundasamy Chetty—Defendant—Appellant.

v.

Kanagaraju and *others*—Plaintiffs and Defendants—Respondents.

Civil Appeal No. 424 of 1916, Decided on 3rd October 1918, against decree of Temporary Sub-Judge, Ramnad in O. S. No. 72 of 1914.

(a) Hindu Law—Alienation—Manager—It is not valid except for necessity.

The general rule of Hindu Law is that the managing member of an undivided Hindu family

or any other member cannot alienate any portion of the family property except for necessity. [P 505 C 1]

(b) Hindu Law—Alienation—Co-parcener—Alienation of his share for consideration is valid but not gift.

Under the Mitakshara Law, however as prevalent in the Madras Presidency a co-parcener may alienate his own share either in the whole of the family property or in any particular item of it for valuable consideration. He cannot however make a valid gift of his share. [P 505 C 2]

(c) Contract Act (9 of 1872), S. 2 (d)—Gift by co-parcener of his share in consideration of marriage is valid—Hindu Law, Alienation.

A gift made by a co-parcener in pursuance of a promise in consideration of marriage is an alienation for consideration within the rule of Hindu law and is valid and is enforceable against the alienor's share. [P 505 C 2]

T. Narasimha Aiyangar—for Appellant.

C. S. Venkatachariar and *S. Gopala Sarma*—for Respondents.

Judgment.—The only question argued in the appeal is as to issue 3. That issue raised the question whether the alienation in favour of defendant 4 was valid. Defendant 4 is the daughter of the divided brother of defendant 1, now dead. The plaintiff is the adopted son of defendant 1, and he sued for partition and accounts and for similar other reliefs. Defendant 14, the appellant before us, who is the husband of defendant 4 whose heir is defendant 14, being her husband, died since the institution of the suit. The alienation in question was made by a document, Ex. 3, dated 19th May 1909. By it defendant 1 purports to settle some of the property in dispute on defendant 4, and the validity of that settlement according to the case of the appellant, would depend on whether it was made in consideration of defendant 14 marrying defendant 4. The property would belong to the joint family, and defendant 1 would not have been entitled to settle any property belonging to the family on defendant 4, if at the time the plaintiff had been adopted. The learned pleader for the appellant tried to show that the promise, according to the witnesses examined by him in connexion with this question, was made before the adoption of the plaintiff by defendant 1. But we do not think that the evidence at all clearly makes this out. We cannot therefore uphold this contention on the part of the appellant.

But the learned pleader next argues that even if the promise to settle the property was made after the adoption of of the plaintiff by defendant 1, since defendant 1 upheld the deed of transfer, Ex. 3, in his written statement filed in the suit, the settlement will be effective at least to the extent of defendant 1's half share in the properties. The evidence relating to the alleged promise in consideration of marriage consists mainly of the evidence of four defendants' witnesses, D. Ws. 1 to 4 before the Commissioner. They were examined on commission at Salem, the parties being residents of Madura District. It appears that the Commissioner, Mr. Anantrama Aiyar, who we understand, is a vakil of the Salem Court, sent a telegram on 17th February 1916 to Mr. P. S. Ganapathi Aiyar, a Vakil of Madura who was appearing for the plaintiff, saying that he had fixed 19th February for the examination of these witnesses. On the 19th however nobody appeared for the plaintiff and there was no cross examination of the witnesses. On that date however, the Commissioner had received a telegram sent by Mr. Ganapathi Aiyar asking for adjournment of the examination till the 21st. But he refused to adjourn the examination as he had to return the warrant on that very day. It is quite clear on these facts that the plaintiff's pleader was not given sufficient opportunity to be present at the examination of these witnesses before Mr. Anantrama Aiyar and that the plaintiff should therefore be given proper opportunity of cross-examining the witnesses, D. Ws. 1 to 4. We must therefore ask the Subordinate Judge to send us a revised finding on the question whether there was a promise made by defendant 1 to settle certain properties in consideration of defendant 4's marriage with defendant 14 after giving proper opportunity to the plaintiff to cross-examine the above witnesses before the Commissioner at Salem. We allow two months for finding and 10 days for objections.

Finding.—I have been directed by th High Court to submit a finding on the following points:

"Whether there was a promise made by the defendant 1 to settle certain properties in consideration of defendant 4's marriage with defendant 14 ?"

Before taking up the oral evidence on the defendants' side in regard to this

point, I shall notice the documents bearing upon it. The earliest documents bearing upon the question are Ex. 4 series, letters written by defendant 1 between 25th May 1908 and 17th June 1908. These letters which precede the settlement deed, Ex. 3, by about a year do not refer to any previous promise of settling any property on defendant 4 by defendant 1. All of them refer to a will, which defendant 14's grandfather seems to have pressed on defendant 1 to execute. From these letters it would appear that defendant 4's consummation marriage had been put off indefinitely after her attaining puberty and when defendant 1 wanted defendant 14's father and defendant 14 to celebrate that marriage all this negotiation between them appears to have taken place, defendant 14's father trying to take advantage of the opportunity by bringing pressure upon defendant 1 to gift or bequeath some property to defendant 4. Ex. 4, dated 25th May 1908, states that, as said by defendant 1, he would prepare a draft will in respect of the seeru and varisai of his daughter Sarathambal and send it. It does not refer to any promise to settle any properties in consideration of the marriage already celebrated. Then, Ex. 4-b, the next document in the order of date, refers to a conversation between defendant 1 and defendant 14's grandfather to the effect that the latter had asked defendant 1 to execute a will in favour of Sarathambal and register it and states that he is ready to do so.

It also states that defendant 1 is ready to act up to what had been talked about at first or originally. Ex. 4 (a) is dated 11th June 1908. This letter also refers to defendant 14's grandfather's personal request to defendant 1 to execute a will in favour of his daughter, Sarathambal, and it recites also that a draft will had been prepared and sent by him to defendant 14's father and requests him to return the same for being registered. There is also a request in the same letter to fix a date for celebrating the nuptials or consummation marriage of Sarathambal. Ex. 4 (c), the last letter, dated 17th June 1908, recites that as originally talked about defendant 1 intended to execute a will after defendant 14 had gone to him. This refers to the draft will being sent to defendant 14's father, wherein he says he has set apart certain property for the chatram and certain properties for Sarathambal (defendant 4) and certain other properties to the adopted son, the plaintiff. It refers also to the irksome or inconvenient position in which defendant 1 and his daughter Sarathambal had been placed owing to the delay in the celebration of the santhimuhoortham or the consummation marriage and it says that on that account defendant 1 had hastily consented to the word of defendant 14's grandfather and had prepared a draft will and sent it up. As noted at the outset, these letters do not refer to any promise by defendant 1 at the time of defendant 4's marriage to settle any property on her. The draft will which defendant 1 had prepared and sent to defendant 14's father, defendant 14 has not chosen to produce, rather suppresed, it.

The will referred to in these letters seems to have been proposed or arranged for by defendant 14's grandfather, and consented to by defendant 1. They do not bear upon the point under consideration. Next, in the order of date, we have Ex. 3, the settlement-deed itself, which is dated 19th May 1909. This document, after reciting that defendant 4 had been brought up by him as his foster-daughter and got married to defendant 14, states that the properties mentioned in it are gifted to her out of love for her maintenance, according to the promise made by defendant 1 to defendant 4 prior to the adoption of the plaintiff to gift these very properties to her. This does not refer to any promise at the time of the marriage of defendant 4 to defendant 14. If any promise had been made by defendant 1 to gift the very properties mentioned in this document at the time of defendant 4's marriage, then it is difficult to understand why the same has not been recorded in it but a different promise altogether apparently prior to the plaintiff's adoption having no connexion with defendant 4's marriage is specifically mentioned. This document, coming as it does about a year after Ex. 4 series, must be expected to make mention of the promise about the time of marriage if it had really taken place. The omission in it of such a promise is very significant. We have next the written statements by defendant 1, defendant 4, defendant 13 and defendant 14 in the case. The written statements by defendants 1 and

4 were filed on 13th November 1913. In para. 8, defendant 1's written statement he simply says that in consideration of his having brought up defendant 4 with affection he had given certain properties to her under the settlement deed with the object of making some arrangements for her.

There is not a word at all in this written statement about any promise made by defendant 1 at or about the time of defendant 4's marriage to settle these very properties on her in consideration of her marriage. If such a promise were true, certainly, it should have found a place in defendant 1's written statement. In defendant 4's written statement, in para. 4, she states that at the time of her marriage, as the bridegroom's people demanded sridhanam defendant gifted the properties, items 3 to 8 in Sch. A, as sridhanam to defendant 4 and that she was enjoying the said items, and in pursuance thereof defendant 1 had executed in favour of defendant 4 a registered deed. This allegation in the written statement would clearly points to the fact that these items 3 to 8, Sch. A were actually gifted to her as sridhanam at the time of her marriage and that she was enjoying the same from that date till the date of Ex. 3, the settlement deed. It would negative any promise by defendant 1 at the time of defendant 4's marriage to settle any property upon her in consideration of the marriage, as the gift itself would appear to have been actually made then. Clearly, then, the allegation in defendant 4's written statement is against the present contention of defendant 14.

We have next in the written statement of the minor defendant 13, filed on his behalf by defendant 14, his father and guardian, on 9th December 1914, that is, after the death of defendant 4, the plea, in para. 4, that according to the demand by the bridegroom's people at the time of defendant 4's marriage defendant 1 agreed to give sridhanam and in pursuance of that agreement or promise he executed the settlement deed in favour of defendant 4 giving away items 3 to 8 in Sch. A. In defendant 14's written statement, filed on 27th August 1915, the same plea or the same allegation is made in respect of this agreement or promise by defendant 1 to settle or to give some sridhanam to defendant 4. We see, thus, that there is a patent and clear difference in the plea raised by them regarding the point under consideration. While defendant 4 would say that there was an actual gift of the items at the time of the marriage defendants 13 and 14 would have that there was simply a promise to gift them, not an actual gift, which promise was performed later on by the execution of the settlement deed, Ex. 3. Defandant 13 came in as the heir and legal representative of defendant 4, and defendant 14 as the heir of defendant 13, and the latter has tried to change the plea put forward by defendant 4.

Bearing then the above facts and circumstances, we have to approach the oral evidence on the defendants' side. Of the four witnesses on the defendants' side, the witness 4 knows nothing personally of any arrangement at which the defendant 1 made any promise to settle any items on defendant 4. He simply speaks to an admission of defendant 1, made some months after defendant 4's marriage at a feast given to him in defendant 14's house, that defendant 1 told him that he had agreed to settle Rs. 2,000 worth of property on defendant 4. It is the defence witness 1 that would say that he negotiated with defendant 1 the marriage of defendant 4 to defendant 14 and settled the terms of the marriage, and, one of the terms was that defendant 4 should settle on defendant 14 Rs. 2,000 worth of landed property sometime after her marriage. This witness is a distant relation of defendant 14's grandfather and though only an ordinary friend of his and had been only casually asked to settle a suitable bride for his grandson, he took the trouble of settling with defendant 1 the marriage of defendant 4 to defendant 14 snd settled the terms also himself. Defence witnesses 2 and 3 say that they were present at the lagna patrika ceremony when the second witness's brother asked defendant 1 about the arrangement in regard to the marriage and stated that one of the terms was that defendant 1 was to settle Rs, 2,000 worth of property on defendant 4 after her marriage. The second witness's father is the maternal uncle of defendant's 14 father.

He would have that there was no dispute at the time of defendant 4's nuptials between the parties, but we see, as

per Ex. 4 series, that there was higgling in bargaining between defendant 14's father and defendant 1 in regard to the celebration of defendant 4's nuptials. Witness 3 is also a distant relative of defendant 14 and defendant 14's father is an intimate friend of his, and though he could not remember the particulars of any arrangement regarding marriages at forty or fifty lagna patrika ceremonies which he had attended, he is able to remember the particulars of the arrangement at the lagna patrika ceremony regarding defendant 4's marriage as the defendant 14's father was an intimate friend of his. I am not prepared to attach much weight to the oral evidence of these witnesses for defendants, namely witnesses 1 to 3, on the point and act upon it especially in the face of the omission of any such promise to settle properties in Ex. 4 series, in Ex. 3 and the written statements of defendants 1 and 4. The statement of the defence witnesses regarding this point is that some property, not specified or defined, worth Rs. 2,000 was promised to be settled. The statement in Ex. 3 is that defendant 1 had promised to settle these very items 3 to 8 in Sch. A, prior to the plaintiff's adoption. On a consideration therefore of all the above facts and circumstances I am of opinion that no promise by defendant 1 to settle any properties on defendant 4 in consideration of her marriage with defendant 14 has been made out by defendant 14. I find the point, therefore, against defendant 14 and for the plaintiff. After the return of the finding the Court delivered the following.

Judgment—We think upon the evidence submitted to us that the Subordinate Judge's finding that the alleged promise by defendant 1 to settle property worth Rs. 2,000 on defendant 4 at the time of her marriage is not proved, is incorrect. The evidence on the point conists of certain correspondence and the deposition of certain witnesses. Defendant 4 was a daughter of a separated brother of defendant 1, but she was brought up by him as a foster-daughtor and he got her married to defendant 14, the appellant before us. The plaintiff, who is the adopted son of defendant 1 and is also his nephew, instituted this suit for partition. After the death of defendant 1, during the pendency of the suit, he amended the plaint asking for recovery of properties involved in the suit. We found, at the time we called for a finding from the lower Court on the point in question after giving the plaintiff an opportunity of cross-examining certain witnesses, that there was no promise proved to settle any property on defendant 4 before the adoption of the plaintiff. In Ex. 3 which purports to be a deed of gift there is allusion to such a promise, but apparently there is no other evidence which could support that statement. There is on the other hand evidence to the effect that at the time of the negotiation of the marriage—at what is technically called lagna patrika ceremony — defendant 1 made a promise to give certain jewels worth Rs. 2,500 and settle property worth Rs. 2,000 on his foster-daughter, defendant 4. On the former occasion there was no finding on this point and we therefore wanted that the evidence should be considered from this point of view, which would enable us to find whether there was such a promise and if so, whether the alleged gift in favour of defendant 4 under Ex. 3, was valid and to what extent. The marriage took place some time in 1905 within a week of the adoption of the plaintiff. Defendant 4 attained majority some time in 1908. At that time the question apparently was raised by defendant 14 and his friends as to defendant 1's settling some property on defendant 4 as promised by him. In the list Ex. 4 series, there is allusion to a promise, though the date of the promise and the exact nature of it as to what is the amount of property to be settled is not mentioned.

If the case of the appellant stood upon the correspondence, we should be inclined to hold that he has failed to make out his case. But we have the evidence of several witnesses examined by the defendants, especially D. W. 4, to make out the case of the appellant. D. W's 1 to 3 say definitely that at the time of the lagna patrika ceremony they were present and that there were negotiations between the parties as to the amount of property to be settled. Then it was arranged that property worth Rs. 2,000 should be settled by defendant 1 on defendant 4 besides the jewels. D. W. 4 is a man of considerable position in Salem. He is the Union Chairman and

a Member of the District and Taluk Boards in the District. He also owns considerable properties. He says that he was invited to a feast in the house of defendant 14 in honour of defendant 1 and his wife. That was a month or two after the marriage. On that occasion there was a talk as to what was given by way of a dowry and defendant 1 himself said that he had agreed to give jewels worth Rs. 2,500 and settle property worth Rs. 2,000 on the girl. Nothing whatever has been suggested against this witness. He is not related to either party and no sort of bias can be imputed to him. There seems to be no reason why his evidence should not be accepted; and this is also the evidence of all the other witnesses against whom nothing tangible has been alleged.

There are certain inherent probabilites of the case which also we think bear out the story of the appellent. Defendant 4 was not apparently a good looking girl and defendant 1 had to go from place to to find a proper bridegroom for her. He found oue at last in Salem, which is far off from the residence of defendants 1 and 4. Defendant 14 who belonged to a good family was in very poor circumstances and it seems to us extremely probable that there was negotiation as to the nature and amount of dowry. It also seems to be extremely likely that defendant 14's people insisted on some properties being settled. But no settlement was made at the time and defendant 1 apparently put it off and the correspondence which has been filed in the case tend to suggest that at one time he said that he would make a settlement by will. However that may be, we think that a promise just before the marriage and in consideration of the marriage has been proved.

What then is the effect of Ex. 3? It is not contended by Mr. Narasimha Aiyangar that this transaction would affect the share of the plaintiff in the properties in dispute. What he wants us to hold is that to the extent of defendant 1's own share the transaction is a valid and binding one. Defendant 1 and the plaintiff were undivided co-parceners. The law is well settled that the managing member of an undivided Hindu family or any other member cannot alienate any portion of the family property except for necessity. But a co-parcener may alienate his own share either in the whole of the family property or in any particular item of it for valuable consideration. [See *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* (1).] It is also settled law that a co-parcener cannot make a valid gift of his share. It is contended on behalf of the respondents that the transaction evidenced by Ex. III stands on thefooting of a gift. Mr. T. Narasimha Aiyangar contends that we must treat it as an alienation for valuable consideration just like a sale or a mortgage. There is no express authority on the point and we have got to decide the question on general principles of Hindu Law as obtaining in this Presidency. In this Presidency, as already stated, alienation by a Hindu co-parcener of his share for a valuable consideration is recognized though it is not recognized in some other provinces where the Mitakshara law prevails. The question is whether a gift made in pursuance of a promise in consideration of marriage is an alienation for valuable consideration within the rule of Hindu Law. We are of opinion that it does come within the rule. According to the Contract Act consideration is defined thus:

"When at the desire of the promiser the promisee or any other person has done or abstained from doing or does or abstains from doing or promises to do or to obtain from doing something such act or abstinence or promise is called a consideration for the promise."

If a person contracts a marriage in consideration of a promise then it seems to us that the marriage is valuable consideration within the meaning of this definition. In this respect the law is the same in India as in England. In England a promise made in consideration of marriage is a binding and enforceable agreement. The definition of consideration as given in S. 2, Contract Act seems to be general and wide enough to cover such cases.

That being so the next step in the argument of Mr. T. Narasimha Aiyangar is that this agreement entered into between defendant 1 and defendant 14 was a valid contract which could be enforced against defendant 1. We do not think that this proposition can be doubted. The settlement in Ex. III was made in pursuance of this contract. It seems to us therefore that such a settle-

(1) [1902] 25 Mad. 690.

ment is an alienation for valuable consideration. It might be suggested that the Courts of this Presidency in upholding alienation for consideration by a Hindu co-parcener are making an exception to the strict notion of Hindu law that until partition the co-parcener has no definite share in the family property. But once the validity of alienation for valuable consideration is recognized it seems to us impossible not to include such a transaction as this within the operation of the rule. None of the cases to which we have been referred lay down that this power of a Hindu co-parcener is merely confined to sales or mortgages; but the general proposition which we deduce from the decisions in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* (1); *Baba* v. *Timma* (2), *Pounuswami* v. *Thatha* (3) and *Kosuri Ramaraju* v. *Ivalury Romalingam* (4) is that an ordinary simple gift for no consideration will not be upheld as distinguished from alienations for consideration. We therefore hold that defendant 14 is entitled to a half-share of items 3 to 8 in Sch. A. As regards item No. 5, it was argued by the Pleader for the respondents that as the sale to defendant 5 of that item by the defendant 4 has been found to be not binding on the plaintiff and defendant 5 has not appealed specifically regarding this item the appellant was not entitled to any share in this property. But defendant 5's purchase was found to be ineffective and inoperative and defendant 5 not having appealed the property remains with defendant 4. Therefore defendant 14 is entitled to a share in that property as well to the extent of defendant 1's share. The appellant and respondent 1 will pay and receive proportionate costs from each other with respect to this appeal. In the lower Court each party will bear his own costs.

S.N./R.K. *Appeal allowed.*

(2) [1884] 7 Mad. 357.
(3) [1886] 9 Mad. 273.
(4) [1903] 26 Mad. 74.

A. I. R. 1919 Madras 506

PHILLIPS AND NAPIER, JJ.

Samayan Servai and *another*—Appellants.

v.

P. K. Kadir Moideen Rowthan and *others*—Respondents.

Second Appeal No. 39 of 1917, Decided on 17th October 1918, from decree of Dist. Judge, Madura, in Appeal Suit No. 509 of 1915.

(a) Landlord and Tenant—Zamindari tank-bed and bunds—Rights of tenants stated.

The rights of a tenant in a zamindari tank-bed and bunds are no higher than those of grazing, cutting fuel and fishing arising either by grant or by custom. [P 509 C 1]

(b) Specific Relief Act (1877), S. 54—Tank-bed used for storage of water for welfare of raiyats under aiyacut—Suit to restrain from conversion for any other purpose is maintainable—Maitenance of storage of tank unnecessary—Zamindar is under no obligation to preserve tank.

Where a tank-bed must necessarily be used for the storage of water for the welfare of the raiyats under the aiyacut, it must be maintained as such and the zamindar, as also the assignees of the tank, should be restrained from converting it to any other purpose. Where however the maintenance of a storage tank is unnecessary and the raiyats under the aiyacut get their accustomed supply from other sources, and no damage is caused to them by the tank-bed being used for cultivation or for purposes other than the storage of water, the zamindar is under no obligation to preserve the tank for the storage of water. [P 509 C 2, P 510 C 1]

K. Srinivasa Aiyangar — for Appellants.

Narasimha Iyengar — for Respondents.

Napier, J.—In this suit the plaintiffs as representatives owning lands under the Sallivedan tank claimed relief against the original owner of the tank-bed and certain assignees of land in the tank-bed, alleging various acts by the assignees in the tank-bed which had deprived them of their water facilities. The defendants set up a number of pleas and among them alleged that the tank was not the source of irrigation for the plaint lands; that the tank-bed proper was only 3 acres in extent and that they had not encroached on it. These specific pleas have all been found to be false. Some of the acts alleged against them have not been held established but the findings of the lower appellate Court are as follows: The District Judge has found that the tank-bed has an area of 25 3/4 acres; that it is the source of irrigation of Survey No. 807 in respect of which this representative

suit is brought; that up to 1902 the suit lands were regarded as irrigible by the tank that prior to 1903 the tank-bed was full of babul trees, that there was then no cultivation and that after 1902 defendant 4 began the cultivation in the tank-bed. He agrees with the other findings of the Subordinate Judge which include the finding that the channel forming the main source of supply to the tank has since 1902 been obliterated and converted into nanja lands. Then as to the acts of the defendant he finds that defendants 2 and 3, the assignees of the tank-bed have cut the channel within the tank-bed and put up a bund which prevents the water spreading all over the tank-bed and have otherwise prevented the tank being used for the storage of water. These findings are not contested before us and the sole question is whether on the above findings the plaintiffs are entitled to have the tank-bed restored to its original condition.

The commissioner's plan and the survey plan make it clear what was the position prior to 1896 and what is the present position. The tank lies just below two other tanks named Reddiar tank and Vadukar tank. Prior to 1896 the western tank of the two other tanks that is the Reddiar tank was fed by a stream called Virasamarthu Odai flowing from the north and the eastern tank by a channel which conveyed water from an odai called Athan Odai taking its source in the Sirumalai Hills. This odai ran from north to south-east of the two upper tanks and east of the plaint tank, but the water was taken off by the channel at a point north-east of the upper tanks. The plan also shows that the Athan Odai channel besides feeding the eastern tank ran down between the two tanks and discharged the surplus water into the plaint tank. It appears that some surplus water from the Vadukar tank passed into the plaint tank and a certain amount of rain-water which is practically negligible, flowed off the land south of the upper tank down to the bund of the plaint tank. These were the nominal sources of supply for the plaint tank.

In about the year 1896 the Periyar channel was cut across from east to west north of the upper tanks and the course of supply of all the three tanks was immediately altered. For the Reddiar tank the water was brought from the Periyar channel down the old Virasamarathu Odai direct to the tank, and for the Vadukar tank a new channel was also led from the Periyar channel. This latter channel joined the course of the old Athan Odai channel where it ran between the two tanks towards the plaint tank and defendants 2 and 3, the assignees of land in the bed of the tank have continued this channel down to the tank bund enclosed it by a bund and created an outfall from it for the supply of the raiyats. The result is that at present the raiyats receive water direct from the Periyar channel together with possibly a little surplus from the Periyar water in the two upper tanks. The old channel the Athan Odai, has, as previously stated, been obliterated and cultivated since 1902 at least. The lower appellate Court has found that plaintiffs have not suffered any damage by the present condition of the Sallivedan tank, and indeed it appears that having this abundant Periyar supply they are now cultivating a second crop. These facts are to be found in the judgments of the Courts and are not disputed here.

The Subordinate Judge states the proposition arising from these findings in para. 9 of his judgment as follows:

"The case for the defendants is that since the plaintiffs and other raiyats are getting a never failing and sufficient supply of Periyar water, they cannot insist on getting the tank restored to its original state, especially as the channel from the Athan Odai which is its main source of supply is no longer available owning to disuse and consequent cultivation in the channel bed."

He continues:

"There is some force in this contention but the Periyar supply is only a supplementary source of irrigation. The raiyats have no control over it. Sallivedan tank is the ancient and customary source of irrigations. Why should they sacrifice the natural source of water to which they are entitled as a matter of right, even though they do not now suffer for want of water from the tank? Those two sources are still available and nobody has a right to alter the customary source of irrigation. I must hold that the plaintiffs have a right to have the tank so kept as to allow the accustomed quantity of water to flow through the lands."

The District Judge states the proposition more tersely. He says:

"The acts of the defendants restrict the plaintiff's accustomed user of the water of the tank for irrigation and he is entitled to an injunction."

He says also that the capacity of the tank as tank has, of course, been materially altered for the worse and

the plaintiffs are entitled to have the whole tank-bed area of 25 3/4 acres available as a tank. It seems to me that the questions which arise for determination by us is as follows:

(1) Whether the raiyats have a right that the old customary source of irrigation by a storage tank should be maintained; (2) whether defendants 2 and 3 have done anything which infringes that right; and (3) whether, no damage having accrued to the plaintiffs they have any cause of action against defendants 2 and 3. Mr. Narasimha Ayyangar has argued that the plaintiffs are entitled to have the storage tank and that defendants 2 and 3 by cultivation of the lands and by the building of the banks in the tank-bed have infringed that right. He contends that the fact that they have suffered no damage at present does not deprive them of their cause of action.

The first difficulty in his way however is this, that the old source of supply was the Athan Odai which has disappeared. This disappearance occurred before the defendants did any of the acts complained of and it necessarily follows that the acts of the defendants have not caused the failure of water from the Athan Odai. Mr. Narasimha Ayyangar has been compelled to concede this. But his argument is that if at any time the Periyar water supply ceased, the plaintiffs might be able to get the old Athan Odai channel restored and take the water from their old source of supply. Judging by the plan and from some evidence given in the case, I believe this to be a physical impossibility for it seems to me that the Periyar channel crosses the source of the Athan Odai. But assuming that this contingency might occur, the question is whether the plaintiffs have now a right of suit against defendants. Mr. K. Srinivasa Ayyangar argued that as there was no damage, the plaintiffs were not entitled to any relief. Mr. Narasimha relies on the doctrine laid down in *McCartney* v. *Londonderry and Lough Swilly Railway Co., Ltd.* (1) that the owner of a tenement adjoining a natural stream has no right to divert the water to a place outside the tenement and that it was not necessary for a person having rights in the water of the natural stream to prove damage. This proposition is in certain circumstances unassailable, but it starts with the proposition that the plaintiffs have a right which may be affected, whereas the important question in this case is what are the rights of the plaintiffs.

Section 54, Specific Relief Act provides that a perpetual injunction may be granted to prevent a breach of an obligation existing in favour of the applicant whether expressly or by implication, when the defendant invades or threatens to invade the plaintiff's right to or enjoyment of the property and among others, where the invasion is such that pecuniary compensation would not afford adequate relief. The question therefore to be determined is whether the plaintiffs have a right to, or to the enjoyment of the property, namely the tank-bed and secondly, whether the defendants' auction invades or threatens to invade that right. Mr. Srinivasa Ayyangar at the beginning of his argument wished to contend before us that the sole right of a zamindari raiyat was to have his accustomed supply of water made available for his fields and that he was not entitled to look to the tank at all. I am not certain that it is open to us at this stage of the case to consider a proposition which has not been put forward at any earlier stage. We have not before us any of the Pattas held by the plaintiffs, and the sole finding bearing on the question is the finding that the tank was the old source of supply. This important question may arise for decision and I would reserve my opinion on it till then. But assuming the right of the raiyats to be to have their water from the tank, the question still remains whether they have such a right in the whole of the tank bed as to entitle them to insist on its total area being preserved and the tank bund being kept up in such a manner as to form a storage tank. In the well-known instructions issued to Collectors under the Presidency of Fort St. George, dated October 1799, on the introduction of the permanent settlement of zamindari land, the Government distinctly stated their wish to leave the construction and care of the tanks and water-courses entirely to the proprietors: vide p. 332, Vol. 2 of the Fifth Report, and this was held by the Privy Council to be the Common law of this Presidency in the leading case of the *Madras Railway*

(1) [1904] A. C. 301.

Company v. *Zamindar of Carvetinagaram* (2). The passage is as follows:

"The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognized by Hindu and Mahomedan law, by regulations of the East India Company, and by experience older than history, as essential to the welfare and indeed, to the existence of a large portion of the population of India. The public duty of maintaining existing tanks, and of constructing new ones in many places, was originally undertaken by the Government of India, and upon the settlement of the country has in many instances devolved on zamindars of whom the defendant is one. The zamindars have no power to do away with the tanks, in the maintenance of which large numbers of people are interested but are charged under Indian law, by reason of the tenure, with the duty of preserving and repairing them."

The proprietary right of zamindars in their lands was established by the decision of the Board in the case reported as *Collector of Trichinopoly* v. *Lukkamani* (3), and this right of ownership has always been applied to waste lands and tank porambokes. And I know of no case in which it has been held that the rights of a tenant in a zamindari tank-bed and bunds are anything higher than the rights of grazing, cutting fuel and fishing arising either by grant or custom. It cannot therefore I think, be seriously argued that the plaintiffs, raiyats, have any proprietary right to the bed of the tank or its bunds, and the sole question really is whether their right to be provided with water from the tank is such a right to the enjoyment of property as cannot be varied. If it was to be contended that the water was property, the plaintiffs would be met with the difficulty that the water which now comes to the tank is not water from the old source of supply and that that old source of supply has been cut off, not by the action of defendants 2 to 4, but by persons over whom they have no control. Their rights in the tank-bed and bunds must be correlative to the duty of zamindars, and the language of the Privy Council standing the duty of the zamindars is prima facie in their favour. I asked Mr. Narasimha Ayyangar for further authority on this proposition, but he was unable to give me any, and indeed for the purpose of his argument assumed the position which is now in dispute. The matter is therefore one of first impression and I find considerable difficulty in disposing of it. The Privy Council in the passage above quoted have stated that the preservation of the tanks is essential to the welfare and indeed to the existence of a large portion of the population of India. That is the foundation of the duty, and it goes without saying that where a storage tank is essential for the welfare of the raiyats under the aiyacut, that tank must be maintained. But here we have the finding that a storage tank is not essential. The finding is that since 1902 at least, if not a few years previous, the whole of the water given to the raiyats out of their tank has come from the Periyar Channel. It may be and probably is the fact that for the first few years the water from the channel was allowed to accumulate in the tank bed, but it is obvious that that accumulation conferred no benefit on the raiyats of which they have now been deprived. At the present moment they are in fact cultivating a second crop with the Periyar water, a condition of affairs which was unknown under the old source of supply. The result of the action of defendants has been to do away with this unnecessary storage and lead the water direct to the sluice from which it is supplied to the raiyats, and the construction of the bunds for that purpose has resulted in the re-claiming of a major portion of the tank-bed for purposes of cultivation. To restore the tank-bed would therefore confer no benefit on the raiyats and could remove land from valuable cultivation. It seems to me that it is impossible to ignore the modern conditions of irrigation and to insist on the strict application of the language of the Board used with reference to conditions 40 years ago. In the course of argument my learned brother put this proposition to Mr. Narasimha Ayyangar:

"If it had been found possible in modern days to bring water down the old Athan odai channel through the tank-bed direct to the sluice without filling the tank, could it be suggested that that is an infringement of the plaintiffs' right?"

Mr. Narasimha Ayyangar contended that it would be, and this in fact is the fundamental position that he takes up. It is perfectly conceivable that at some time in the future storage tanks with their waste of large areas by submersion may be found to be unnecessary and that by a perfect system of distribution of river water with the aid of pumping schemes, lands may be irrigated by direct flow. I cannot think that the Privy Council intended by the judgment to re-

(2) [1873] 1 I. A. 268=3 Sar. 318 (P. C.).
(3) [1873] 1 I. A. 364=3 Sar. 391. (P. C.)

quire adherence by zamindars to a system that may eventually be found wasteful and unnecessary. I am therefore of opinion that the enjoyment of the tank-bed, to the extent of the utilization of water stored in it, is a right which only exists as long as it is the duty of the zamindar to preserve such a tank, and that where he is in a position to give all proper water facilities from the tank without such storage, he is under no obligation to maintain the old system. With reference to Mr. Narasimha Ayyangar's further argument that the supply from the Periyar may some day be discontinued, it seems to me sufficient to hold that the right of the plaintiffs against defendants 2 and 3 will arise when water is brought from the old source to the tank and the condition of the defendants' land is then found to make the storage impossible. I would therefore dismiss the suit, but in view of the fact that the defendants set up false defences in both the lower Courts, I would dismiss it without costs in those Courts, only allowing the costs of this appeal against respondents 21 to 24.

Phillips, J.—It seemed to me that if the plaint tank were a Government tank, in exercise of its powers of distributing water it would be entitled to follow the course adopted by defendants 2 and 3 and there seems to be no reason why a zamindar, who owns a tank, should not have similar powers. At any rate we have not been referred to any authority to show that his powers are restricted unless, of course, there is an express contract to that effect, and to hold in favour of such restriction would result in harm to the general public, because improved methods of irrigation rendered possible by the discoveries of modern science would thereby become nugatory. It must, of course, be understood that the exercise of his rights by the zamindar must not in any way be detrimental to the raiyats concerned and as in this case it has been found that the plaintiffs have suffered no damage, I agree in the order proposed by my learned brother.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 510

AYLING AND KRISHNAN, JJ.

Paramaswami Ayyangar—Appellant.

v.

Alamu Nachiar Ammal and *another*—Respondents.

Civil Revn. Petn. No. 256 of 1918, Decided on 23rd August 1918, against order of Court of Deputy Collector, Madura, D/- 19th January 1918.

(a) Civil P. C. (1908), S. 115 — Interlocutory orders passed by Revenue Courts— Final decree non-appealable—Revision lies to High Court not to Board of Revenue— S. 115 applies to revenue proceedings under Madras Estates Land Act.

Section 115, Civil P. C., applies to proceedings in a Revenue Court under the Madras Estates Land Act. [P 511 C 1]

Petitions to revise interlocutory orders passed by Revenue Courts in suits from which no appeal lies against the final decree should be preferred to the High Court, and not to the Board of Revenue.

(b) Civil P. C. (1908), O. 22, R. 5—Revenue proceedings—Party dying—Rival claims for legal representative — Revenue Court ought to decide question.

Where, on the death of a party to a suit or proceeding in a Revenue Court, rival claims are preferred for being impleaded as the legal representative of the deceased, it is the duty of the Court to inquire into the matter and determine who is the proper representative; 12 *All.* 198, *Dist.* [P 513 C 1]

(c) Civil P. C. (1908), O. 22, R. 5—Rent suit —Right to collect rent is vested in plaintiff's legal representative and not necessarily in person who is entitled to be landholder.

In a suit for rent the legal representative of a deceased plaintiff is the person in whom the right to collect the arrears of rent is vested, and not necessarily the person who is entitled to be the landholder after the plaintiff's death. [P 511 C 2; 512 C 1]

(d) Madras Estates Land Act (1908), S. 205 —S. 205 relates to such proceeding as those in which no appeal lies.

Per *Ayling, J.*—S. 205, Madras Estates Land Act, relates not to incidental orders in suits, the final decree in which is appealable, but to such proceedings as are specified in part B of the schedule to the Act as those in which no appeal lies. It is not and cannot be intended to affect the revisional powers of the High Court in suits which are made appealable to the District Court. [P 511 C 1]

(e) Civil P. C. (1908), O. 22, R. 5 — Words "shall be determined" are imperative.

The words "shall be determined" in O. 22, R. 5, are imperative and presuppose an inquiry in which every claimant is entitled to adduce evidence to support his claim. [P 512 C 1]

(f) Madras Estates Land Act (1908), S. 205 —Word "proceeding" refers to whole proceeding and not to part of it such as interlocutary order.

Per *Krishnan, J.*—The word "proceeding" in S. 205 refers to the whole proceeding and not to a part of it, or in other words, in a rent suit to the whole suit itself and not to any interlocutory

orders in it. There is nothing in S. 205, which expressly excludes the applicability of S. 115, Civil P. C. [P 512 C 2]

(g) Civil P. C. (1908), S. 2 (11) — Legal representative need not necessarily be beneficial owner of estate.

The expression "legal representative," as defined in S. 2 (11), means a person who in law represents the estate of the deceased person, and he need not necessarily be the beneficial owner of that estate. [P 513 C 2]

K. Srinivasa Iyengar and *K. V. Krishnaswamy Aiyar*—for Appellant.

M. Patanjali Sastri—for Respondent.

Ayling, J.—This is an application to revise an order of the Special Deputy Collector, Madura District, in the matter of bringing on record the legal representatives of the deceased plaintiff in certain suits under S. 77, Madras Estates Land Act, pending in his Court. The preliminary objection is taken that this Court has no power of interference in revision in such cases. Reliance is placed on S. 205, Madras Estates Land Act. In my opinion this section relates, not to incidental orders in suits, the final decree in which is appealable, but to such proceedings as are specified in part B of the schedule to the Act, as those in which no appeal lies (Nos. 12—20). It is not, and cannot be, intended to affect the revisional powers of this Court, in suits which are made appealable to the District Court and this Court under part A of the schedule. S. 115, Civil P. C., is one of the sections made applicable to suits under the Madras Estates Land Act by S. 192 of the latter. No appeal lies against the Deputy Collector's order sought to be revised ; and if, as is urged on plaintiff's behalf, the Deputy Collector has failed to exercise a jurisdiction vested in him by law, this would seem to be a fit case for interference in revision.

Reference was made to a recent unreported decision of Seshagiri Aiyar, J., (Civil Revision Petition No. 945 of 1916). I have considered this but in the view I take of S. 205, I regret to find myself unable to follow it. It has therefore to be determined whether the Deputy Collector has declined to exercise the jurisdiction vested in him by law. The dispute lay between the widow of the deceased plaintiff on the one hand claiming as his natural heir and his father and brothers claiming under wills, the validity of which was challenged by the widow. The claim of the brothers was dropped as the will they set up did not cover the present matter, so that only that of the father remains. The Deputy Collector held that, as the validity of the will was a very contentious matter, it might be left for settlement in another Court and without taking evidence dismissed the claim of the father and added the widow as legal representative of the deceased. The question is, whether this was a compliance with O. 22, R. 5, which says:

"Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court."

For respondent much reliance is placed on an order of the District Collector passed under S. 3 (5), Madras Estates Land Act, subsequent to the institution of the suit recognizing the widow as landholder in succession to the deceased plaintiff. This order is referred to by the Deputy Collector, but the latter makes it quite clear that he does not rely on it as the basis of his own order. Respondent's vakil contends that it should have been treated by the Deputy Collector as conclusive of the point for determination under O. 22, R. 5, and that even if not, a reference to it is sufficient compliance with the provisions of the rule. I do not think either contention is sound. The Collector's order (subject to determination by a civil Court) is conclusive as to who is entitled to take subsequent proceedings under the Act, and probably also, in a case of succession like the present one, as to proceedings instituted between the death of the last holder and the passing of the order. But we are concerned here simply with the question of who is entitled to continue proceedings which were legally instituted by the last holder; in other words, who should represent his estate for the purpose of the suit. This person will not necessarily be the same person as is entitled to succeed to his rights as landholder after his death. As laid down by Seshagiri Aiyar, J., in *Sundaram Iyer* v. *Kulathu Aiyer* (1), a person can sue to recover rent which has accrued due to him as a landholder, although his estate as such may have terminated. The right to recover arrears of rent is a part of the estate of the deceased (in the personal sense not in the sense of the definition in S. 3, Madras Estates Land Act) and is devisable by will; such a devise could not possibly be

(1) [1915] 39 Mad. 1018=31 I. C. 81.

defeated by an order of the Collector deciding who should succeed to the position of landholder after his death.

The Collector's order is therefore not only not conclusive on the point, but has no hearing on it and cannot be the basis of an order of the Court under O. 22, R. 5, or obviate the necessity for an inquiry thereunder. The words of the rule are imperative, "shall be determined," and I think this presupposes an inquiry in which any claimant shall be entitled to adduce evidence to support his claim. No such inquiry has been held here. I am fully alive to the practical objections to compelling a Court to conduct a long and complicated inquiry as a preliminary to a suit which may be of little value and importance. and which will not preclude further litigation on the very same question. But that is the law, and it must be followed. I would therefore set aside the order of the Deputy Collector and direct him to inquire and determine who is entitled to be brought on record as legal representative of the deceased plaintiff. Costs to be provided for in the final decree.

Krishnan, J.—We have first to deal with the preliminary objection taken by the respondent's vakil that as the order sought to be revised is that of a Revenue Court no revision lies to the High Court and that if any revision lies at all, it is to the Board of Revenue or to the District Collector under S. 205, Estates Land Act. It may be conceded that S. 115, Civil P. C. does not of its own force apply to the proceedings of a Revenue Court. The Civil Procedure Code is applicable only to Courts of civil jurisdiction—see the preamble to the Code—and S. 3, which enumerates the Courts which are subordinate to the High Court and over which the High Court is empowered by S. 115, to exercise revisional jurisdiction, does not refer to Revenue Courts. Nevertheless S. 192, Estates Land Act, has made S. 115 applicable to proceedings in Revenue Courts. That section says:

> "Subject to the other provisions of this Act and subject to the following modifications and additions, the provisions of the Civil Procedure Code shall apply to all suits, appeals and other proceedings under this Act so far as they are not inconsistent therewith."

Section 622 of the old Code corresponding to S. 115, of the new Code, is not one of the excepted sections mentioned in the latter part of S. 192. S. 115, Civil P. C., would therefore seem to apply to proceedings in a Revenue Court under the Estates Land Act. It is however argued for respondent 1 that S. 205 of that Act properly applies that and, as that section specifically provides for the revision of orders like the present one, the jurisdiction of the High Court under S. 115, Civil P. C., should be held to be excluded as being inconsistent with it, or at any rate in the exercise of our discretion under that section, we should refuse to interfere. In considering this argument we have first to decide whether S. 205, can be applied at all. That section speaks of "any proceeding before a revenue official from whose decision no appeal lies." The question whether S. 205 applies to orders in a rent suit depends upon the meaning we attach to the word "proceeding" in it. To avoid the serious anomaly of a conflict of decision in the same matter that may otherwise result from the revenue authorities revising orders passed in rent suits in which the appeal lies from the final decree to the civil Courts, I think we may well hold that the word "proceeding" refers to the whole proceeding and not to a part of it, or, in other words, in a rent suit, to the whole suit itself and not to any interlocutory orders in it. If this is correct, as an appeal lies from the revenue officer's decision in the suit, S. 205, will not apply to proceedings in rent suits and S. 115, Civil P. C., stands unaffected.

It is argued that this is giving too restricted a meaning to the term "proceeding" and that we should hold that it is not less extensive in scope than the word "case" in S. 115, Civil P. C. The two words are not analogous and are used in different connexions, but even if we assume that what took place before the Deputy Collector in the present case can be treated as "a proceeding" by itself, the result, so far as the applicability of S. 115, Civil P. C., is concerned, seems to be the same. It will only make S. 205, also applicable, and we have then a case of concurrent jurisdiction both in the High Court under S. 115, Civil P. C., and the revenue authorities under S. 205, Madras Estates Land Act. There is nothing in S. 205, which expressly excludes the applicability of S. 115 and, as the latter section is expressly made applicable to the Revenue Courts by

S. 192, we cannot treat it as impliedly abrogated by S. 205 when there is nothing strictly inconsistent between the two sections. The next question is whether, in the view that the revenue authorities have co-ordinate jurisdiction with the High Court in the matter, we should not in the exercise of our discretion, leave it to them to revise the order in question. I do not think so. To avoid the anomaly pointed out above it is certainly more convenient and proper that this Court should exercise its jurisdiction in the matter. If a party has already elected his remedy by applying to the revenue authorities under S. 205 it may be a question whether interference under S. 115, Civil P C., should not be refused but such a difficulty does not arise here. The first respondent's vakil relied on the rulings in Civil Revision Petition No. 945 of 1916 unreported and in *Ram Dayal* v. *Ramadhin* (2) in support of his argument. In the former case which is a ruling of a single Judge of this Court, the learned Judge says:

"the learned vakil for the petitioner has not been able to point to any section under which he can ask the High Court to revise the proceedings of a Revenue Court."

His attention was not drawn to S. 192, Estates Land Act and his ruling in therefore loses its authority. The case *Ram Dayal* v. *Ramadhin* (2) arose under the North-Western Provinces Rent Act 12 of 1881, which though similar in some aspects to the Act in this Presidency differs materially on the very point we have to consider here. The ruling was given in a recent case from which there was no appeal to the civil Courts under S. 189, Act 12 of 1881, the amount claimed being less than Rs. 100. Furthermore, that Act has expressly excepted cases in which appeals lie to the civil Courts from the decisions of the revenue officers under S. 189 from the scope of the S. 189 which gives the revisional power to the Board. The ruling therefore cannot be treated as in point here. I therefore agree with my learned brother that the preliminary objection fails. The next point is whether on the merits this is a fit case for our interference in revision. On that point also I agree with my learned brother because, when the Deputy Collector refused to consider the petitioner's claim based on his alleged will and referred him to a suit to establish its validity, he acted with material irregularity in the exercise of his jurisdiction.

The order said to have been passed by the Collector in favour of respondent 1 under S. 3, Cl 5, Estates Land Act, declaring her to be the landholder in succession to the deceased plaintiff, on which much reliance was placed by respondent 1 before us, was not relied on by the Deputy Collector as the basis of his order. That order itself is not before us and we can therefore hardly decide the exact effect of it regarding the arrears of rent sued for in this Rent Suit No. 702 of 1917. Prima facie the proper legal representative of the deceased plaintiff in the suit is the man to whom the ownership of the rent has passed on plaintiff's death, and the petitioner alleges that he is that person who has become the owner under the will. It may be that if the right to continue the suit in the Revenue Court has passed to the respondent under the order of the Collector under S. 3, Cl. 5, she will be the proper legal representative irrespective of the question of the ownership of the amount sued for; just as the holder of a succession certificate for a particular debt will be in a suit for that debt. The rights of the beneficial owner will not be defeated as he could sue the person added as the legal representative and recover from him. The legal representative, as defined in the Code, S. 2, Cl. 11, means a person who in law represents the estate of a deceased person; so he need not necessarily be the beneficial owner of that estate. But even if that be so, the order of the Collector not being before us, it is not possible to say whether it refers to the arrears of rent sued for and confers on the respondent the exclusive right to continue the suit or not. Unless the declaration by the Collector is given retrospective effect, it can scarcely affect the arrears of rent which had already accrued and had been sued for; and there is no reason to suppose that such effect should be given to it.

If the Collector's order is to take effect only from its date, petitioner will be the landholder *qua* the rent sued for under S. 3, Cl. 5, if his claim to collect it under the will is established: see *Sundaram Iyer* v. *Kulathu Aiyer* (1). In that case it was held that a person to whom arrears of rent were due was a landholder

(2) [1890] 12 All. 198.

though his estate had terminated. If he is such a landholder, petitioner will be the proper person to continue the suit under the Estates Land Act in the Revenue Court. I therefore agree that the order of the Collector under S. 3, Cl. 5, is not shown to affect the question who the proper legal representative of the deceased plaintiff is; and for the purpose of deciding it, it seems necessary that the genuineness and the validity of the petitioner's will should be inquired into. I therefore agree in the order proposed by my learned brother.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 514

COUTTS-TROTTER AND KUMARASWAMI SASTRI, JJ.

Aiyalam Kesava Chetty—Plaintiff—Appellant.

v.

Secy. of State—Defendant—Respondent.

Second Appeal No. 2101 of 1917, Decided on 21st November 1918, against the decree of the Temporary Sub. Judge, Vellore, in Appeal Suit No. 36 of 1917.

(a) Madras Land Encroachment Act (3 of 1905), Ss. 3, 7 and 14—'Levied' in S. 14 means collected—Assessment—Period of Limitation commences from date of actual collection.

The word 'levied' in S. 14 means 'collected' and the period of limitation in S. 14 of the Act runs from the date when the assessment or penalty is actually collected, and not when it is merely imposed. 32 *I. C.* 755, *Expl.* [P 515 C 1]

(b) Interpretation of Statutes—Marginal notes cannot be used.

Marginal notes to the sections of an Act cannot be used for the purpose of construing the Act [P 514 C 2]

K. Ramanatha Shenai—for Appellant.

V. Ramesam—for Respondent.

Judgment.—The plaintiff is the appellant. He sued the Secretary of State for India respondent, for a declaration that the property specified in the plaint belongs to him and is not liable to penal assessment, for an injunction restaining the defendant from interfering with the property and for refund of the penal assessment levied. The case for the plaintiff is that the property belongs to him absolutely and was never the property of the Government, that he was served with a notice from the Revenue Divisional Officer dated 15th July 1914, purporting to be issued under Madras Act 3 of 1905, levying a penal assessment of Rs. 10 and that the amount was wrongly collected from him on 21st July 1914. The defence is that the property was nattam poramboke which the plaintiff trespassed upon, that the Government is entitled to levy the assessment claimed and that the suit is barred by limitation. Both the District Munsif and on appeal the Subordinate Judge held that the suit was barred by limitation, as it was brought more than six months after the 15th July 1914, the date of the notice of the Divisional Officer informing the plaintiff that an assessment of Rs. 10 was levied owing to his having encroached on Government property.

The question raised in this second appeal is whether the period of six months specified in S. 14, Madras Land Encroachment Act 3 of 1905 is to be computed from the date of the imposition of the assessment or the date when it is actually collected from him. Section 14 of the Act provides that Civil Courts shall not take cognizance of any suit instituted by persons aggrieved by any proceedings under that Act, unless the suit is instituted within six months from the date of the cause of action. The explanation to the section states that the cause of action in respect of any assessment or penalty shall be deemed to arise "on the date on which such assessment or penalty was levied." As regards eviction or forfeitures, the cause of action is said to arise on the date of eviction or forfeiture.

Both the lower Courts have erred in construing S. 14 with reference to the marginal notes to Ss. 3, 5 and 7 of the Act. It is now well settled that marginal notes to sections of an Act of the Indian Legislature cannot be referred to for the purpose of construing the Act. The view taken in *Punardeo Narain Singh* v. *Sarup Roy* (1) and *Emperor* v. *Alloomiya Husan* (2) has been affirmed by their Lordships of the Privy Council in *Thakarain Balraj Kunwar* v. *Rae Jagatpal Singh* (3), where Lord Macnaghten observed as follows:

"It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake and was exploded long ago. There seems to be no reason for giving to the marginal notes of an Indian Statute any greater authority than the marginal notes in an English Act of Parliament."

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(1) [1898] 25 Cal. 858.
(2) [1904] 28 Bom. 129.
(3) [1904] 26 All 393=31 I. A. 132=7 O. C. 248=8 Sar. 639 (P.C.).

The marginal notes do not throw much light on the question. It is significant that while the marginal notes to Ss. 3 and 9 would suggest that "levy" was used in the sense of "imposition," the marginal note to S. 15 uses the word in the sense of "collection." In the body of the Act the word "levied" is only used in S. 13 and obviously means "collected," as the clause provides that if any penalty has been levied from any person under S. 5, no similar penalty shall be levied under any other law. I am of opinion that the word "levied" in S. 14 means "collected" and that the period of limitation in S. 14 runs from the date when the assessment or penalty is actually collected, and not when it is merely imposed. The decision of the Revenue Officer under S. 3 of the Act to impose assessment need not be on notice to the party, as S. 7 of the Act requires notice to be given only when it is decided to impose penalty or eviction or forfeiture of crops. As the explanation to S. 14 refers to both assessment and penalty, it is difficult to see how a mere decision of the Revenue Officer to levy assessment can cause time to run against the person aggrieved. If "levy" simply means "imposition" time will begin to run before the person on whom it is imposed has any notice of the demand and if the fact that assessment has been imposed comes to his knowledge six months afterwards, he would be without any remedy.

As regards the recovery of the sum actually paid, plaintiff's cause of action can only arise after he has paid it and there is no reason why he should go to Court before he is actually damnified by the amount being recovered from him. Nor is he bound to file a suit to declare his title to the property or for an injunction, until the Government take some steps to eject him and the mere imposition of assessment or fine, if unaccompanied by any steps taken to evict him under the powers conferred by S. 6 of the Act, would not affect his possession. Under Cl. (b) of the explanation to S. 14 a person's cause of action arises in respect of eviction or forfeiture from the date of the eviction or forfeiture, and not when the Collector issues the order directing his eviction, and there seems to me no reason why in the case of assessment or penalty his cause of action should be deemed to have arisen on the mere imposition of the assessment or penalty and not on payment.

Reference has been made to *Secretary of State* v. *Illikal Assan* (4), where it was held that a notice under S. 7 of the Act gives rise to no cause of action. It appears from the facts of that case that the assessment was actually collected six months before the suit and all that was decided was that that suit for declaration of title would be barred if the remedy to recover the assessment paid was barred under S. 14, Cl. (a) of the Act. It is no authority for the view that the starting point of limitation is the imposition and not the actual collection of the assessment or penalty. On the contrary the fact that his right to ask for a declaration of title would be barred if his remedy in respect of the assessment or penalty is barred is, in my opinion, a good reason for holding that payment and not mere demand gives rise to the cause of action. As the penal assessment was paid on 21st July 1914, the suit is in time having been filed within six months from that date.

I would reverse the decrees of both Courts and remand the suit for disposal to the District Munsif for trial on the other issues. Appellants will be entitled to a refund of court-fees. Costs will abide and follow the result.

Coutts-Trotter, J.—I agree and have nothing to add.

S.N./R K. *Suit remanded.*

(4) [1916] 39 Mad. 727=32 I. C. 755.

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AYLING, KUMARASWAMI SASTRI AND KRISHNAN, JJ.

Mahomed Esuf Sahib and *another*—Defendants—Appellants.

v.

Abdul Sathar Sahib and *another*—Plaintiffs—Respondents.

Letters Patent Appeal No. 32 of 1918, Decided on 8th October 1918, against judgment of Wallis, C. J., in Appeal Suit No. 221 of 1917, D/- 19th February 1918.

(a) Grant — Inam — Grant for religious service is a public trust and not service tenure.

A grant of an inam for the founding of a mosque and for the performance of religious services therein is a public trust and does not partake of the character of a service tenure.

[P 521 C 1, 2]

(b) Mahomedan Law—Wakf—Grant for religious purposes by Mahomeden ruler—Confirmation by British Government on condition—Wakf does not cease to be valid—Confirmation does not amount to fresh grant.

A wakf created by a Mussulman ruler of India does not cease to be valid on its being confirmed by the British Government with a condition of resumability on the trustee's failure to carry out the trust. Nor does the confirmation amount to a fresh grant by the British Government: 18 *I. C.* 195 and 7 *M. I. A.* 128, *Dist.*; 38 *I. C.* 200, *Foll.* [P 522 C 1]

(c) Trusts Act (2 of 1872), S. 88—Resumption and levy of full assessment on trustees—New grant is not created — Advantage enures for benefit of trust.

The resumption of the inam and the levy of full assessment on the trustee for failure to fulfil the conditions of the trust does not amount to a re-grant to the trustee in his private capacity or extinguish the trust originally created. The principle of S. 88, Trusts Act, applies and the advantage gained by the trustee must be deemed to enure for the benefit of the trust.

[P 520 C 1; P 521 C 1; P 522 C 2]

(d) Civil P. C. (5 of 1908) S. 92—Suit to remove trustee or to frame scheme is maintainable.

A suit lies, under S. 92, to remove the trustee or to frame a scheme for the management of the trust [P 524 C 2]

(e) Grant—Inam—Condition of power of resumption—Public character of trust is not impaired—Principle does not apply to grant by British Government.

Per *Ayling, J.*—There is no authority to support the position that, in the case of a grant by the ruling power, the condition of power of resumption, in case the trust is not carried out, impairs the public character of the trust. In any event the principle could not be applied to a grant by the British Government. [P 520 C 1]

(f) Grant—Inam—Presumption.

Per *Kumaraswami Sastri, J.*—In the absence of evidence as to what was actually granted, in grants by Native Rulers there is no presumption that only the melvaram was granted [P 521 C 2]

(g) Mahomedan Law—Wakf—Law is not applicable to grant by non-Mahomedan—Confirmation of grant for wakf—Grant is validated under Crown Grants Act (15 of 1895), S. 2.

The law as to wakfs does not apply to trusts created by a non-Mahomedan State. In any event the confirmation of a grant for wakf on condition of the discharge of the duties annexed thereto will validate the grant under S. 2, Crown Grants Act. [P 522 C 1]

(h) Grant—Inam—Resumption of whole—Presumption—Issue of patta—Levy of full assessment—Inference is that lands should be subject to old conditions.

Per *Krishnan, J.*—Where the resumption purports to be of the whole inam, it cannot be said that the melvaram alone was resumed, the kudivaram being left as before. But, whether the resumption be of both or only of one of the varams, where the patta is subsequently issued to the same trustees and full assessment is levied on the land, it is a fair inference to draw that the Government intended that the lands should be held under the same conditions as before, subject to the one exception that full assessment was to be paid. [P 524 C 1]

S. Rangachariar T. R. Ramachandra Aiyar and *G. S. Venkatarama Aiyar*—for Appellants.

C. Padmanabha Iyengar—for Respondents.

Wallis, C J.—The District Judge has found that the mosque in question is a public mosque and I see no reason to differ from his conclusion. Defendant 1, who should be in possession of the original purvana or grant by the last ruling Nawab of the Carnatic has not produced it, though it was produced by his predecessors before the Indian Commission in 1861. The Inam Register mentions the objects with which the lands were granted, viz. the building of a mosque and the performance of certain ceremonies in commemoration of the Nawab Wallajah whose body rested on the site of the mosque on the way from Madras to Trichinopoly. In the absence of express evidence as to whether the mosque was dedicated for public worship, the point must be determined by user, and it is clear from the evidence that the mosque has always been open to the public for worship. Defendant 1 was fined on one occasion for interfering with the public worship there, and in his cross examination he had to admit that the public had a right to worship there. In these circumstances it is immaterial whether it is called a Jumma Masjid or not, but the fact that the worshippers were styled Jamayatkars, as spoken to by him, goes to show that it was a Jumma Masjid It must, I think, be taken that the grantee, in the deed which has not been produced, as a muttawali, and this is confirmed by the fact in the column in the Inam Register for particulars regarding the present owner. Three persons are entered as "enjoying together as managers of the Masjid." It was, I think, clearly a grant on trust, as held in a very similar case in *Sikkandar Rowther v. Secy. of State* (1).

It must, I think, be taken that the mosque was founded, dedicated and endowed for public worship. The Inam granted for these purposes was confirmed by the Inam Commissioner subject to the due performance of services but was re-

(1) [1917] 38 I. C. 200.

sumed in 1893 for failure duly to perform them. With regard to the suggestion that the original grant was only of the assessment, and not of the lands, I think it is clear that the site of the mosque was granted, and I think the presumption is that there was a grant of the other lands as well. The Parwana has not been produced by the defendants, and I think it is not likely that the first muttawali, a grantee of the mosque, was the owner of the lands prior to the grant. Now it is quite clear that Government might have resumed both the lands and the assessment, and re granted the lands to anyone they chose at the full assessment. What it did was to require payment of the full assessment from the descendant of the person in whose name the Inam had been confirmed, and the main question argued was, whether they must be taken to have resumed both the lands and the lands and the assessment and re-granted the lands as private property to defendant 1, or whether they merely resumed the assessment and did not interfere with the ownership of the lands. They were clearly, in my opinion, lands dedicated to charity though liable to be resumed, and defendant 1 and his predecessors were merely in the position of muttawalis or trustees.

In these circumstances I can find no reason for presuming that the Government intended to resume the lands as well as the assessment and to re-grant the lands to the muttawali as his private property. As the resumption of the assessment was occasioned by the failure of the muttawali to perform his duties, it seems unlikely that the Government intended to make a fresh grant of the lands in his favour freed and discharged from the charitable trusts to which they had till then been subject. That would in effect be rewarding the defaulting muttawali for his breach of duly. I see no sufficient reason for imputing this intention to Government, and consider that the lands still remained subject to the charitable trust even after the assessment had been resumed In *Divi Punniah* v. *Goruntla Kotamma* (2) it appears to have been assumed that the land itself was resumed and granted as private property freed from all charitable trust to defendant 1. The point that the land itself was not resumed but continued subject to the charitable trust was not raised before the Court or adjudicated on. What the plaintiff wanted was a half share in the land for which a pattah had been issued in the name of the defendant, his co-trustee, and the interests of the charity were not represented at all. On the other hand in *Sikkandar Rowther* v. *Secy. of State* (1), which was also the case of a mosque, it was held that the lands had been dedicated for the support of a public mosque and that the so-called resumption of the inam for the failure of the trustees to perform their duties had not the effect of making the lands cease to be trust properties. The contest in that case was whether the lands had been dedicated for a public charitable purpose. If so, it does not appear to have been seriously questioned that a mere resumption of the assessment could be taken as indicating that the Government had exercised its right of resuming the lands themselves and granting them to the defaulting trustees as their private property. I think this decision is in accordance with a principle which to some extent underlies the decisions in *Gunnaiyan* v. *Kamakchi Ayyar* (3) and *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya* (4) that when the Government resumes an inam by imposing the full assessment and does nothing more, and does not expressly resume the lands as well, the ownership of the land is unaffected and if it was subject to any charitable trust it still continues subject to it. In these circumstances I think the decree of the District Judge should be confirmed except as to one point. The words in the decree after "do submit schemes for the future management of the trust and its properties" must be omitted, as it is unnecessary and improper to impose a permanent disability to fill the office of trustees on all the defendants and their descendants. Otherwise the appeal is dismissed with costs.

Spencer, J.—This suit was brought for the removal of the defendants from the position of trustees of the Wallajah Masjid at Villupuram, for the recovery from them of the income of the institution alleged to have been misappropriated by them, and for the settlement of a scheme for the future management of the charity. Two questions have been

(2) [1917] 40 Mad. 939=38 I. C. 237.

(3) [1903] 26 Mad. 33).
(4) [1907] 30 Mad. 434.

argued at the hearing of the appeal. (1) whether S. 92, Civil P. C. is applicable to the facts of this case, and (2) whether the defendants are accountable for the income of the lands after the resumption of the inam. It appears from an extract from the inam Register of the District of South Arcot (Ex. A) that this inam was originally granted in 1799 free of tax for building a Masjid on the spot where the coffin of Nawab Wallajah rested temporarily while it was being carried to Trichinopoly for reading namaz and fatias every Friday, and performing or celebrating the annual ceremony, and for feeding fakirs that may happen to pass by it. In 1893 the inam was resumed and fully assessed by Government on account of the failure of the grantees to perform the religious service for which it was granted. The reasons for the resumption do not find place in the Board's proceedings (Ex. 7) but they appear from the statement of defendant 1 (D. W. 1) and from Exs. 3 and 4. The learned District Judge was of opinion that the Government was not acting strictly within its powers in entirely resuming this inam but that it should rather have ensured the due performance of the service by changing the muttawali, which he thinks the Government could have done as being a successor of the original founder. I do not think that any question of the competence of Government to resume the grant can properly be raised in this suit to which the Government is not a party. There is no doubt that, in some instances, religious inams are resumed and re-assigned. Board's Standing Order 54, para. 7, sub-divisions (1) and (2), provide for this course being followed where the institution still continues and the service is maintained but the lands have been alienated, and where the institution still continues but the inam has become incapable of application to its original object; but sub-division (2) prohibits reassignment in cases when the institution has disappeared and the service has ceased and became incapable of restoration.

There is nothing on record to show what considerations influenced the officers of Government in resuming this inam but presumably they acted according to rule. We only know from Ex. 5 that when the Mahomedan inhabitants of Villupuram 18 years later petitioned the Government for a reassignment of the inam, the Collector refused to consider the request after that lapse of time. We have therefore only to consider the effect of the resumption, treating it as an accomplished fact. In *Gunnaiyan* v. *Kamakchi Ayyar* (3) Bhashyam Aiyangar, J. observed that grants of land or land revenue for religious or charitable purposes in this country, when made by the ruling authority, should be construed not as out and out grants but as reserving a reversion in case of the trust failing. On this principle, he stated, Government has a right to resume the inam if the grantee's family fail to fulfil the objects and conditions of the grant. He added:

> "it is open to the ruling power to resume the grant and appropriate it for other religious or charitable purposes or incorporate it with public revenue. In the latter case Government simply imposes full assessment without extinguishing the right of the family of the grantee in the land and making a fresh grant of it."

The learned Judge then proceeds to consider the effect of enfranchisement and to distinguish it from resumption. The two are distinct processes in their operation on the grantee's interest but we need not follow him into his discussion of their features. This is a case of resumption and resumption means a taking back of what was granted. But in cases like the present, the real question is not so much what was resumed as what was granted in the first instance. We have not the original grant to tell us these directly. But we know what is the presumption that the Government draws in such cases, because that is laid down in the Board's Standing Orders for the direction of officers of Government dealing with cases of resumption and we are able to know what presumption the Government drew in this particular case from their conduct in simply imposing full assessment and leaving the enjoyment of the land where it was. In the case of ancient grants like this, where it does not appear from the title-deed whether it was the land or the assessment that was originally granted, the Government gets over the difficulty of uncertainty as to title and avoids interfering with occupancy rights by requiring the Collector to report who is the actual occupant of the land and by treating the inam subject to resumption as a grant of the assessment on the land and fully assessing it in the name of the occupant. It is only

in the case of grants made within 60 years of resumption proceedings, when there is prima facie evidence that the grant was of the land also, that any steps are taken to resume the land and interfere with the enjoyment of the person in possession. That these are the principles governing the action of Government is evident from the Board's Standing Order, p. 54, paras. 4 and 5. I agree with the learned Judge who decided *Divi Puniah* v. *Goruntla Kotamma* (2) that in cases of resumption of charitable inams the land that was previously the property of the trust becomes the property of the person to whom Government grants it, and that it is within the discretion of Government to grant land which it has resumed to the former trustee or to any other person.

If then resumption, in the words of the Privy Council quoted in *Sreevadhu Yerranna* v. *Pontiva Kannamma* (5),

"consists in putting an end to the grant, remitting the services and requiring them (i. e, the grantees or their heirs) to pay the full assessment,"

what is the effect on the rights of the defendants to dispose of the land which was trust property, and its income? There is nothing to show that the lands were waste before the grant. The grant was more than 60 years old at the time of the resumption. The lands have now been incorporated with Ayan, an ordinary raiyatwari patta has been issued to them which carries with it no obligation beyond the payment of the assessment. The restriction on alienation has been removed from the properties, which were before inalienable on account of the religious service for which they were intended to be a support; transfers of the pattadar's interest are recognised by the Government and the holding is hereditary in the ordinary way according to the personal law of the holder. The natural inference is that the grant must be taken to have been a grant of the assessment, that on full assessment being imposed nothing was left for the trust, that the Government, which represents the grantor, released the grantees from their obligations to render service from the moment that resumption took place and that the trust is at an end. It may be that the holders of service and religious inams are by these means able to take advantage of their own default, but this is a matter for consideration of the Government and not of the civil Courts, whose function is only to declare the law as it stands. See the observations of the Judicial Committee in *Balakrishna Udayar* v. *Vasudeva Aiyar* (6). Moreover as full assessment is now being paid I am doubtful whether there has been any real advantage accruing to the defendants in consequence of the resumption. Issues 2 and 4 must therefore in my opinion be answered in the negative.

I am further of opinion that the suit must fail on issue 1 also, though I admit that this question does not admit of easy solution. Mr. Ameer Ali in his Book on Mahomedan Law at p. 561 distinguishes between public wakfs and quasi public or private wakfs and states that a Mahomedan mosque, unless it is a Masjid-i-Jamma, is not regarded by Mahomedan lawyers to be vested in the public. In this passage and in his commentary on Civil P. C. the learned author declares that S. 92, Civil P. C., has no application to private or quasi public trusts. In the present case we have the statement of Kazi of Villupuram (D. W. 3), who ought to know the facts, that this Wallajah Mosque is not called a Jamma Masjid, that is, a mosque where congregational worship is held. In Ganapathi Iyer's Religious Endowments at pp. 119 to 125 the distinction between public and quasi public trusts made by Mr. Ameer Ali is said to be unwarranted but the latter's authority on questions of Mahomedan law is, in my opinion, so great as not to be lightly disregarded. In *Sikkandar Rowther* v. *Secy. of State* (1) the Begumpur Mosque at Dindigul was decided to be a public trust although the learned Judges held in that case, to which Government was a party, that Government were justified in resuming the inam. That was a grant of two whole villages as inam for the upkeep of a mosque and a durgah. In *Sriranga Chariar* v. *Pranatharthihara Chariar* (7), an inam granted for the support of hereditary office-holders in a Hindu temple was held to be not a religious trust of a public nature. No doubt each case must depend on its own facts and therefore other decisions do not help us much in determining this case, but looking to all the

(5) [1911] 35 Mad. 704=12 I. C. 457.

(6) A. I. R. 1917 P. C. 71=40 Mad. 793=40 I. C. 650=44 I. A. 261 (P. C.).

(7) [1915] 30 I. C. 74.

known circumstances connected with the grant and the resumption of this inam, its registration not in the name of any institution, but in the name of an individual grantee, the statement of D. W. 3 and other evidence, I am of opinion that this is not a public trust of the kind tc which S. 92, Civil P. C., is applicable. On these two grounds I think that the appeal should be allowed and the suit dismissed with costs here and in the District Court. Under S. 98, Civil P. C., the appeal is dismissed with costs.

Ayling, J.—The first question for consideration in this case is obviously the nature of the original grant which, it is common ground, was made by the Nawab of the Carnatic in 1798; and I have no hesitation in agreeing with my Lord the Chief Justice that it was of the nature of a public trust for the benefit of a mosque founded, endowed and dedicated for public worship. In the absence of the parwana, we have to look to the record in the Inam Register, Ex. A, and to the evidence of user. Both are strongly in plaintiff's favour. I attach no importance to the statement of D. W. 3 that the mosque is not called a Jumma Masjid, in the face of the evidence that it has always been used for public worship. Ex. A shows clearly that the Inam was a religious endowment for the establishment and upkeep of a mosque and various services therein, and that the persons named in Cols. 16—20 as "present holders" are so treated as managers of the Masjid and not in their individual capacity.

Indeed, the only ground on which the public character of the trust has been seriously attacked is the fact that it was treated by the British Government as resumable, and that, under Mahomedan law, a wakf must be unconditional. No authority has been quoted which, as far as I can see, supports the contention that in the case of a grant by the ruling power the condition of power of resumption, in case the trust is not carried out, impairs the public character of the trust. We have been referred to a passage at p. 526 Vol. 1, of Ameer Ali's Mahomedan Law, which says:

"If a person were to create a wakf and make a condition that the property should return to him in case of necessity, the condition would be valid and the wakf would be void, the transaction taking effect as a mere hubs or settlement; when the need arises the property would revert to the owners."

This has reference to a totally different state of things. A contingency of reversion to the owner, in case the latter needs the property, obviously implies only a temporary settlement, which can be annulled although all its other conditions are rigorously complied with. In *Kuttayan* v. *Mammanna Ravuthan* (8), the only case to which we were referred as being in appellant's favour, there wss no question of resumability, but of the the existence of outstanding private rights in the alleged wakf property. In *Sikkandar Rowther* v. *Secy. of State* (1) a very similar case to the present, Srinivasa Aiyangar, J, and myself held that land forming the subject of a public trust was resumable by Government on failure to perform the conditions of the trust.

I would therefore reject this contention and may add that in any case it could not be applied to a grant by the British Goverment while there is no evidence attaching a specific condition of resumability to the original grant by the Nawab. The earliest evidence is the entry in the Inam Register, Ex. A, dated 1861. It only remains to consider the nature and effect of the proceedings of Government in 1893 by way of resumption. There appears to have been considerable argument before the Divisional Bench as to whether the original grant was of the lands themselves as held by the Chief Justice or only of the assessment thereon. Before us the learned vakil for the appellants did not contest the view taken by the Chief Justice on this point, but was content to argue his case on the hypothesis that the lands themselves constituted the grant.

But if this be so appellants' case is hopeless whichever view be taken of the extent of the interest resumed by Government. If, as both the learned Judges of the Division Bench held, Government only resumed its right to collect full assessment on the land, then the remaining interest in the land remained as much the subject of the trust as ever. If, on the other hand, it be held that Government took back all that it had granted (i. e. the raiyats' interest as well as its own right of collecting assessment) and made a re-grant of the raiyats' interest to the trustees in their individual capacity then the principle embodied in S. 88, Trusts Act, comes into effect. There can

(8) [1913] 35 Mad. 681=18 I. C. 195.

be no question that, by such a transaction the trustees would gain for themselves a very valuable proprietary interest in the property, which interest previously appertained to the trust. This interest would have been acquired by the simple process of neglecting their duty as trustees, whereby Government was driven to resume the Inam. In such circumstances the advantage they gained must be held by them for the benefit of the trust. It is argued that the trust had ceased to exist, but this cannot be the case. Apart from the cultivable lands which formed the endowment of the mosque, there is the mosque itself and the site on which it stands, which latter also formed part of the original grant. It cannot be seriously suggested that the site of the mosque was assessed and with the mosque upon it re-granted to the defaulting trustees for their private use. There is certainly no evidence to prove that such was the case, and as long as the mosque and the site remain unaffected, the trust cannot be said to be extinguished. I would dismiss the appeal with costs.

Kumaraswami Sastri, J.—I am of opinion that the decision of the Chief Justice ought to be affirmed. There can be little doubt from the inam title deed that the inam was granted by Nawab Azim Jah in Fasli 1208 (1798) for the purpose of erecting a Masjid, for keeping a light burning every night for reading the Namaz and Fatias every Friday (for performing the annual ceremony, of the Nawab whose coffin rested on the spot where the Masjid was to be built on its way from Madras to Trichinopoly) and for feeding the fakirs. It does not appear that it was he intention of the grantor that the trustee should obtain any personal benefit or that he should appropriate any portion of the income of the lands. The land is classed as a religious endowment in the Inam Register and this is as pointed out in *Muhammad* v. *Jafar Muhammad Ibrahim* (9), strong evidence that the property was subject to a public trust. The persons in possession are described as managers of the Masjid. Defendant 1 and his witnesses in their evidence state that the lands were Manyam lands assigned to the mosque. I see no reason to hold that the mosque is not a public mosque and that the grant of the inam was in the grantees personally as a service inam. It is conceded before us that the grant was of both the melvaram and kudivaram of the land. In the absence of evidence as to what was actually granted the recent decision of the Privy Council in *Adusumilli Suryanarayana* v. *Achuta Pothanna* (10) is to the effect that to grants by native rulers there is no presumption that only the melvaram was granted It is also clear that a mosque was built and that the trusts were carried out till at least 1861, as the remark in Col. 8 of the Inam Register is to the effect that the conditions were all regularly fulfilled. It also appears that the trusteeship was hereditary. As to what happened between 1861 and 1893 (the date of resumption by Government) the evidence is not clear. The probabilities are that having got the recognition of the British Government during the inam settlement proceedings the trustees gradually neglected their duties and treated the inams as their private property. In 1893 an inquiry was held and in consequence of it full assessment was levied on the lands. Ex 6 shows that a total tirva of Rs 123 8-0 was levied on the lands which are said to consist of 2 acres 99 cents of punja and 16 acres 70 cents of nanjah. It is argued the levying of this assessment had the effect of putting an end to the trust and the grant of the lands as the private and absolute property of the grantees.

I do not think this consequence follows. All that Government did was to levy the full assessment on lands which were free from it. The kudivaram rights on the lands were not affected and as the grant in inam was of both varams it is difficult to see how the levying of the assessment can put an end to the trust. At the most all that can be said is that by levying full assessment the income of the trust properties was reduced by the amount of the tirva levied. Reference was made by the appellants' vakil to *Unide Rajaha Raje Bommarauze Bahadur* v. *Pemmasamy Venkatadry Naidoo* (11). In this case the inam was a service inam and the grant seems to have been of the melvaram in return for services. The levying of the assessment had therefore the

(9) [1901] 24 Mad. 248.

(10) A. I. R. 1918 P. C. 169=41 Mad. 1012=49 I. C. 91=45 I. A. 209 (P. C.).

(11) [1857-59] 7 M. I. A 128 (P. C.).

effect of putting an end to the tenure. In the present case the grant in inam was of both the varams and I cannot a from the mere fact of the levying of full assessment and the grant of patta to the trustees, hold that there was a resumption of both the varams by the Government which extinguished the trust and a re-grant to the trustees of an absolute estate freed from all obligations. The case of *Divi Punniah* v. *Goruntla Kotamma* (2) is distinguishable as the resumption was assumed to be of both the varams.

It has been argued that no valid wakf was ever created as the lands were resumable at the option of the grantor if the trusts were not performed by the grantees of the inam. Reference has been made to Ameer Ali's Muhammadan law, Vol. 1, p. 526. The original grant is not produced and no satisfactory explanation has been given for its non-production. That such a document existed appears from the Inam Register which refers to "documents in Persian with Parwana." There is therefore nothing to show that a right of resumption existed in the original grant constituting the wakf. I doubt very much if the limitations which would apply to grants by private individuals would apply to trusts created by sovereign rulers, but assuming it is so there is nothing to show that there were any terms or conditions in the Parwana issued by the Nawab of the Carnatic which were repugnant to Mahomedan law. What the British Government did in 1861 was to confirm the grant. A clause was added that the inam was "continued so long as the conditions of the grant are regularly fulfilled," but this clause cannot render a valid wakf already created invalid nor can the inam proceedings of 1861 be taken to amount to the creation of a new wakf. Assuming it to be so the trust would be one created by the British Government and the law as to wakf would not apply to trusts created by a non-Mahomedan state. I am also of opinion that S. 2, Crown Grants Act, 15 of 1895, which provides that all provisions restricting conditions and limitations contained in grants by the Crown shall take effect according to their tenor notwithstanding any rule of law to the contrary will validate the grant as the act is retrospective.

There can be little doubt that full assessment was levied by the Government because the then trustees did not carry out the trust. Assuming that there was a re-grant of both the varams to such trustees, the case will fall under S. 88, Trusts Act. Having regard to the Standing Orders of the Board of Revenue the grant in cases where inams are resumed is as pointed out by Spencer, J., ordinarily to the persons in possession and the patta was issued to the trustees because they were in possession of the lands. I agree with the Chief Justice that the Government can hardly have intended to reward the defaulting trustees by conferring on them an estate free from the trust. The Government had waived its right to levy assessment on condition that certain trusts were performed and on failure by the trustees it levied full assessment. The patta was issued to the trustees because they were in possession as trustees, and not because of any special claims they had apart from the trust. The trustees, who were bound to carry out the trusts therefore gained an advantage by their breach of trust and they must hold the land for the benefit of the trust. I would dismiss the appeal with costs.

Krishnan, J.—The first question for our decision in this case is whether the plaint mosque is a trust created for public purposes within the meaning of S. 92, Civil P. C. The nature of a trust has to be judged primarily from the terms of the deed of endowment creating it. But in the present case the parwana by which the trust was created is not produced. The appellants pretend that they have lost it, but I am unable to believe it. I am inclined to think it is kept back as its production would work against their interests and therefore every presumption should be drawn against them on the question at issue. In the absence of the original deed of the trust we have to fall back upon what appears in the extract from the Inam Register of 1861, Ex. A, and on the usage in the institution. Ex. A shows that the grant was made in Fasli 1208 or A. D. 1798 by the order of the then Nawab of Carnatic for the purpose of building a Masjid on the spot where the coffin of Nawab Wallajah rested on its way to Trichinopoly, for keeping a light in it, and for reading Namaz and Fatias on every Friday for performing the annual

ceremony of the Nawab's death and for feeding Fakirs who pass by. No doubt the object so stated and the fact that the Inam was to be continued only so long as the conditions were fulfilled are in favour of the appellants' argument that the Inam is a service Inam. But the Inam is not described as a service Inam in the deed but it is stated to be a "religious endowment" and the lands are said to be enjoyed by the persons then in possession as "managers of the Masjid." These circumstances rather support the contention that the endowment is a public one. I am however not prepared to go so far as my learned brothers that they are conclusive of the question at issue. It seems to me that no definite inference can safely be drawn from Ex. A by itself as to the character of the trust. But I consider the matter is put beyond doubt by the usage in the institution as proved by the evidence in the case. Several witnesses speak to the mosque being open to the Mahomedan public for worship. Defendant himself had to admit that "the people had a right to worship in the mosque." He seems to have also been fined once for interfering with public worship in it see: Exs. B and B-1. It is also proved that there is a Peshi Imam and Khatib and a Muazzin for the mosque. P. W. 1 swears that he is the holder of the first two offices and P. W. 3 claims to be the Muazzin Defendant 1 admits the existence of these offices though he claims to hold them himself. P. W. 1 also swears that he was in the habit of preaching as Katib from the "mimbar" or pulpit regularly to congregations of Mahomedans. In these circumstances it seems to me idle to say that the mosque is not a public one. I therefore agree that the finding arrived at by the District Judge and supported by his Lordship the Chief Justice and by my learned brothers now that the mosque is a public trust should be adopted. As pointed out by the learned Chief Justice, this view is supported by the ruling in *Sikkandar Rowther* v. *Secy. of State* (1), where under similar circumstances a similar inference was drawn.

It was next contended by the appellant's vakil that as the grant was confirmed and continued by the British Government by Ex. A only subject to the conditions of the grant being fulfilled, it became an invalid wakf, as under the Mahomedan law the grantor cannot retain any interest in a valid Wakf and reliance was placed on Ameer Ali's Mahomedan Law, Vol. I, p. 526. This argument is clearly fallacious. In the first place the Government was creating no new trust at all by Ex. A. They simply confirmed the previous grant imposing certain conditions, as they were entitled to do as the ruling power in the land. In doing so they did not act as the representatives of the Nawab who was the original grantor, nor did they purport to make a new grant themselves. In the second place, if we take it that they did make a new grant obviously the Mahomedan law of Wakf cannot apply to it. In any case, therefore the objection is futile. It was finally contended by the appellants' vakil that the resumption proceedings in 1893 put an end to the Inam in question and as the lands were granted to his client's predecessor-in-title on an ordinary raiyatwari patta they became his private property. On this question the learned Chief Justice and Spencer, J., have taken different views, the former holding that it did not affect the trust and the latter that it did. I am inclined to agree with the view of his Lordship the Chief Justice.

It is admitted before us that the lands themselves formed the Inams and not merely the revenue payable on it. As the note of the fact of the Inam Register, Ex. A, states that the "whole Inam has been resumed," I am not able to adopt the suggestion that the resumption was only of the melvaram right and that the kudivaram still remained as it was before. But even taking that the lands themselves were resumed, I think it really makes no difference to the result of the case. If the Government had granted the lands to a stranger without expressly providing for the trust to attach to them it may be they would have become the ordinary private raiyatwari property of the grantee. But the grant in this case was to the muttawalis themselves and apparently on the ground that they were such muttawalis. In such a case it seems to me a fair inference to draw that the Government intended that the lands should be held under the same conditions as before, subject to the one exception that full assessment was to be paid. In fact the considerations mentioned by Spencer, J., regarding resumption in the case of ancient grants show that where the

Government merely levy full assessment they do not intend to interfere with the existing rights; and therefore, where they purport to resume the land and re-grant it to the same trustee on full assessment, it is clearly right to hold that they intended by their re-grant that the lands should be held subject to the same right as before resumption. The case of *Divi Punniah* v. *Gorunt'a Kotamma* (2) relied on by the appellant's vakil does not seem to me to be in point here.

In that case both parties were agreed that the charitable trust had come to an end by the resumption proceedings; in fact the claim was for a share on the footing that the property had become private property. In such a case the learned Judges held that the re-grant to a person who happened to be one of the trustees did not lead to a presumption that it was given to him because he was a trustee or that he took it jointly for himself and the other trustees; for, if that was the intention of the Government, the grant would have been to all the trustees. Whether this view be correct or not, it is not in conflict with the view that where the grant is not inconsistent with an intention to preserve the trust, such intention may be presumed.

I agree with the view taken in *Sikkandar Rowther* v. *Secy. of State*.(1), which is followed by the learned Chief Justice in this case, that where lands have been dedicated for the support of a public mosque, their resumption and re-grant to the trustees on full assessment do not free them from the trust. I am prepared to support my conclusion in this case on another ground as well. It is proved here that it was entirely due to the failure of the muttawalis to perform their duties properly that led to the inam being resumed and the lands being re granted on full assessment. In these circumstances I am of opinion that even though the resumption proceedings be taken to have resulted in freeing the lands from the trust in the hands of the Government, the trust re-attached to them when they were given back to muttawalis on the principle underlying S. 88, Trust Act, thuogh that Act does not directly apply to public religious endowments. Otherwise as the learned Chief Justice remarks :

"We would in effect be rewarding the defaulting muttawalis for their breach of duty."

Section 88 embodies a principle which is of general application, that if a trustee avails himself of his character as such to gain an advantage thereby he must hold it for the beneficiaries. It is quite clear in this case that it was by taking advantage of their position as muttawalis and failing to do their duty as such, that they led the Government to resume the lands and re-grant them to them. They cannot be allowed to take advantage of their own default and to treat the lands as private property in their hands. I, therefore find on issue 1 that the Wallajah Masjid of Villupuram is a public religious institution to which S. 92, Civil P. C., applies and on issues 2 and 4 that the lands are trust properties belonging to the Masjid and that defendants are accountable for the income. The amount decreed by the lower Court has not been seriously disputed before us.

I agree wihth the learned Chief Justice that the decree of the District Judge should be modified as he proposes, as it is not right to exclude the defendants and all their descendants from filling the office of trustees for ever. Adopting that modification which has already been incorporated in the decree of this Court, I agree in dismissing the appeal to us with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 524
Full Bench

WALLIS, C. J., OLDFIELD AND SESHAGIRI AIYAR, JJ.

Vaitheeswara Iyer—Plaintiff—Appellant.

v.

Srinivasa Ragava Iyengar and *others*—Defendants—Respondents.

Second Appeal No. 1815 of 1917. Decided on 4th February 1919, against decree of Dist. Judge, Trichinopoly, in Appeal Suit No. 168 of 1916.

Mortgage—Assignee though benamidar can sue.

An assignee of a mortgage, who is a mere benamidar, is entitled to sue on the mortgage; *A.I.R.* 1918 *P. C.* 140, *Foll.*

[P 525 C 2 P 526 C 1]

A. Krishnaswami Aiyar and *S. Subramanya Aiyar*—for Appellant.

K. V. Venkatasubramanya Aiyar for *S. T. Srinivasagopalachariar*—for Respondents.

Order of Reference.—This is a suit on a mortgage by an assignee mortgagee. The lower appellate Court has found that the plaintiff was a benamidar for D. W. 1, and has dismissed the suit, obviously on the ground that a benamidar cannot sue on title. Before us it is urged on authority of *Singa Pillai* v. *Govinda Reddi* (1) that such a benamidar can sue. The case relied on is a direct authority for that contention. We are, however, unable to accept it as conclusive. In this Court ever since the decision in *Kuthaperumal Rajali* v. *Secy of State* (2) it has we think been consistently held that a benamidar must show some right to sue under the general law apart from the fact that he lent his name for the purchase. At least we are aware of no decision to the contrary and no such case has been relied on by the learned Judges who decided *Singa Pillai* v. *Govinda Reddi* (1) With deference to the learned Judges, we should be prepared to consider the matter concluded by the doctrine of stare decisis but for the fact that the later decision is published in the authorized Law Reports. But that being the case, we think that the question must be referred to a Full Bench. We do not think it necessary ourselves to examine the cases in other Courts, as was done in *Kuthaperumal Rajali* v. *Secy. of State* (2) and has been done in *Singa Pillai* v. *Govinda Reddi* (1), but we would offer a few observations on the latter case. With deference to Spencer, J., we do not think that the unreported case, Second Appeal No. 186 of 1903, was quoted with approval in *Kuthaperumal Rajali* v. *Secy. of State* (2).

On the language of the learned Judges we gather that they did not approve of it and sought to distinguish it on the ground that the plaintiff in that case may have been appointed an agent In the present case such a contention could not be raised, as both the plaintiff and D. W. 1, have sought to make out the plaintiff was the real purchaser and the plaintiff was admittedly not an agent. Seshagiri Aiyar, J., relies on *Sree Raja Datla Venkata Suryanaraina Jagapatiraju* v. *Goluguri Bapiraju* (3), as an inroad on the rights of real owner. With deference we do not think that it is The plaintiff in that case was a successful bidder at a Court auction of certain property and a sale certificate was issued to him. He subsequently sued to have the sale cancelled on the ground of a fraudulent suppression of facts at the auction. The plaintiff was found to be a benamidar. The learned Judges, following *Kuthaperumal Rajali* v. *Secy. of State* (2) among other cases enunciated the proposition on p. 148 (of 34 *Mad.*) that a benami transaction does not vest any title to an immovable property, but they continue and say that that does not prevent a person who has been found to be an agent for an undisclosed principal in a contract for purchase of land, from suing for any relief in respect of the contract, even though the land has subsequently been conveyed to him. In our opinion this decision does not even go so far as the reservation in *Kuthaperumal Rajali* v. *Secy. of State* (2), for in the latter case the right of an agent for an undisclosed principal to bring any suit appears to be conceded. We think that the decision in *Singa Pillai* v. *Govinda Reddi* (1) does distinctly negative the principle laid down in *Kuthaperumal Rajali* v. *Secy. of State* (2) and accepted in *Sree Raja Datla Venkata Suryanaraina Jagapatiraju* v *Goluguri Bapiraju* (3). It is necessary therefore to refer to a Full Bench the following question:

"When on the evidence it is found that an assignee mortgage is a mere benamidar, can he sue on the mortgage?"

Opinion.—We think that this question must be considered to have been settled by the recent pronouncement of the Privy Council in *Chowdhuri Gur Narayan* v. *Sheo Lal Singh* (4). The respondents were not represented, but the report of the argument shows that the divergent decisions of the Courts in India were placed before their Lordships by Mr. De Gruyther, who appeared for the appellants. Mr. Ameer Ali dealt with the point in the following very general terms:

"As already observed the benamidar has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him. Their Lordships find it difficult to understand why, in such circumstances, an action

(1) [1918] 41 Mad. 435=43 I. C. 905.
(2) [1907] 30 Mad. 245.
(3) [1911] 34 Mad. 143=7 I. C. 60.
(4) A.I.R. 1918 P. C. 140=46 I. A. 1=49 I.C. 1.

cannot be maintained in the name of the benamidar in respect of the property although the beneficial owner is no party to it."

These very general observations appear to us to be conclusive of the question referred to us, and we accordingly answer it in the affirmative.

S.N./R.K. *Answered in the affirmative.*

A. I. R. 1919 Madras 526

ABDUR RAHIM, J.

T. Venkatakrishnama Charlu—Defendant—Petitioner.

v.

Arunachalam Pillay—Plaintiff—Opposite Party.

Civil Revn. Petn. No. 134 of 1918, Decided on 22nd October 1918, against decree of Dist. Munsif, Chittoor, in Sm. Cause Suit No. 611 of 1917.

Contract Act (1872), S. 70—"Lawful payment" explained—Payment against protest of person on whose behalf it purports to have been made—S. 70 does not apply.

A payment is said to be "lawful" within the meaning of S. 70, Contract Act, if it is shown to have been made in good faith or was not an unlawful payment, and the person making the payment did not intend the payment to be gratuitous, but expected compensation for it. What is lawful payment will depend on the facts of each particular case. Where a payment is made against the protest of the person on whose behalf it purports to have been paid, it would not be covered by the section: 11 *All.* 234 *and* 34 *I. C.* 341; *not Foll*: 23 *W. R.* 305 (*P. C.*), *Dist.*, 18 *Mad.* 88; 3 *I. C.* 110 *and* 28 *I. C.* 309, *Foll.* [P 527 C 1]

V. Lakshminarayana and *P. M. Srinivasa Aiyangar*—for Petitioner.

A. Chidambaram and *C. L. Nilakanta Mudaliar*—for Opposite Party.

Judgment.—It is found by the District Munsif that the payment of a quit rent by the plaintiff was made for the benefit of the defendant who was liable for the quit rent. At the same time he has found that the payment was not made at the request of the defendant. The Munsif however finds upon the facts, and no doubt rightly, that the plaintiff did not intend to make the payment gratuitously. Under S. 70, Contract Act,

"where a person lawfully does anything for another person or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

The wording of the section, as has been observed in a number of cases, is very wide and is wider than the rule of the English Common law. But there are cases in which a narrow interpretation has been placed on the word "lawfully." For instance in *Chedi Lal* v. *Bhagwan Das* (1) it is stated by Straight, J., at pp. 242 and 243:

"I pointed out to Mr. Simeon that if you could read S. 70, Contract Act, without the word 'lawful' in it, I might go to the full length of the contention set up by him. But I presume that the legislature intended something when it used the word 'lawful' and that it had in contemplation cases in which a person held such a relation to another as either directly to create or by implication reasonably to justify an inference that by some act done for another person the party doing the act was entitled to look for compensation for it to the person for whom it was done."

Reliance is also placed by the learned vakil for the petitioner on the ruling of the Privy Council in *Ram Tuhal Singh* v. *Biseswar Lall Sahoo* (2), where it is stated as a general proposition:

"It is not in every case in which a man has benefited by the money of another, that an obligation to repay the money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay. It is well settled that there is no such obligation in the case of a voluntary payment by *A* of *B*'s debt. Still less will the action lie when the money has been paid, as here, against the will of the party for whose use it is supposed to have been paid, *Stokes* v. *Lewis* (3). Nor can the case of *A* be better because he made the payment not ex mero motu, but in the course of a transaction which, in one event, would have turned out highly profitable to himself, and extremely detrimental to the person whose debts the money went to pay."

This is a statement of law which is not based on the words of S. 70, Contract Act, and if we read this proposition in the light of the facts, I think the case is easily distinguishable from the present case. In the present case there can be no doubt that the payment by the plaintiff was made in good faith; he certainly did not intend the payment to be gratuitous; he expected compensation for it. As has been pointed out by Pollock and Mulla in their commentary on the Contract Act, S. 70 enacts a law wider than the English Common law on the subject. The preponderance of rulings in this High Court does not support the restricted view which found favour with

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(1) [1889] 11 All. 234.
(2) [1875] 23 W. R. 305=2 I. A. 131=3 Sar 477=3 Suth. 136 (P. C.).
(3) [1785] 1 T. R. 20.

the Allahabad High Court in *Chedi Lal* v. *Bhagwan Das* (1) or with the Calcutta High Court in *Panchkori Ghosh* v. *Hari Das Jati* (4). It was laid down in the latter case that

"to entitle a person to claim the benefit of S. 70, Contract Act, the payment must have been lawfully made, that is by a person having a lawful interest in making it and not some interest from the point of view of the payer."

If by that is meant that there must be some interest like that mentioned in S. 69, I must, with great respect, observe that I find no warrant for any such limitation. On the other hand as far back as *Damodara Mudaliar* v. *Secy. of State* (5), it was held by this Court:

"Certainly there may be difficulties in applying a rule stated in such wide terms as is that expressed in S. 70. According to the section it is not essential that the act shall have been necessary in the sense that it has been done under circumstances of pressing urgency, or even that it shall have been an act necessary to be done at some time for the preservation of property. It may therefore be extended to cases into which no question of salvage enters; it is not limited to persons standing in particular relations to one another; and, except in the requirement that the act shall be lawful, no condition is prescribed as to the circumstances under which it shall be done."

This view of the law has found acceptance in later rulings of this Court. *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Marakayar* (6) and *Saptharishi Reddiar* v. *Secy. of State* (7). In the last mentioned case it was the view of Ayling, J., that the payment must be held to be lawful within the meaning of the section if it could be shown to have been made in good faith or that it was not an unlawful payment. It may not be easy to define what are the circumstances in which the payment would not be lawful; the case, for instance, in which a payment is made against the protest of the defendant would, I think, not be covered by S. 70. I think the ruling in *Gajapathi Krishna Chandra Deo* v. *Srinivasa Charlu* (8) also supports the view which I am inclined to take in this case, and I do not think that the decision of the learned Chief Justice and Srinivasa Aiyangar, J. in *Jagapatiraju* v. *Sadrusannamarad* (9) lays down any proposition inconsistent with *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Marakayar* (6) and the other rulings to which I have referred. I therefore dismiss the petition with costs.

S.N./R.K. *Petition dismissed.*

(4) [1916] 34 I. C. 341.
(5) [1895] 18 Mad. 88.
(6) [1909] 33 Mad. 15=3 I. C. 110.
(7) [1915] 28 I. C. 309.
(8) A. I. R. 1915 Mad. 95=38 Mad. 235=20 I. C. 445.
(9) [1915] 39 Mad. 795=31 I. C. 255.

A. I. R. 1919 Madras 527

OLDFIELD AND SESHAGIRI AIYAR, JJ.

R. Nanjunda Row—Appellant.

v.

Marwadi Dhammaji Sammiji—Respondent.

Appeal No. 282 of 1918, Decided on 26th February 1919, against order of Dist. Judge, Bellary, in Execution Petn. No. 18 of 1918.

Civil P C. (5 of 1908), Ss. 58 and 145—Security bond in favour of decree-holder for release of debtor from Jail—Release ordered under S. 58—Bond must be deemed to be on record and is enforceable in execution.

A security bond executed in favour of a decree-holder to obtain the release of a judgment-debtor from imprisonment in execution, and filed in Court, whereupon the release of the judgment-debtor is ordered under the proviso to S. 58 must be regarded as a matter of record in the Court as much as if it had been executed to the Court itself, and is consequently enforceable against the surety in proceedings in execution.

[P 527 C 2]

T. Narasimha Aiyangar and *D. Srinivasa Row*—for Appellant.

V. S. Narasimhachari—for Respondent.

Judgment.—In this case appellant and another person executed a security bond to the respondent, who held a decree against one Narayana Row, to obtain the release of the last mentioned from his imprisonment in execution. The bond was filed in the lower Court with respondent's application for the release of Narayana Row; and his release was ordered under the proviso to S. 58, Civil P. C. The respondent sebsequently applied for a warrant of arrest against appellant, as he failed to pay the decree amount in accordance with the provisions of the bond. This appeal is against the order of the lower Court issuing warrant.

The appeal is argued here on a ground not apparently relied on in the lower Court, that the bond having been given out of Court can be enforced only by suit, not by proceedings in execution of the decree in connexion with which it was given; and no doubt, if the facts were as this statement of the argument

assumes them, the decision in *Subbaraya Pillai* v. *Sathanatha Pandaram* (1) and the observations of Spencer, J., in *Nadanalıgi Kurugodappa* v. *Angadi Soogamma* (2) would justify it. But the facts actually before us differ from those assume) in material respects. Firstly, as already stated, the security-bond was filed in Court and was left there. The Court no doubt was not asked to consider its terms or their propriety But it was certainly asked to take action, statedly on the ground that the bond had been given; and, as the bond itself refers to the request which preceded its execution, it must be taken to have been presented to the Court with the concurrence of the surety and judgment-debtor. It must accordingly be regarded as matter of record in the Court as much as if it had been executed to the Court itself.

Secondly, the bond provides that in case of the judgment-debtor's default, execution can be taken against him. It is argued that the p·rties cannot give the Court jurisdiction by their consent. But the facts of the present case resemble those in *Sadasiva Pillai* v. *Ramalinga Pillai* (3) the circumstances that the bonds in question therein were executed to the Court not affecting the general ground on which the decision proceeded, that:

"the respondent had, by the proceedings in question, come under an obligation, which was capable of being enforced by proceedings in execution"

and that "upon the ordinary principles of estoppel he could not be heard to say" that the relief claimed was not obtainable under the decree. For these reasons the lower Court's decision must be confirmed, the appeal against order being dismissed with costs.

S N./R K. *Appeal dismissed.*

(1) [1918] 48 I. C. 940.
(2) [1917] 41 Mad. 40=39 I. C. 928.
(3) [1874-75] 2 I. A. 219=3 Sar. 519=3 Suth. 190 (P. C.).

A. I. R. 1919 Madras 528

SADASIVA AIYAR AND SPENCER, JJ.

Srinivasa Raghava Iyengar—Appelt.

v.

K. R. Renganatha Iyengar and *others*—Respondents.

Second Appeal No. 2510 of 1917, Decided on 27th November 1918, from decree of Dist. Judge, Tanjore, in Appeal Suit No. 790 of 1915.

(a) Contract Act (1872), Ss. 2 (d) 23—Execution of security bond for forbearance to sue for debt due—Consideration is lawful—Suit on security bond is maintainable.

A foreb arance to sue a debtor on his promissory n te is a good consideration for the latter executing a security bond for payment of the debt, and the creditor can maintain a suit on the secu·ity bond. [P 529 C 1]

(b) Contract Act (1872) Ss. 2 (d), 23—Forbearance to sue—Agreement—Specifying of time is not necessary.

It is not necessary that there should be an agreement for forbearance for any definite or particular time. It is enough if an implied request by the debtor for forbearance for a time can be inferred. 1 *All.* 309 and *A. I. R.* 1915 *Mad.* 528, *Dist.* [P 529 C 2]

(c) Transfer of Property Act (1882), Ss. 40, 58 and 100—Charge on specific immovable property is mortgage—Subsequent mortgage deed or sale deed in favour of bona fide transferee without notice—Prior charge is not defeated.

Per *Spencer, J.*, *Quaere*—Whether a security bo·d which amounts to a charge on immovable property is a mortgage involving a transfer of interest in the property. [P 329 C 2]

Per *Sadasiva Aiyar, J.*—Even where there is no personal covenant to pay, document creating a charge on specific immova·le property is a mortgage and not a mere charge liable to be defeated by subsequent mortgage deed or sale deed, though executed in favour of a bona fide transferee for consideration without notice : 33 *Cal.* 985, *not Appr.*

Distinction between a charge and a mortgage pointed out. [P 5:1 C 1]

T. R. Venkatarama Sastri and *S. Parthasarathi Aiyar*—for Appellant.

K. Bhashyam Aiyangar and *K. Narasimha Aiyangar*—for Respondents.

Spencer, J.—Defendant in this suit executed a promissory note for Rs. 2,500 on 4th December 1913 in favour of one Aramudachari, and two days later gave a security bond to the same individual for the same debt. The plaintiff obtained an assignment of both instruments and sued upon them. Defendant 2 is a subsequent purchaser; and defendant 3 is Official Receiver of Tanjore, who was made a party in consequence of defendant 1's insolvency. The plaintiff has succeeded in obtaining a personal decree against defendant 1 for what was due upon the promissory note, but his claim to be allowed to enforce his charge upon defendant's immovable properties has been refused by both the lower Courts on the ground that there was no consideration for the security bond (Ex. C), and upon this point he has lodged this second appeal.

The consideration for Ex. C is stated in para. 4 of the plaint to be the for-

bearance of the payee under the promissory note (Ex. A) to press defendant 1 for payment, when he became aware after the execution of Ex. A of the great extent of defendant 1's indebtedness and his concession of some time before filing a suit. Both the Subordinate Judge and the District Judge, in considering the issue relating to consideration for the security bond, in my opinion, misdirecting themselves on the question of law involved in this issue.

The Subordinate Judge followed *Manna Lal* v. *Bank of Bengal* (1), which he thought to be exactly in point. The District Judge seems to think that forbearance to sue must be forbearance for some particular time in order to constitute valuable consideration, as he rejects the evidence of the payee Aramudachari himself (P. W. 2) on account of his failure to specify the length of time he gave defendant 1 when he executed Ex. C, although it does not appear from his deposition that any question was put to the witness on this point. *Manna Lal* v. *Bank of Bengal* (1) has been followed by this Court in *Muthukaruppa Mudali* v. *Kathappudayan* (2), but both those cases are distinguishable from the present case on the facts. In the former case the hundi debt had not matured when the acceptor of the hundis pledged his own house and shops as security for due payment and thus there was obviously no consideration for the pledge. In the latter case it was held that a mere recommendation by A of a borrower B was not good consideration for a contract based on a subsequent promise to the lender C to pay advances made to B. Both in England and in India it is settled law that past consideration may be good consideration if there has been a precedent request : [vide *Lampleigh* v. *Braithwait* (3) and *Sindha Shri Ganpatsingji* v. *Abraham* alias *Vajir Mahomad Akuji* (4) and Pollock and Mulla's Contract Act, Edn. 3, p. 22] and forbearance from suing comes under the expression "does or abstains from doing" under S. (2) (d), Contract Act, which defines "consideration.." In the present case forbearance from suing has been set up in the plaint, there is evidence to support the plea, and there is the fact that defendant 1 was not actually sued upon the promissory note from the date of its execution, 4th December 1913, till this suit was brought on 12th July 1915. Even in the absence of evidence it was open to the lower Courts to have presumed from the circumstances of the case that the security bond would not have been given unless the creditor had expressed his dissatisfaction with the promissory note payable on demand. In *Alliance Bank* v. *Broom* (5) the Vice-Chancellor observed:

"It appears to me that, when the plaintiffs demanded payment of their debt, and, in consequence of that application the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was that the plaintiffs did in effect give, and the defendant received, the benefit of some degree of forbearance ; not, indeed, for any definite time, but, at all events, some extent of forbearance."

This case was followed in *Fullerton* v. *Provincial Bank of Ireland* (6), in which Lord Macnaghten said:

"In such a case as this it is not necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time and that forbearance for a reasonable time was in fact extended to the person who asked for it."

Similar observations occur in the judgment of Vaughan Williams and Fletcher Moulton, L. JJ. and of Parker, J., in *Glegg* v. *Bromley* (7). On these principles it is clear that the learned District Judge's decision being based on a refusal to recognize an act of forbearance on the part of the creditor, which was not for a definite period, cannot be supported. On the appellant's behalf reliance is also placed on the words of S. 58, T. P. Act, defining mortgage as a transfer of interest:

"for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt."

and it is argued that Ex. C is a mortgage. The document describes itself as a security bond, and I think it amounts to a charge on immovable property, but in the view I have taken it becomes unnecessary to decide whether it is a mortgage involving thereby a transfer of interest in property, or a mere charge. Defen-

(1) [1875-78] 1 All. 309.
(2) A. I. R. 1915 Mad. 528=25 I. C. 726.
(3) [1616] 1 Smith L. C. 10th Edn. 136, 12th Edn. 159.
(4) [1896] 20 Bom. 755.
(5) [1864] 2 Drew & Sm. 289.
(6) [1903] A. C. 309.
(7) [1912] 3 K. B. 474.

dant 2 claimed to be a bona fide purchaser for value without notice, and issue 4 relates to the questions raised by this claim. Assuming that he had no notice of the charge created in favour of Aramudachari, although he must have known of it before his sale deed was registered on 13th June 1914, as it is mentioned in the security bond (Ex. 2) given to him on 31st March, and it has been found that he and Aramudachari are next-door neighbours, still this would not help him to avoid Ex. C; for if Aramudachari took a bona fide charge on the same property for good consideration on 6th December 1913 the subsequent sale to defendant 2 on 2nd March 1914 must be subject to that charge. I would allow this appeal and would give the plaintiff a decree for sale of the property which is the subject of of the charge with costs throughout, and I would direct defendant 2 bear his own costs in all the Courts. Time for sale is 8 months from this date.

Sadasiva Aiyar, J.—I entirely agree throughout. The decree we pass for sale is of course, intended to award to the plaintiff a relief additional to the relief he has obtained against the defendant 1 personally. As the defendant 1 has not opposed the plaintiff's claim, he will not be liable personally for the plaintiff's costs here and in the lower Appellate Court. The question whether the security-bond created a simple mortgage or a mere charge is a difficult one which it is unnecessary to decide, as pointed out by my learned brother, see *Jwahir Mal* v. *Indomati* (8), where two learned Judges differed as to the construction of the bond in question therein. The language of the bond in that case was however, weaker than that of the security bond before us.

As regards S. 40, Act 4 of 1882, an obligor who executes a bond creating a charge on specific immovable property does, in my opinion, transfer an interest therein and the obligee is entitled to an interest in the property and not merely to the benefit of an obligation annexed to the obligor's ownership of immovable property within the meaning of S. 40, Act 4 of 1882. The obligation contemplated in that section is a personal obligation correlative to a personal right in the obligee such as a right to obtain a mortgage deed or a sale deed (which deed it is that transfers the interest contracted to be transferred). The subsequent purchaser from a man who has already created a valid charge is as much bound by it as the creator himself on the same principle that the subsequent purchaser for valuable consideration from a simple mortgagor is bound by the mortgage, the question of actual notice to him being immaterial see *Cooling* v. *Saravana* (9):

As regards the distinction between a mortgage and a charge, it seems to me that every mortgage document creates also a charge but conversely, a charge may not amount to a mortgage in all cases. That in some cases a document creating a charge may be a mortgage document is implied in the language of S. 100, T. P. Act itself, defining a charge. Where it is created by law and not by act of parties, it is, of course, not a mortgage, as the definition of a mortgages under S. 58 contemplates the creation of the mortgage by the intentional act of a private person called the mortgagor who transfers the mortgage interest in favour of the mortgagee.

The distinction between a charge and a simple mortgage is oftentimes very difficult to appreciate. Where no personal covenant to pay the borrowed money is found in the deed which creates the charge, it is probably not a simple mortgage according to the trend of the decisions. Where however the charge is created over specific immovable property, I am inclined to hold that though it may not be a simple mortgage owing to the absence of a personal covenant to pay, it is still a mortgage, though of the anomalous kind mentioned in S. 98, of the Act (4 of 1882). Where the immovable property is not described in a definite manner, than the transaction may create merely a charge and not a mortgage, as S. 100, Act 4 of 1882 uses the general expression "immovable property" and not the expression "specific immovable property" found in S. 58, Act 4 of 1882.

The result, as I said before is that S. 40, Act 4 of 1882 does not apply and the principle of the decision in *Cooling* v. *Saravana* (9) does not apply to the document we have to construe in the

(8) A. I. R. 1914 All. 187=36 All. 201=22 I. C. 973.

(9) [1889] 12 Mad. 69.

present case. I am inclined to think, with great respect, that the decision in *Royzuddi Sheikh* v. *Kali Nath Mookerjee* (10) takes a too narrow view of the effect of a document creating a charge on specific immovable property and I hold that even where there is no personal covenant to pay, the document, creating such a charge, is a mortgage and not a mere charge liable to be defeated by a subsequent mortgage-deed or sale deed, though executed in favour of a bona fide transferee for consideration without notice.

S.N./R.K. *Appeal accepted.*

(10) [1906] 33 Cal. 985.

A. I. R. 1919 Madras 531

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Kumarappa Chettiar and *others*—Defendants—Appellants.

v.

Saminatha Chettiar and *others*—Plaintiffs and Defendant—Respondents.

Civil Appeal No. 358 of 1917, Decided on 15th October 1918, against decree of Sub-Judge, Kumbakonam, in O. S. No. 60 of 1916.

(a) Limitation Act (9 of 1908), Arts. 120 and 144—Joint family—Individual members in possession of specific items—Such possession does not exclude others from joint property—Exclusion is necessary to bar right under Art. 127.

Where individual members of a joint family are in possession of specific items of joint property, such possession does not constitute an exclusion of the others from the family properties. To bar a plaintiff's right under Art. 127 there must be exclusion from the whole of the joint family property: 21 *Bom.* 325, *Diss. from.* [P 531 C 2]

(b) Adverse Possession—Tenancy-in-common—Possession is not adverse in absence of evidence of ouster.

In the case of a tenancy-in-common, the possession of one tenant is the possession of all, and is not adverse to his co-tenants in the absence of clear evidence of ouster: *Corea* v. *Appuhamy*, (1912) *A. C.* 230, *Foll.* [P 531 C 2]

English and Indian law on the subject of adverse possession among co-tenants reviewed by Seshagiri Aiyar J. [P 532 C 1,2]

T. R. Venkataram Sastri and *K. R. Rangaswami Ayyangar*—for Appellants.

T. Narasimha Ayyangar and *M. S. Ramanuja Ayyangar*—for Respondents.

Wallis, C. J.—I have had the advantage of reading the judgment prepared by Seshagiri Aiyar, J., and will state my conclusions very briefly. If the property was undivided and Art. 127 is applicable, I entirely agree with him that to bar the plaintiff there must be exclusion from the whole of the joint family property and that exclusion from the suit property only will not do. The decision in *Vishnu Ramchandra* v. *Ganesh Appaji Chaudhuri* (1) appears to me to be opposed to the decree of the Privy Council in the Belgaum case and to the other cases cited by my learned brother as well as to the language of the article, and I am unable to follow it. Assuming however that a division must be presumed to have taken place, it is said that Art. 127 does not apply because the plaintiff is not a person excluded from joint family property within the meaning of the article but only a tenant-in-common excluded from the common property. The words "joint family property" are used in the corresponding S. 1, Cl. 13 of the Act of 1859, and I think the scope of the two enactments is the same though the starting points of the limitation are different. It is, in my opinion, unnecessary to review the decisions on the question whether the words "joint family property" in the article apply whether there has been a division in status, but no division of immovable properties by metes and bounds. In such a case if Art. 127 does not apply, Art. 144 must apply. Under that article the suit would not be barred, as the possession of one tenant-in-common is the possession of all, and is not adverse to his co-tenants in the absence of clear evidence of ouster: *Corea* v. *Appuhamy* (2). The Subordinate Judge has not found that there was anything amounting to ouster in this case, and there is no sufficient evidence of it. I agree with the order proposed by my learned brother.

Seshagiri Aiyar, J.—This is a suit for partition. Defendants 1 and 2 represent one branch; defendants 3, 4 and 5 the second branch, defendant 6 the third branch; and defendant 7 the fourth branch. The fifth branch is not represented in this litigation. Defendants 8 to 12 are alienees from defendants 3 to 7. The plaintiffs purchased the suit properties from defendants 1 and 2. The plaintiffs' case is that the family was divided and that, as the purchasers from defendants 1 and 2, they are entitled to the sole possession of the properties in the suit. They also set up the alternative

(1) [1897] 21 Bom. 325.
(2) [1912] A. C. 230.

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plea that defendants 1 and 2 had acquired title by prescription to the properties. The defence is that the members of the family are undivided and that the plaintiffs are not entitled to more than a fifth share in the properties conveyed to them. The Subordinate Judge held that as the plaintiffs' vendors were in exclusive and hostile possession of the suit properties for more than 12 years, they were competent to convey them to the plaintiffs. He also expressed the opinion that the five branches had become divided in status though the properties were not divided by metes and bounds. The appeal was argued on the supposition that the finding as to division by status was correct without deciding the point.

The point for decision is whether the possession of defendants 1 and 2 of a portion of the family properties was adverse to the other members of the family. In my opinion the decision of the Subordinate Judge is wrong. I shall shortly trace the history of the legislation regarding adverse possession by co-tenants in England and in India before dealing with the decided cases. In England, before the enactment of 3 and 4 William IV Ch. 27, the law as to possession by co-tenants was this (vide the First Report of the Common Law Commissioners made in the year 1851 as to forms of action relating to ejectment):

"In cases where by reason of the rule plaintiff and defendant being tenants-in-common, joint tenants are co-parceners, an actual ouster must be established in order to found an action of trespass, the rule is modified by requiring the substituted defendant to admit fictitions ouster only in case an actual ouster of the lessor of the plaintiff is proved."

Then came the Statute 3 and 4 William IV Ch. 27. S. 12 ran thus:

"That when any one or more of several persons entitled to any land or rent as co-parceners, joint tenants or tenants-in-common shall have been in possession or receipt of the entirety or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the persons or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such lastmentioned person or persons or any of them."

This section was apparently enacted to negative the presumption that possession by one co-tenant is possession on behalf of all them. As was pointed out in *Holmes* v. *Newlands* (3) and *Gulley* v. *Doe* (4), before the Statute of William IV, there was no adverse possession in such cases. The bare receipt of all rents and profits by a tenant-in-common was not adverse to his co-tenants. *Reading* v. *Rawsterne* (5) and *Fairclaim* v. *Shackleton* (6). In *Peaceable* v. *Read* (7) it was held that where one tenant-in-common levied a fine and received all the rents for more than five years afterwards without any entry or claim made to avoid the fine, no actual ouster of his co-tenant could be presumed. After the passing of the statute, as has been pointed out in 19 Halsbury, para. 247,

"the possession of the joint tenants, tenants-in-common and co-parceners is separate and is not the possession of the other joint tenants."

It was held in *Thornton* v. *France* (8) that if a person entitled to an undivided share in the land is in exclusive possession of the whole land or any part of it, the title of his co-owner to his undivided share would be extinguished by such possession. In *Glyn* v. *Howell* (9), Eve, J,. says:

"Mr. Upjohn is right when he says the decisions have proceeded upon two lines, the one being those cases where the possession of the part has been treated as possession of the whole. because the Court has found, either by contract or according to conscience, that possession of the whole is what the person possessed of the part was intended to have, and the other being those cases in which the Court, finding no just reason for inferring, in favour of a person relying solely on possession of a part, a constructive possession of the whole, has refused to make such inference."

This is the state of the law under 3 and 4 William IV. Now we have to see how the law stands in India. Under Act 14 of 1859, S. 1, Cl. 13, enacted the general rule that suits to enforce the right to share in any property, moveable or immovable, on the ground that it is the joint family property must be brought within 12 years from the death of the person from whom the property alleged to be joint is said to have descended or from the date of the last payment to the plaintiff or any person through whom he claims by the person in the possession or management of such property or estate on account of such alleged share. The Limitation Acts of 1871 and of 1877, although they fixed the starting

(3) [1839] 11 A. & E. 44.

(4) [1840] 11 A. & E. 1008.
(5) 2 Raymond 829.
(6) [1770] 5 Bur. 2604.
(7) [1801] 1 East 568.
(8) [1897] 2 Q. B. D. 143.
(9) [1909] 1 Ch. 666.

point of limitation from demand and refusal in the one case and from exclusion in the other, introduced no substantial changes in the first column of the schedule.

Two things are clear from the history of the Limitation Acts. One is that no distinction is made between moveable and immovable property as in the cases of 3 and 4 William IV. Secondly there is no special provision regarding the hostile possession of tenants-in-common. The reason is not far to seek. In India co-parcenary and joint enjoyment are normal: whereas in England they are exceptions. The legislature apparently considered that it would be dangerous to introduce the principle enunciated in 3 and 4 William IV into this country, where managers and other members of the family are ordinarily in enjoyment of either the whole or portions of the property exclusively to avoid the disruption of the family ties and the partition of family properties. I am of opinion that the decisions passed on S. 1, Cl. 13, Act 14 of 1859, govern Art. 127, in the later Acts. Under the Act of 1859 it was held in *Runjeet Singh* v. *Kooer Gujraj Singh* (10) that if one of the members of the family was in possession of only a portion of the property to the exclusion of the others the presumption will be that the possession was for and on behalf of the other members of the family. This is what their Lordships say:

"Their Lordships entertaining the view which they have expressed there was no partition, but that the plaintiffs took the sir land as equivalent to a payment in respect of their shares by the defendant, are of opinion that the proceeds of those sir lands have been substantially payments by the defendant within the meaning of that section, payments which have continued to the time of action brought and that therefore the statute of limitation does not apply."

In *Sakho Narayan Khandalkar* v. *Narayan Bhikaji Khandalkar* (11), the learned Judges say at p. 241:

"But in the class of cases similar to the one before us, where both parties are in possession of portions we should require a definite finding as to whether there had or had not been partition between the parties. In this particular case we have a clear finding that no partition was made, and that each party is in possession of a portion of the entire estate, either by mutual agreement or accidental circumstances. In this view of the matter we consider the suit not barred."

(10) [1873] 1 I. A. 9=3 Sar. 304 (P.C.).
(11) [1869] 6 B H. C. R. 239.

In the *Udayarpalayam* case (12), which related to the Udayarpalayam Zamindari it was pointed out

"that although one member of the family was in sole possession of the estate the receipt of maintenance by the other member and his enjoyment of portions of property allotted to him for maintenance would be regarded as participation in the family income."

In *Sri Raja Lakhshmi Devi Garu* v. *Sri Raja Surya Narayan Dhatraju Bahadur Garu* (13), which related to the Belgaum Zamindari, one member of the family, believing the estate to be impartible, was in sole possession of the major portion of the zamindari. The others were given a few villages for their maintenance. After the death of the last zamindar the question was whether the other members, who were enjoying the villages for maintenance, were not barred by limitation. On behalf of the widow the plea of limitation was raised on the ground that the other members notwithstanding their possession of portions of property were excluded from the zamindari. Both the High Court and the Judicial Committee overruled this contention. They held that so long as there was no total exclusion of the claimants there can be no adverse possession in favour of persons holding portions of the property. As against these decisions we were referred to *Vishnu Ramchandra* v. *Ganesh Appaji Chaudhuri* (1), in which it was held that the possession of a part of the property exclusively by a member of the joint family would be hostile to the other members of the family. I am unable to agree with this decision. It is inconsistent with the decisions I have quoted and with the judgment of Lord Macnaghten in *Corea* v. *Appuhamy* (2), where it was pointed out

"Before Act 3 and 4 William IV was passed it was a settled rule of law that the possession of anyone of such persons was the possession of the other or others of the co-proprietors. It was not disputed at the Bar that such is now the law in Ceylon."

I may add that this is the law in India as well. Having regard to the decisions I have referred to and to the observations of Lord Macnaghten, it seems to me that the decision in *Vishnu Ramchandra* v. *Ganesh Appaji Chaudhuri* (1) is not right. There is only one other deci-

(12) [1901] 24 Mad. 502.
(13) [1897] 20 Mad. 256=24 I. A. 118=7 Sar. 125 (P.C.).

sion to which I shall refer and that is the decision in *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (14). That was a case in which the co-parcener wanted to establish his rights to his own share as well as to a moiety of his father's interest to which he became entitled on the death of his father. It was held that S. 1, Cl. 13, Act 1859, applied to such a case. As regards the plea of limitation the Judicial Committee says at p. 59:

"Now so far as the immovable property of the family is concerned, there seems to be no ground for the application of the statute. Not only has the respondent all along been in the enjoyment of part of that property, viz., the house at Shahpur but .... is also entitled to exclude from the computation the period of limitation during which he had prosecuted the suit."

This decision is authority for the proposition that possession of part of the property would save limitation, as regards the rest of the property. In the present case it is not denied that defendants 3 to 12 have been in possession of portions of the joint family property. It was contended for the respondent that the expression "joint family property" in Art. 127 does not apply to the case of persons who have become divided in status. Granting this contention is well founded, as to which I express no opinion the cases referred to by me establish that even if Art. 144 applied to the case, the possession of the plaintiffs' vendor would not be adverse to the other defendants. In any view therefore the decision of the Court below is wrong and his decree must be reversed.

The plaintiffs, as purchasers of the share of defendants 1 and 2, are entitled to a two-fifths share in the suit properties by partition and to the mesne profits on that share from the date mentioned in the judgment of the Subordinate Judge: plaintiffs are entitled to the damages awarded by the lower Court, on the security of the Sch. B properties as provided in the judgment of the lower Court. Plaintiffs are entitled to the costs from defendants 1 and 2, who in their turn will get all their costs from defendants 3 to 7 and 9 to 12 personally and from the security of Sch. B properties and must pay defendants 3 to 7 and 9 to 12 their costs in both the Courts. Plaintiffs are also entitled to interest on Rs. 7,500 from 26th March 1912 up to date of payment.

S.N./R.K. *Appeal allowed.*

(14) [1880] 5 Bom. 48=7 I. A. 181=4 Sar. 173=3 Suth. 778 (P.C.).

A. I. R. 1919 Madras 534

SESHAGIRI AIYAR AND BURN, JJ.

Manamathi Munusawmi Mudali—Defendant—Appellant.

v.

Perumal Mudaly—Plaintiff—Respondent.

Second Appeal No. 1661 of 1918, Decided on 30th July 1919, against decree of Dist. Court, Chingleput, in Appeal Suit No. 104 of 1917.

Contract Act (9 of 1872), S. 60—Creditor and Debtor—Payments—Appropriation of—Prejudice to third parties is immaterial.

A creditor's right of appropriation of payments on behalf of the debtor towards any particular debt due to him is preserved until the moment of his filing his plaint in Court. In appropriating a particular debt the creditor is not bound to look to the likely or probable prejudice which might be caused to third parties having claims against the debtor, but can put himself in an advantageous position so long as it is not unconscionable or inequitable on his part to do so. *Cory Brothers & Co.* v. *The Owners of the Turkish Steamship "Mecca"* (1897) *A. C.* 286, *Foll.* 30 *I. C.* 92, *not Appr.* [P 535 C 1]

K. Rajah Aiyar—for Appellant.

T. V. Muthukrishna Aiyar—for Respondent.

Judgment.—An interesting question was argued by Mr. K. Rajah Ayyar relating to appropriation of payments. The plaintiff had a mortgage from defendants 1 and 2. There was also a debt due to him from them on a promissory note. Defendants 1 and 2 requested the plaintiff to collect some money due to them from a third party. This was done on 16th August 1915. Prior to that, the plaintiff sued on his pro-note, and obtained a decree. In his earlier execution application, he could not have asked that the money collected by him should be credited in partial discharge of the decree. On 11th November 1915 under another money decree against defendants 1 and 2, defendant 3 purchased the equity of redemption in the properties mortgaged. Five days after this, plaintiff entered up satisfaction of his money decree to the extent of the money collected by him. He then sued for the full amount due on the mortgage. Defendant 3 contended that the plaintiff should have appropriated the money to the mortgage debt and that his liability pro tanto should be discharged. The

lower appellate Court refused to accept this contention. We think the District Judge was right.

It is now well settled that the plaintiff's right of appropriation is preserved to him until the moment of his filing the plaint in Court. See Lord Macnaghten in *Cory Brothers & Co.* v. *The Owners of the Turkish Steamship "Mecca"*.(1). In *Seymour* v. *Pickett* (2) Romer, L. J., pointed out that, provided it will not be inequitable to do so, the plaintiff should not be deprived of this right. Mr. K. Rajah Ayyar contends that when the rights of third parties are likely to be prejudiced, it must be taken that it would be inequitable on the part of the plaintiff to make the appropriation in a particular way. Our reading of the learned Lord Justice's judgment is that there must be something unconscionable, something which would operate as an estoppel, before this right of the plaintiff is taken away. It was held in *Simson Ingham* (3) that a creditor can cancel an appropriation entered in the accounts if the same was not communicated to the defendant. This authority shows that the question of inequity has to be looked at not only from the point of view of the third party, but also from the point of view whether the creditor should not endeavour to put himself in an advantageous position so long as there is nothing which makes it unconscionable on his part to do so. Viewed in this light we think the District Judge has applied the proper test in giving his decision.

We may say that the decision in *Kundan Lal* v. *Jagan Nath* (4), which seeks to go back to the principle enunciated in *Clayton's* case (5), namely, that the creditor should elect as soon as the payment is made, is opposed to the language of the Contract Act and to *Cory Brothers & Co.* v. *The Owners of the Turkish Steamship "Mecca"* (1) and to *Seymour* v. *Pickett* (2). The second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1897] A. C. 286.
(2) [1905] 1 K. B. 715.
(3) [1823] 2 B & C. 65.
(4) [1915] 37 All. 649=30 I. C. 92.
(5) [1816] 1 Mer. 572.

A. I. R. 1919 Madras 535

PHILLIPS AND KUMARASWAMI SASTRI, JJ.

Vadamalai Thiruvanatha Sevuga Pandia Thevar—Defendant—Appellant.

v.

Sankara Moorthi Naidu—Plaintiff—Respondent.

Second Appeal No. 2193 of 1917, Decided on 4th September 1918, against decree of Dist. Judge, Ramnad, in Appeal Suit No. 503 of 1916.

(a) Madras Estates Land Act (1908), Ss. 3 and 143—Landlord and tenant—Cess—Levy of—Legality—Burden of proof—Long payment—Presumption is of legal origin.

In considering whether any particular cess claimed and which has been paid for a period of years is enforceable or not, the first thing to be considered is, whether the cess claimed has any direct or proximate bearing on the purposes for which the land is let. If the cess is payable in respect of such purposes, it will prima facie be one which is binding on the parties and the onus will be on the tenant to show that owing to some special circumstances it is not binding on him. Where the cesses are in their nature unconnected with the object for which land is let, they can only be claimed by the landlord under a contract between him and the raiyat supported by consideration or under a usage for which a legal origin is either proved on presumed from the nature of the cess and "long course of payments." While on the one hand mere length of payment will not render a cess, which is purely voluntary or which is on its face illegal, acquire a binding character, payment during a long series of years will be presumptive evidence that the payment of a cess had a legal origin if the cess is of such a nature that a contract to pay it may be reasonably inferred. [P 536 C 2]

(b) Madras Estates Land Act (1908), Ss. 3 and 143—Landlord and tenant—Agreement to pay cess—Purpose of levy failing—Agreement can be put an end to.

Both the landlord and the tenant who share equally in the varam may agree that certain expenses, which they think beneficial to both of them shall be met by them in common and the rest of the produce divided. But it will be open to the tenant to show that the purpose of the levy has failed or that the landlord has not been appropriating the sum to the purpose for which he levied it, in which case he will be released from his agreement. [P 537 C 1]

(c) Madras Estates Land Act (1908), Ss. 3 and 143—Landlord and Tenant—Cess having no direct bearing for lease of land—Burden of proof enunciated.

Where the cess has no direct bearing on the purpose for which the land is let and is payable out of the tenant's share of the rent, the onus ought to be on the landlord to show that it was either part of the consideration for which the land was originally leased or that it was supported by consideration subsequently. [P 537 C 1]

(d) Madras Estates Land Act (1908), S. 3—Cess—Binding nature—Each case depends on facts.

There is no rule that a cess which has been held to be not binding on one estate will also be

not binding on other estates and vice versa. Each case must depend on its own facts. [P 537 C 1]

(e) **Madras Estates Land Act (1908), Ss. 3 and 143—Cesses which cannot be levied enunciated.**

The following cesses cannot be levied viz. kangovi, kattalavuvasi and ayyanar kanganam i. e., fee for watching the harvest, Kulavethu. i. e., expenses for repair of tanks, kudivaram urai and melvaram urai, i. e., fees for measuring paddy, swatanthram, i. e., payment to village artizans, are incidental to the relation of landlord and tenant and are payable by the tenant. Thirupani, i. e., cesses for repairing the temple cannot be levied.

(f) **Madras Estates Land Act (1908), Ss. 3 and 143—Thrashing ground rent.**

Thrashing ground rent is leviaved where the tenant has no thrashing floor. [P 538 C 1]

A Swaminadha Aiyar—for Appellant.

K. V. Sesha Aiyangar—for Respondent.

Judgment.—The defendant zamindar is the appellant. Plaintiff, who is a raiyat in the zamindari, sued, under S. 55, Madras Estates Land Act, for a decree directing the defendant to tender to him a proper patta. He put in a patta which did not contain any provision for cesses that had been usually levied and objection was taken by the zamindar to the form of the patta which he wanted to get. The zamindar put in the patta, Ex. 1 which was granted to the plaintiff's predecessor-in-title, which contained the following cesses which were described as pothu palavu or common expenses which were to go to the zamindar : (1) ayyanar, (2) kulavethu, (3) kattalavuvasi, (4) kanganam, (5) melvaram kotta urai, (6) swatanthram, (7) kudivaram kottai urai. It provided for two items to go to the tenant as common expenses and stipulated that, after deducting the above items of common expenses, one-half of the paddy was to be taken by the landlord and the other half by the tenant. Out of the kudivaram thus taken by the raiyat he was further to give to the landlord (1) kangovi, (2) thrashing ground rent, and (3) thirupani.

It is not disputed that the land to which the patta claimed related is nanja and varam rents are payable. The plaintiff in his evidence admits he has been paying the cesses to the zamindar for the past 30 years and that his father was paying the cesses when he was alive and that all the tenants have been paying the cesses without complaint. The Revenue Divisional Officer held that the cesses claimed by the zamindar were payable "according to usage having the force of law" and that they must be included in the patta. On appeal the District Judge disallowed the cesses as illegal under S. 143, Madras Estates Land Act, and held that plaintiff was entitled to the patta without any of the cesses being included.

The question for decision in this second appeal is as to the legality of all or any of the cesses claimed. As regards kangovi and kattalavuvasi and ayyanar, it is not clear what they are payable for or on what ground payment is based. The zemin karnam who was examined as D. W. 1 states that he does not know why kangovi was collected. He says nothing about ayyanar and kattalavuvasi and the appellant's vakil is unable to throw any light on these cesses. These three cesses are not shown to have any connexion with the holding or the rent payable. The other cesses claimed stand on a different footing. Kanganam is the fee for watching the harvest. Kulavettu relates to the expenses for keeping tanks in proper repair. Kudivaram urai and melvaram urai are in respect of measuring the kudivaram and melvaram paddy. Swatanram is in respect of payment to village artizans. Thriupani is the cess for repairing the village temple.

Rent is defined in S. 3, Cl. 11 (a), Estates Land Act, as including any local tax, cess, fee or sums payable by a raiyat as such in addition to the rent due in respect of land according to law or usage having the force of law. S. 143 prohibits land-holders from exacting from their raiyats anything in addition to the rent lawfully payable by them rendering all stipulations and reservations for such additional rent void. In considering whether any particular cess claimed and which has been paid for a period of years in enforceable or not, the first thing to be considered is whether the cess claimed has any direct or proximate bearing on the purposes for which the land is let. If the cess is payable in respect of such purposes, it will prima facie be one which is binding on the parties and the onus will be on the tenant to show that owing to some special circumstances it is not binding on him. Where the cesses are in their nature unconnected with the object for which land is let, they can only be claimed by the landlord under a contract between him and raiyat sup-

ported by consideration or under a usage for which a legal origin is either proved or presumed from the nature of the cess and "long course of payments." While on the one hand mere length of payment will not, as pointed out in *Sundaram Iyer* v. *Theetharappa Mudaliar* (1), render a cess which is purely voluntary or which is on its face illegal acquire a binding character, payment during a long series of years will be presumptive evidence that the payment of a cess had a legal origin if the cess is of such a nature that a contract to pay it may reasonably be inferred.

Another distinction is whether the particular cess is paid out of the tenant's share of the varam or whether it is deducted out of the whole gross produce before the division of the varam is made. There is nothing to prevent both the sharers in the varam from agreeing that certain expenses which they think beneficial to both of them shall be met by them in common and the rest of the produce divided. So long as it is not a device by the landlord to give himself a purely personal advantage, the purpose for which the item is appropriated is immaterial. It will of course be open to the tenant to show that the purpose for which the cess was levied had failed or that the landlord has not been appropriating the sum to the purpose for which he levied it, but otherwise there is no reason for releasing the tenant from his agreement.

Where the cess has no direct bearing on the purpose for which the land is let and is payable out of the tenant's share of the rent, we think that the onus ought to be on the landlord to show that it was either part of the consideration for which the land was originally leased or that it is supported by consideration subsequently.

I do not think that because a cess has been held to be not binding on one estate it follows that it is not binding on other estates or *vice versa*. Each case must depend on the facts, and reported decisions are only useful in so far as they lay down general principles which guide Courts in coming to conclusions as to the validity or otherwise of any particular cess.

In the present case kanganam kulavethu, melvaram urai, kudivaram urai and swatantram are set apart before division of the produce between the landlord and tenant. Kanganam, as pointed out in *Arunachallam Chettiar* v. *Mangalam* (2), is clearly a cess which the landlord is entitled to levy as in case of varam tenure, he is interested in seeing that he gets his due share of the harvest; Kulavethu which is a cess for keeping the tanks in proper repair is for a purpose beneficial to the landlord and tenant and there is no reason why the cess should be disallowed. Reference was made by the respondent's vakil to *Bonunadevara Venkata Narasimha Naidu* v. *Samanedan Ramamma* (3), but the case has no application to the facts of the present case as in that case the finding was that the tank fell into disrepair several years ago when the anicut system was introduced by the Government in the Kistna District. The zamindar did not repair the tank and the raiyats derived no benefit in consideration of which the cess could be claimed. In the present case there is no allegation that tank water is not used by the respondent. Kudivaram urai and melvaram urai are in respect of the measurement of the melvaram and kudivaram respectively. It is not denied that measurement of the paddy is necessary to determine the landlord's and tenant's share.

As regards swatantram the cess is collected for payment to village artizans and servants and it is not shown that the tenants who have been paying this cess without any objection for several years receive no benefit. The cess was taken out of the gross produce before division and there is nothing either in the plaint or in the evidence adduced by the plaintiff to show that this cess is purely for the benefit of the landlord. In *Sree Sankarachari Swamiar* v. *Varada Pillai* (4) it has been held that a cess for payment to village artizans is lawful.

Turning to the cesses (kangovi, thrashing ground rent and thirupani) which in the patta granted to plaintiff's vendors are payable after division of the produce we have already disallowed. Kangovi, thirupani is collected for repairing temples. This cess has been held to be purely voluntary in *Siriparapu Raman*

(1) [1917] 40 I. C. 159.

(2) [1916] 40 Mad. 640.=35 I. C. 329
(3) [1912] 16 I. C. 208.
(4) [1904] 27 Mad. 332.

na v. *Mallikarjuna Prasada Nayudu* (5) wherein the learnded Judges (Muthuswami Aiyar and Best, JJ.) observed:

"A duty to contribute to the expenses of a temple is not an ordinary incident of the relation of landlord and tenants, nor has it any connexion with the jirayati tenure on which the raiyat holds his land. Prima facie, the contribution is voluntary and unless the fee is shown to be a charge on the land it cannot be treated as a payment which the zamindar can legally compel the raiyat to make."

A similar view was taken by Benson and Bashyam Aiyangar, JJ, in *Ramalingam Chettiar* v. *Ramasami Aiyar* (6).

As regards thrashing ground rent it is difficult to see why the cess should not be paid in cases where owing to the want of thrashing floor belonging to the tenant the parties have to pay for using another's. Where however the tenant has a thraehing floor the cess ought not to be levied. We would modify the decree of the District Judge by allowing kanganam, kulavethu, melvaram urai, kudivaram urai, swatantram and thrashing ground rent in cases where the tenant has no thrashing floor. As regards the items which under the Patta, Ex. 1, go to the raiyat the landlord does not dispute that the tenant is entitled to them. These items will also be included in the patta so far as wet lands paying varam are concerned. The Patta will issue in terms of Ex. 1 with the above modifications so far as varam-paying wet lands are concerned. The decree of the Dist. Judge disallowing cesses will stand as regards punja land.

As the appellant has succeeded substantially and as the respondednt came to Court alleging that no cesses were due, we direct the respondent to pay the appellant's costs in this and in the lower appellate Court.

S.N./R.K. *Decree modified.*

(5) [1894] 17 Mad. 43.
(6) [1903] 13 M. L. J. 379.

A. I. R. 1919 Madras 538

OLDFIELD AND SESHAGIRI AIYAR, JJ.

Seshappa Heggade —Plaintiff — Petitioner.

v.

Chandayya Heggade — Defendant — Opposite Party.

Civil Revn. Petn. No. 519 of 1918, Decided on 13th March 1919, against the decree of the District Munsif, Udipi, D/- 4th March 1918.

(a) Provincial Small Cause Courts Act (9 of 1887), S. 15 and Art. 38—Suit for arrears of maintenance by its assignee is not cognizable.

A suit by an assignee of arrears of maintenance which had accrued due to the assignor for the recovery of such arrears is not cognizable by a Small Cause Court: 20, *Mad.* 19, *Foll.* [P 538 C 2]

(b) Transfer of Property Act (4 of 1882), S. 6 (d) and (h)—Maintenance right of member of Tarwad or Aliyasanthana family is transferable.

Per *Seshagiri Aiyar, J.*—A right to maintenance which falls due to a member of a Malabar tarwad or an Aliyasanthana family is capable of assignment and is "property" within the meaning of S. 6 (a), Transfer of Property Act, its assignment being not opposed either to the principles of Sub-Cls. (d) and (h) of the section or to the general law: 6 *I. C.* 439, *Expl.* [P 539 C 2]

B. Sitarama Rao— for Petitioner.

K. Y. Adiga—for Opposite Party.

Oldfield, J.—I do not propose to express any opinion on the question which my learned brother has dealt with—whether the plaintiff's claim is sustainable. My reason is that there is no decree before us, which we are entitled to test with reference to the considerations arising in connexion with that question. The decree was passed by a Small Cause Court without jurisdiction, inasmuch as the claim is a claim for maintenance: see *Saminatha Ayyan* v. *Mangalathammal* (1). The only order we can pass, in my opinion, is that the decree be set aside and that the lower Court do return the plaint for presentation to the proper Court. Each party will bear his own costs throughout up to date.

Seshagiri Aiyar, J.—This is a suit for arrears of maintenance by an assignee. The assignor is a member of an Aliyasanthana family. The suit was brought in the Small Cause Court for arrears which had already fallen due. The lower Court dismissed the suit on the ground that the assignment is opposed to the Transfer of Property Act. In my opinion, this conclusion is wrong. I do not think that, S. 6, T. P. Act, is opposed to the assignability of the right which the plaintiff seeks to enforce. It is undoubtedly property, because it is now well settled that the right of a member of a Malabar tarwad or of an Aliyasanthana family to maintenance is based on ownership of property, and not because he is entitled to be paid a fixed allowance by the Karnavan who must be regarded as the true owner of the property. In *Maradevi* v.

(1) [1897] 20 Mad. 29.

Pammaka (2) this principle was laid down and this is followed in a case to which I was a party, viz., *Manikath Ammini Ammal* v. *Nanikkath Padmanabha Menon* (3). In an earlier case, *Chandu* v. *Raman* (4), this Court held that the right to maintenance by a junior member of a tarwad can be made a charge upon a specific portion of the tarwad property. Therefore, it seems to me to be clear that the right to maintenance which a member of an Aliyasanthana family or a junior member of a tarwad possesses is property, and therefore the first portion of S. 6, T. P. Act, is complied with. Mr. Adiga for the respondent contended that the assignability is opposed to Cls. (d) and (h) of the same section. Some support is given to this argument by the observations of Sadasiva Aiyar, J., in *Palikandi Mammad* v. *Chingoran Keloth Valia Appa* (5). The question before Sadasiva Aiyar and Moore, JJ., in that case related to the attachability of the right to maintenance under a money decree obtained against a widow. Therefore the present question did not arise for decision directly in that case, but Sadasiva Aiyar, J., in coming to the conclusion that the right to maintenance was not attachable, refers to Cls. (d) and (h), S. 6, T. P. Act. I will take Cl. (d) to which the learned Judge refers.

That refers to an interest in property restricted in its enjoyment to the owner personally. I do not think it can be said that the right to maintenance is a right of that kind. That clause contemplates cases like service-tenures or the office of an archaka in a temple, which is restricted in its enjoyment and cannot be transferred by the office-holder. Then as regards Cl. (h), the transfer must not be opposed to the nature of the interest affected thereby. This again relates to cases of property which are known as extra commercium, for example, transfer to a non-Hindu of a right in a religious office: thst would be opposed to the nature of the interest affected thereby. I do not think that a right to maintenance is covered by either Cl. (*d*) or Cl. (*h*) of S. 6. I am supported to some extent by the observations of the learned Judges who decided *Annapurni Nachiar* v. *Swaminatha Chettiar* (6), wherein they say that at any rate where, as here, the amount payable is subsequently fixed by agreement or by decree, a transfer of a widow's right to maintenance from her late husband's estate would be good. I understand the distinction to be this: that you cannot attach maintenance which is to fall due at some future time but where the maintenance has become payable, it is attachable. That is well settled. Therefore so long as a decree-holder does not attempt to anticipate an income which is to fall due, there can be no objection to his obtaining decree and subsequently attaching the allowance when it becomes payable. Subject to this limitation, I fail to see why a right to maintenance should not be assigned. I am therefore of opinion that the Transfer of Property Act is not opposed to to the assignability of the maintenance of a member of a Malabar Tarwad or of a member of an Aliyasanthana family.

Mr. Adiga next attempted to argue that under the general law a right to maintenance should not be assigned and he quoted two cases one in *Bhyrub Chunder Ghose* v. *Nubo Chunder Gooho* (7) and another in *Narbadabai* v. *Mahadeo Narayan* (8), in support of this proposition. So far as my experience goes in Madras, it has always been regarded that a right to maintenance which has already fallen due can be assigned and can be attached and, as I said before, there is nothing either in the Transfer of Property Act or in the Civil Procedure Code which prohibits such a transfer or such an attachment. I am, therefore not prepared to hold that under the general law a right to maintenance is not assignable.

This conclusion lands Mr. Sitarama Rao's client in another difficulty. If it is in the nature of a right in property and a right to maintenance that he has purchased, then the suit will not lie in a Small Cause Court. The decisions in *Saminatha Ayyan* v. *Mangalathammal* (1) is in point. Even the decision quoted by the learned vakil, *Achutan Nair* v. *Kunjinni Nair* (9), shows that such a suit is taken away from the cognizance

(2) [1913] 36 Mad. 203=14 I. C. 383.
(3) [1918] 41 Mad. 1075=48 I. C. 104.
(4) [1888] 11 Mad. 378.
(5) [1917] 40 Mad. 302=34 I. C. 381.
(6) [1910] 34 Mad. 7=6 I.C. 439.
(7) [1866] 5 W. R. 111.
(8) [1880] 5 Bom. 99.
(9) [1903] 13 M. L. J. 499.

of a Small Cause Court. I would therefore direct that the decree be set aside and that the lower Court do return the plaint for presentation to the proper Court. I agree with my learned brother as to the order as to costs which he proposes to make.

S.N./R.K. *Petition allowed.*

A. I. R. 1919 Madras 540

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Lanka Lakshmanna and *another*—Plaintiffs—Appellants.

v.

Lanka Vardhanamma and *another*—Defendants—Respondents.

Civil Appeal No. 192 of 1917, Decided on 3rd September 1918, against decree of Sub-Judge., Kistna, at Ellore. D/- 7th April 1917, in Original Suit No. 32 of 1916.

Evidence Act (1 of 1872), S. 33—Proof of genuineness of will—Inquiry before Sub-Registrar — Depositions are admissible in subsequent suit — Registration Act (16 of 1908), S. 41 (2).

Depositions made before a Sub-Registrar at an inquiry under S. 41, (2), Registration Act, on the presentation of a will are admissible in evidence in a subsequent suit between the parties in which the genuineness of the will is in dispute, provided the witnesses are dead and the other party had an opportunity of cross-examining them.

[P 542 C 1]

B. Narasimha Rao, K. Srinivasa Aiyangar and *K. S. Aravamudu Aiyangar*—for Appellants.

G. Venkataramiah—for Respondents.

Wallis, C. J.—Objection has been taken in this case that the Subordinate Judge wrongly admitted in evidence depositions of persons dead at the date of the trial which had been made by them at an inquiry held by the Sub-Registrar under S. 41 (2), Registration Act (16 of 1908), when the will or authority to adopt which is in question in this suit was presented for registration. Such depositions have been frequently admitted and acted on without objection, but there is no authority on the point, and it is necessary to consider the question of their admissibility under S. 33, Evidence Act. It may be said at the outset that the legislature clearly intended to give a wide scope to the section and to go beyond the English law, because it renders admissible, not only evidence given by a witness in a judicial proceeding, but also evidence given by a witness "before any person authorized by law to take it," and also provides that a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of the section. In the earliest case of Godbolt 326 at p. 327; 78 English Reports 192 it was laid that when a witness was dead or could not be found, :

"his deposition in an English Court in a cause betwixt the same parties, plaintiff and defendant, may be allowed to be read to the Jury."

Taylor on Evidence, para. 464, says :

"Where a witness has given evidence under oath in a judicial proceeding, in which the adverse litigant had the power to cross-examine, the testimony so given will, if the witness himself be incapable of being called, be admitted in any subsequent suit between the same parties or those claiming under them, if such suit relates to the same subject or substantially involves the same material questions."

The Evidence Act (S. 1) applies to judicial proceedings in or before any Court and accordingly S. 33 deals with the admissibility of previous depositions "in a subsequent judicial proceeding," that is, in a judicial proceeding arising subsequently to the making of the deposition. But the previous deposition need not have been made itself in a judicial proceeding. According to the language of S. 33, it is sufficient if it was made in a judicial proceeding or in such circumstances as to make it .

"evidence given by a witness before any person authorized by law to take it."

Now the word "evidence" is defined in S. 3 as meaning and including :

"all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry"

and "Court" is defined as including "all persons except arbitrators legally authorized to take evidence," and the Sub-Registrar is a person authorized to take evidence within the meaning of these definitions under the provisions of the Registration Act, which are referred to below, as he is a person authorized to take statements from witnesses in relation to matters of fact under inquiry before him. The only remaining question is whether the provisos to S. 33 were satisfied (1) that the former proceeding was between the same parties or their representatives-in-interest, (2) that the adverse party in the first proceeding had the right and opportunity to cross examine and (3) that the questions in issue were substantially the same

in the first as in the second proceeding. For the purpose of answering this question, it is necessary to examine the statutory provisions regarding the proceedings of the Sub-Registrar under S. 41 (2) of the Act. That section imposes on him the duty of registering the will if he is satisfied that it was executed by the testator, that the testator is dead and that the person presenting it claims as executor or otherwise under the will. S. 63 gives the registering officer power to administer oaths at his discretion to persons examined before him and to record their statements, and S. 36 provides for the summoning of witnesses at the instance of persons presenting any document for registration or claiming under any document which is capable of being so presented and also provides for enforcing their attendance, etc., in the same manner as in suits before civil Courts.

Under S. 69 (*j*) which authorizes the making of rules "generally regulating the proceedings of the Registrars and Sub-Registrars," rules have been made as to "the inquiry contemplated by S. 41 (2) of the Act." Rule 69 requires the registering officer to whom the will is presented for registration to fix a day for such inquiry and to cause notice of the inquiry (*a*) to be served on persons to whom, in his opinion, special notice should be given and (*b*) to be published (1) in the District Gazette and (2) in the villages where the testator lived, where interested parties may reside and where the property of the deceased is situated. Rule 70 requires him to summon witnesses, not only at the desire of the persons presenting the will—as he is required to do by S. 36 of the Act, but also at the desire of persons who object to registration on the ground that the will was not executed by the testator or that he is not dead or that the person presenting it is not entitled to present it under S. 40, that is to say, that he does not claim under it as executor or otherwise. Rule 168 shows that the rules contemplate that the parties may be represented by counsel as it prohibits any but licensed practitioners from appearing at the inquiry, and R. 72 (1), requires the registering officer to prepare and place on record a memorandum in English containing a summary of the evidence and the reasons for registration or refusal; as the case may be. There is an appeal from his order to the Registrar under S. 72 (1) of the Act. In construing the provisos to S. 33, it is important to remember that S. 33 is applicable even where the earlier proceeding was not a judicial proceeding and therefore that the section contemplates that provisos may be satisfied and evidence at the earlier inquiry be admissible even where that inquiry does not satisfy all the requisites of a judicial proceeding. We should therefore be on our guard against construing the language of the provisos so strictly as to exclude evidence at all enquiries which are not judicial proceedings, and we have not to consider whether the inquiry is or not a judicial proceeding as in *Queen-Empress* v. *Tulja* (1) and *Atchayya* v. *Gangayya* (2), or whether or not the doctrine of absolute privilege applies to statements made at it, as to which see *Krishnammal* v. *Krishnaiyangar* (3) and *Co-partnership Farms Ltd.* v. *Harvey-Smith* (4). Approaching the question in this way, I think the first and third proviso to S. 33 are satisfied when, as in the present case, the parties to the suit or those whom they represent, were arrayed against each other at the inquiry before the Sub-Registrar, the one side upholding the genuineness of the will with a view to its registration and the other side attacking it, and that the inquiry must be considered to have been between the same parties and substantially about the same question. There only remains the question whether the adverse party at the inquiry had the right and opportunity to cross-examine so as to satisfy the second proviso. This has all along been regarded as the leading test, as stated in Buller's Nisi Prius 239 (1793):

> "A deposition cannot be given in evidence against any person that was not a party to the suit, and the reason is, because he had not liberty to cross-examine the witness; and it is against natural justice that a man should be concluded by proofs in a cause to which he was not a party."

Now it is to be observed that while under the Act and the rules made pursuant to it, the parties propounding the will for registration and opposing it both have the right to have the witnesses summoned (R. 69) and the registering officer is required to "prepare and place on record a memorandum in English contain-

(1) [1888] 12 Bom. 36.
(2) [1892] 15 Mad. 138.
(3) [1912] 15 I. C. 652.
(4) [1918] 34 T. L. R. 414.

ing a summary of the evidence" the rules do not provide expressly either for the examination or cross-examination of the witnesses summoned on either side. But these provisions for summoning the witnesses and recording their evidence, in my opinion, necessarily imply that they are to be both examined and cross-examined in the ordinary way, especially as the rules contemplate that the parties may appear by counsel. Otherwise, their statements could scarcely be referred to as evidence in the rule, or form the basis for the summary of the reasons for registering or refusing to register which the registering officer is required by the rule to record. It is also the invariable practice for the witnesses at these inquiries to be cross-examined and, as has been said, the practice of the Court is the law of the Court. It would, I think, be very unfortunate if we had baen compelled to hold otherwise, as owing partly to the fact that mofussil wills do not require probate, suits as to wills not infrequently come on for trial when nearly all the parties acquainted with the facts are dead. (His Lordship then dealt with the evidence.) The appeal is dismissed with costs.

Sashagiri Aiyar, J.—I agree.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 542 (1)

SADASIVA AIYAR, J.

Nallaya Naick and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 225 of 1918, and Criminal Revn. Petn. No. 175 of 1918, Decided on 8th November 1918, against judgment of Sub-Divl. Mag. Sivakasi Division, in Criminal Appeal No. 70 of 1917.

(a) Penal Code (1860), S. 447—Criminal trespass—Warrant for delivery of property by Civil Court—Amin refusing to inspect documents showing rights in derogation of delivery warrant—Amin is not guilty of offence of trespass.

An Amin of a Civil Court cannot be charged with criminal trespass for delivering property to a person covered by a delivery warrant of Court although a portion of the property is claimed by a different person whose documents of title the Amin refuses to inspect or act upon. It is not for the Amin to determine whether his superior officer might not have committed a mistake in suing the warrant. [P 542 C 2]

(b) Penal Code (1860), S. 447 — Person helping Amin in discharge of duty is not guilty.

A person assisting an Amin in doing his duty cannot be held guilty of criminal trespass. [P 542 C 2]

S. Swaminadham and *A. N. Krishna Aiyangar*—for Accused.

Public Prosecutor—for the Crown.

Order.—The convictions and sentences cannot be upheld. The Amin (accused 6) has to obey the clear directions found in his delivery warrant and not to be looking into Ex. C offered for his inspection and then to solve a difficult question of law, whether his superior officer might not have committed a mistake in issuing a delivery warrant in wider terms than was legally justifiable. The other accused assisted the Amin in doing his duty and could not be convicted of criminal trespass or charged with illegal and dishonest intentions. The convictions are set aside and the fines, if paid, will be refunded.

S.N./R.K. *Convictions set aside.*

A. I. R. 1919 Madras 542 (2)

SPENCER, J.

Chidambaram Pillai—Plaintiff—Petitioner.

v.

Meenakshiammal — Defendant—Opposite Party.

Civil Revn. Petn. No. 980 of 1917, Decided on 10th October 1918, against decree of Sub-Judge, Tinnevelly, in Small Cause Suit No. 276 of 1917.

Hindu Law—Stridhan—Wife creditor for her stridhan—Wife in possession of assets after husband's death — Testamentary bequest by her of debt—Intention to keep debt alive—Legatee is entitled to recover—Doctrine of merger is not applicable—Transfer of Property Act (1882), S. 101.

A Hindu died leaving a widow and a daughter born of a former wife and about Rs. 25,000. The widow was a creditor to her husband's estate to the extent of Rs. 478 for her stridhanam. Shortly before her death, she made a will devising this debt to the plaintiff, who sued to recover the amount from the daughter who succeeded to the estate after the widow's death. The suit was dismissed on the ground that the widow having become possessed of assets whereby she could have paid off her debt, the debt became extinguished:

Held: (1) that the widow's possession of the assets did not amount to a payment of her stridhanam debt, there being no analogy between executors who are creditors to the estate paying their debts out of the estate, and a widow who is entitled to enjoy the whole of the income of the estate; (2) that the widow's stridhanam not being at law a charge or incumbrance within the meaning of S. 101, there was no merger because

in the case of a limited owner the presumption was against merger. [P 543 C 2, P 544 C 1]

N. Kunjithapadam Aiyar—for Petitioner.

K. V. Sesha Aiyangar—for Opposite Party.

Order.—Before I can dispose of the point of law raised in this petition it is necessary to know: (1) Whether the debt of Rs. 478 from Nellayappa Pillai to his wife Velammal was stridhanam in the hands of the latter? (2) Whether Nellayappa Pillai at his death was possessed of sufficient assets for the discharge of this debt from his estate? (3) Whether Velammal did any act denoting an intention of satisfying the debt due to her out of her husband's estate?

The Subordinate Judge is requested to return findings on these issues within six weeks after adducing evidence. Ten days will be allowed for filing objections to the finding after notice of return of the same shall have been posted up in this Court.

(In compliance with the above order the Subordinate Judge submitted the following)

Finding.—I have been directed to submit my finding on the following points: (1) Whether the debt of Rs. 478 from Nellayappa Pillai to his wife Velammal was stridhanam in the hands of the latter? (2) Whether Nellayappa Pillai at his death was possessed of sufficient assets for the discharge of this debt from his estate? (3) Whether Velammal did any act denoting an intention of satisfying the debt due to her out of her husband's estate?

Issue 1.—The account (Ex. A 1) has sufficiently been proved to be a genuine account. The witness called on the defendant's side admits that the entries at p. 6 of Ex. A-I up to 10th Karthigai are in the hand of Velammal's husband Nellayappa Pillai himself. He also admits that the last item (receipt of Rs. 100 in Velammal's favour) found at p. 96 of the account (Ex. A-1) is in the hand of Nellayappa Pillai. In that page balance from p. 6 has been brought forward. Hence there can be no doubt as to the truth of the debt itself. P. W. 1 swears that the debt is Velammal's stridhanam and there is no evidence contra. The fact that her husband has opened a separate ledger in her name shows that it is her separate property.

Issue 2.—It is admitted that Nellayappa Pillai left assets to the extent of Rs. 25,000 at his death.

Issue 3.—There is no evidence that Velammal did any act indicating an intention of satisfying the debt out of her husband's estate the Court delivered the following

Judgment.—The facts necessary to be stated for the disposal of the question of law raised in this petition are these. One Nellayappa Pillai died in January 1915 leaving a widow and a daughter born of a former wife; also about Rs. 25,000 assets. The widow was a creditor of her husband's estate to the extent of Rs. 478 which he owed her for her stridhanam. In January 1916 the widow made a will devising this debt of Rs. 478 to the plaintiff and died shortly after. The plaintiff brought this suit to recover the amount from the daughter, who succeeded to the estate of her father after the widow's death. The Subordinate Judge dismissed the suit, holding that it was not maintainable on the ground that, by the widow becoming possessed of assets whereby she could have paid off her own debt, the debt became extinguished. For this proposition he relied upon certain observations occuring in *Husainara Begum* v. *Rahmannessa Begum* (1) and in Chitty on Contract, p. 774 (Edn. 4). In the former, which was a case of a mortgagee appointed as administrator of his mortgagor's estate, it was stated that possession of assets amounts to payment on the principle that there is an extinguishment of the debt if the person who is to receive the money is also the person who ought to pay, reference being made to Williams on Executors, Edn. 10, Vol. 1, p. 1058, and to *Wankford* v. *Wankford* (2). These deal with the case of a debtor making a creditor his sole executor and leaving assets which come into that executor's hands. It is not alleged in this case that Nellayappa Pillai made his widow his executor in law or that she took out Letters of Administration to his estate. The principle which applies to executors does not extend to widows as such. A Hindu widow succeeding to her husband's estate is in a different position from an executor. This has often been pointed out. I will cite only one of the recent decisions of the Calcutta High Court: *Sudhir*

(1) [1910] 38 Cal. 342=8 I. C. 837.
(2) [1698] 1 Salk. 299.

Chandra Das v. *Kamal Chandra Dutta* (3), where the position of an executor was defined by Chitty, J., in the following and other words:

"It was argued that, as a widow or a guardian of a minor or shebait was a manager, therefore an executor, who was also a manager, stood in the same position. The argument is obviously fallacious. The analogy is in no sense complete, and the cases which deal with the peculiar powers of widows, guardians or shebaits have really no bearing upon the present question . . . . An executor under Statute is the legal representative of a deceased person for all purposes and all the property of the deceased person vests in him as such. . . . . The executor is therefore in many respects in a different position from a Hindu widow succeeding to her husband's estate a guardian of a minor, or a shebait of an idol. The estate of the testator is absolutely vested in the executor for the purposes of administration and he can deal with it as he pleases, subject of course to the responsibility for the due administration of the estate."

An attempt has been made to support the Subordinate Judge's decision by invoking the doctrine of merger. In this country the only statutory merger is that created by S. 101, T. P. Act, which runs thus:

'Where the owner of a charge or other incumbrance on immovable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished unless he declares, by express words or necessary implication, that it shall continue to subsist or such continuation would be for his benefit."

Now the widow's stridhanam in the present suit was at law not a charge or incumbrance within the meaning of this section, as it was not attached to any land. Again in equity the question of merger is one of intention, the presumption being that a person having a right to act in one of two ways is assumed in the absence of evidence to the contrary, to have acted according to his interest: vide *Gokaldas Gopaldas* v. *Puranmal Premsukh Das* (4). In the case of a limited owner the presumption is against merger, as it is not for his or her advantage that the charge should sink for the benefit of the remainderman (Halsbury's Laws of England, Vol. 13, p. 147). It is not for the advantage of a widow to pay off her stridhanam debt out of the income of her husband's estate as she is entitled to enjoy the whole of the income of the estate. The obligation she is under to discharge her husband's debts is a religious and a moral obligation. Moreover if intention is to be gathered from circumstances, the inference in this case is that the debt was intended to be kept alive, for not only has the Subordinate Judge found on the third issue remanded to him that there was no evidence that the widow did any act indicating an intention of satisfying the debt out of her husband's estate but the very fact of her making a will bequeathing the debt to the plaintiff denotes an intention on her part to keep it alive. On this preliminary point the Subordinate Judge's decision must therefore be reversed and the suit will be remanded for disposal on the other issues arising in the case. Costs will abide and follow the result.

S.N./R.K. *Appeal allowed.*

(3) [1917] 45 Cal. 538=41 I. C. 503.
(4) [1882] 10 Cal. 1035=11 I.A. 126=4 Sar. 543.

A. I. R. 1919 Madras 544

SADASIVA AIYAR AND NAPIER, JJ.

Samarapuri Chettiar — Defendant—Appellant.

v.

A. Sutharsana Chettiar and *another*—Plaintiffs—Respondents

Second Appeal No. 1218 of 1918, Decided on 2nd May 1919, against decree of Dist. Judge, Chingleput, in Appeal Suit No. 80 of 1917.

Contract Act (9 of 1872), S. 55—Contract for re-sale of property conveyed—Time is essence of contract.

The doctrine that time may not be of the essence of a contract, which arises on the construction of contracts of sale, should not be applied to contracts for the re-sale of property conveyed. The right to re-purchase being an option, must be exercised according to the strict terms of the power. [P 544 C 2]

T. Narasimha Aiyangar and *Sadagopachariar*—for Appellant.

Krishnamachariar—for Respondents.

Judgment.—The lower appellate Court was in error in applying the doctrine that time may not be of the essence of the contract, which arises on the construction of contracts of sale, to contracts for re-sale of property conveyed. The true doctrine is stated in Fisher on Mortgages, p. 11, Ch. 1, S. 18, and is that if the transaction is not a mortgage, the right to re-purchase, being an option, must be exercised according to the strict terms of the power: vide *Joy* v. *Birch* (1), *Ranelagh* v. *Melton* (2) and *Dibbins* v. *Dibbins* (3). There is no reason why a different rule should prevail in India. We therefore reverse the decisions of the

(1) [1836] 7 E. R. 22.
(2) [1864] 62 E. R. 627.
(3) [1896] 2 Ch. 348.

lower Courts and remit the case to the Court of first instance for the trial of issues one and four in the light of the observations of the Full Bench in *Muthuvelu Mudaliar* v. *Vythilinga Mudaliar* (4). Costs to abide. Appellants to have refund of costs paid on this memorandum of second appeal.

S.N./R.K. *Case remanded.*

(4) [1917] 42 Mad. 407=50 I. C. 205.

A. I. R. 1919 Madras 545

SADASIVA AIYAR AND SPENCER, JJ.

Sultan Moideen Sahib — Plaintiff—Appellant.

v.

Secy. of State — Defendant—Respondent.

Second Appeal No. 1831 of 1917, Decided on 27th September 1918, against decree of Sub-Judge, Tinnevelly in Appeal Suit No. 129 of 1916.

Madras Land Encroachment Act (1905), Ss. 6, 7 and 14—Suit for declaration and injunction against Government can be instituted within six months of notice of eviction.

A suit under S. 14 for an injunction restraining Government from interfering with plaintiff's possession and enjoyment of land from which it is sought to evict him can be instituted within six months of the notice of eviction.

Per *Sadasiva Aiyar, J.*—A suit for a substantive declaratory relief in respect of proceedings under the Madras Land Encroachment Act must be brought within six months from the time when the plaintiff's title is first definitely and finally denied to his knowledge, and the actual levy of penal assessment from him is such an unequivocal denial of title on the part of Government. [P 545 C 2]

Per *Spencer, J.*—A notice of eviction under the Madras Land Encroachment Act may properly be regarded as a fresh and greater invasion of the owner's right than a levy of penal assessment so as to give him a fresh cause of action for a declaration of his title. The prayer for declaration is incidental to the prayer for an injunction, as the plaintiff's right to obtain an injunction could not be determined without first coming to a conclusion on the question of title. [P 546 C 1]

A. Suudaram and *S. Parthasarathy Aiyar*—for Appellant.

V. Ramesam—for Respondent.

Sadasiva Aiyar, J.—So far as the relief for declaration of the plaintiff's (appellant's) title is concerned, his right to sue for such relief accrued once for all when his title was first definitely and finally denied to his knowledge: see *Thirumala Rao* v. *Kadekar Durgi Shettethi* (1), and the actual levy of penal assessment from him is clearly such an unequivocal denial of title on the part of Government. The notice of eviction under S. 6, Act 3 of 1905 also involves a denial of title, but it would not give a fresh starting point of limitation for declaratory relief and limitation runs from the date of the first denial of title itself and continues to run. Hence the claim for the declaratory relief is barred in this case, as penal assessment was levied more than six months before suit. I however find that the declaration is not prayed for in the plaint as a substantial relief, the injunction relief claimed being alone valued at ten rupees and court-fees of twelve annas paid thereon. As regards the suit then, treated as a suit for an injunction to restrain the defendant Secretary of State for India from interfering with the possession and enjoyment of the plaint land by the defendant, the levy of penal assessment does not give a cause of action for such relief and the plaintiff is therefore not bound to sue for that relief within the six months limited by S. 14, Act 3 of 1905 and is not even entitled to sue at all for that relief, as levy of penal assessment does not necessarily involve an immediate prospect or threat of ejectment proceedings. Notice of eviction was given to the plaintiff in this case within six months before the suit and that notice it was that gave to the plaintiff the cause of action to sue for the injunction relief, which in the above view is therefore clearly not barred. The decrees of the lower Courts are set aside and the suit remanded to the first Court for fresh decision after a trial of the issues arising in the case other than the issues 1 and 2. Costs hitherto will be provided for in the fresh decision. Court-fee stamp on the second appeal memo. will be refunded to appellant.

Spencer, J. — The Act 3 of 1905 gives to persons "deeming themselves aggrieved by any proceedings" under the Act a right to apply to the civil Courts for redress upon two causes of action, viz., (1) imposition of any penalty or prohibitory assessment; (2) eviction or forfeiture. In *Bhaskarudu* v. *Subbarayudu* (2) it was observed:

"If the plaintiff did not feel himself aggrieved by the notice or levy of the penal assessment, he was not bound to bring a suit for a declaration. He might wait till any further step taken by Government gives him a right of suit."

(1) A. I. R. 1914 Mad. 429=22 I. C. 888.

(2) A. I. R. 1914 Mad. 659=38 Mad. 674=21 I. C. 840.

This was not overruled by the Full Bench in *Secy. of State* v. *Illikhal Assan* (3), which only confirmed the view taken in *Narayana Pillai* v. *Secy. of State* (4) that a preliminary notice under S. 7 does not give rise to a cause of action. In *Secy. of State* v. *Ramanujam Chetty* (5) to which I was a party, we observed that the plaintiffs might have waited till they were actually evicted and the anicuts demolished when they would have got still another cause of action. Adopting the language used in *Cuddapara Anantarazu Garu* v. *Cuddapparazu Narayanarazu* (6), I am inclined to think that the owner's title is affected by an eviction in an altogether different and greater degree than it is by a charge of prohibitory assessment, and the eviction may properly be regarded as a fresh and greater invasion of the plaintiff's right so as to give him a fresh cause of action for a suit for a declaration of his title. Moreover in this case one of the remedies prayed for in the plaint was that an injunction be issued restraining the defendant from interfering with the possession and enjoyment of the plaint land in any manner whatsoever. An occasion for asking for this remedy did not arise when the plaintiff was merely asked to pay prohibitory assessment, but only when he received notice under S. 6 of the Act that proceedings were about to commence to evict him. The prayer for a declaration of title was a remedy incidental to the granting of the prayer for an injunction, as the plaintiff's right to obtain an injunction could not be determined without first coming to a conclusion on the question of title. As a notice under S. 6 of the Act is alleged in the plaint to have been served on the plaintiff on 26th March 1915 and his suit was instituted on 23rd September 1915 within six months of the commencement of the eviction proceedings. I hold that the suit is not barred if the date of the notice is correctly stated. The appeal must be allowed and the suit remanded for decision by the District Munsif of Tinnevelly on the issues other than those dealing with the question of limitation. I agree with the order as to costs.

S.N./R.K. *Suit remanded.*

(3) [1915] 39 Mad. 727=32 I. C. 755.
(4) [1912] 15 I. C. 257.
(5) [1919] 49 I. C. 264.
(6) [1912] 36 Mad. 389=13 I. C. 96.

A. I. R. 1919 Madras 546

SPENCER AND KRISHNAN, JJ.

V. Sreenivasa Chariar and *others*—Appellants.

v.

P. Kumara Thathachariar and *others*—Respondents.

Appeal No. 221 of 1917, Decided on 14th July 1918, from order of Dist. Judge, Chingleput, in Appeal Suit No. 443 of 1915,

Civil P. C. (1908), O. 23, R. 3—Agreement to abide by decision in another proceeding amounts to adjustment when that decision is passed.

An agreement between the parties to a suit to abide by the decision which may be made in another proceeding amounts to an adjustment of the suit when that decision is actually passed within the meaning of O. 23, R. 3: *A. I. R. 1914 Mad. 449 and 1 I. C. 622, Dist.*

Quaere.—Whether the parties are estopped from contending that they are not bound by the agreement. [P 547 C 1]

C. Narasimhachariar and *Srinivasachariar*—for Appellants.

T. Narasimha Aiyangar—for Respondents.

Spencer, J.—I am of opinion that the learned District Judge was mistaken in applying the decision in *Rajah of Venkatagiri* v. *Chinta Reddi* (1) to the facts of this case. In *Rajah of Venkatagiri* v. *Chinta Reddi* (1) this Court had before it an agreement, as to which there was no written record, of the exact representations of the parties, to postpone the settlement of a dispute, and to take a Small Cause suit out of the control of the Small Cause Court having jurisdiction to decide it, and to make the decision of the Small Cause suit depend upon the decision of the District Munsif in an original suit whose decision would in the ordinary course be subject to appeal. The effect of recognising such an agreement would have been to abrogate the unsuccessful party's right of appeal against the District Munsif's decision and to oust the jurisdiction of the Small Cause Court in a manner not contemplated by law. Accordingly the learned Judges declined to give effect to such an "unauthorized" agreement.

We have also been referred to the case of *Rukhanbai* v. *Adamji* (2) decided by a single Judge. There, Beaman, J., was

(1) A. I. R. 1914 Mad. 449=37 Mad. 408=15 I. C. 378
(2) [1909] 33 Bom. 69=1 I. C. 622.

dealing with a case of an agreement to refer the matter in dispute in an administration suit to the decision of an Assistant Commissioner. He held that there had been no regular submission to arbitration and no acceptance by the parties of the so-called arbitrator's award. He finally made an order referring the matter back to the very same arbitrator. The facts of that case are dissimilar from those of this case. Now in the present case we have an agreement in writing signed by the vakils of the contesting parties to aside by the final decision of another appealable suit in a connected case. I fail to see any valid reason why this agreement plus the final decision of the High Court in Original Suit No. 295 of 1886 does not conclude the claims of the parties in this suit and operate as an adjustment of the suit, The decision of the District Judge must therefore be set aside and the decree of the District Munsif restored with costs here and in the District Court.

Krishnan, J.—I agree with my learned brother. In this case there was an agreement between the parties to abide by the decision of the High Court in another suit in which the same questions as were involved in this suit seem to have been raised. The arrangement was made by statements of the vakils in Court and was recorded by the Court, and in accordance with it the Court adjourned the hearing of the case till the disposal of the appeal in the High Court. The High Court has now given its decision. The respondents before us, against whose view that decision apparently went, contend that they are not bound by the previous arrangement and want this suit to be tried on the merits. In the first Court, they urged that their vakil was not authorized to enter into such an agreement but that was found against. They now rely on *Rajah of Venkatagiri* v. *Chinta Reddi* (1) and contend that the agreement in question is not a valid agreement and is no bar to their claim to have their suit heard on the merits. It seems to me that though the agreement was a conditional one at the time when it was entered into, it became completed as soon as the High Court's decree was passed and it amounted to a valid adjustment of the suit under O. 23, R. 3, Civil P. C. In the case relied on, the terms of the agreement are not found. The learned Judges seem to have looked at it as tantamount to an agreement to postpone the settlement of the case. They say,

"the agreement did not settle the dispute but postponed the settlement and purported to authorize the Court to settle it in a certain manner."

The agreement in the present case was one putting an end to the dispute in the suit as soon as the High Court's decree was passed. Parties not having resiled from their agreement before that decision was given, I fail to see how it can now be said that the suit has not been adjusted wholly by a lawful agreement, the Court having only to pass a decree in accordance with the agreement. Whatever their position may have been before the High Court's decision, it seems to me that O. 23, R. 3, clearly applies now. If the case of *Rajah of Venkatagiri* v. *Chinta Reddi* (1) intended to lay down that all agreements in suit to abide by the decision in some other suit are ipso facto invalid, I am with all respect unable to follow it and if it is not distinguishable, I should have felt bound to refer the question to the Full Bench. But as stated above, the nature of the agreement set up in it is not clear. The decisions relating to reference to arbitration are not in point, as various other considerations arise in them. It has also been argued before us that the respondents must be held estopped from contending that they are not bound by the arrangement in question and the cases of *Bahir Das Chakravarti* v. *Nobin Chunder Pal* (3) and *Protap Chunder Dass* v. *Arathoon* (4) were relied on. This question was not considered in *Rajah of Venkatagiri* v. *Chinta Reddi* (1). There is considerable force in this contention but it is not necessary to decide it in the present case, as in my view a completed adjustment has resulted. I agree to the order proposed by my learned brother.

S.N./R.K. *Appeal allowed.*

(3) [1902] 29 Cal. 306.
(4) [1882] 8 Cal. 455.

A. I. R. 1919 Madras 547

WALLIS, C. J. AND NAPIER, J.

C. Cunniah—Defendant—Appellant.

v.

K. Gopal Chettiar — Plaintiff— Respondent.

Original Side Appeal No. 34 of 1918, Decided on 15th December 1918

(a) **Transfer of Property Act (4 of 1882), Ss. 8 and 54—Provisions of S. 54 cannot affect express provisions of S. 8.**

The general provisions of S. 54 as to sales by act of parties cannot be construed as affecting the express provisions of S. 8 as to the transfer of securities being attendant on the transfer of the debt. [P 549 C 1]

(b) **Transfer of Property Act (4 of 1882), S. 9—Pro-notes secured by deposit of title deeds—Equitable mortgage is created — Registration is not necessary.**

The transfer of a promissory note secured by deposit of title deeds passes the equitable mortgage with it and no separate registered document is necessary to evidence the latter: 23 *A. I. R.* 1914 *Mad.* 353 and 18 *Mad.* 454, *Foll.*: 24 *Mad.* 449, *Diss. from.* [P 548 C 1]

(c) **Transfer of Property Act (4 of 1882), Ss. 9 and 54—Assignment of pro-notes for collection—Deposit of title deeds—Security passes—S. 9 applies.**

Per *Napier, J.*—Where the assignment of pro-note is not for consideration but for collection, S. 9, applies and the title-deeds having been delivered with an intention to transfer, there is a legal transfer and title passes along with the assignment. [P 549 C 1]

T. V. Venkatrama Aiyar and *G. Krishnaswamy Aiyar*—for Appellant.

Venkatasubba Row and *Radhkrishnaya*—for Respondent.

Wallis, C. J.—In this case the defendant borrowed money from a Chetty on a promissory note secured by a deposit of title deeds. The Chetty endorsed the promissory note to the plaintiff for collection and at the same time gave him the title-deeds, and the plaintiff sued on the equitable mortgage Bakewell, J., has given him a decree holding that, under S. 8, T. P, Act, the security passed to the plaintiff with the debt and that the objection that the transfer of the mortgage interest was a sale and required registration under S. 54, T. P. Act, did not arise. In this he was clearly right. He also referred to my decision in *Dwarka Doss* v. *Danakoti Ammal* (1), following *Subramaniam* v. *Perumal Reddi* (2), that even if there had been consideration for the transfer of the debt, the mortgage security would have passed with it, although that decision had been questioned obiter by Bhashyam Aiyangar, J., in *Ramasami Patter* v. *Chinnan Asari* (3). As this last decision has been dissented from in Allahabad, with reference to Bhashyam Aiyangar, J.'s dictum, and as this provision of the section has received very little consideration, it may be as well to point out that in that dictum the learned Judge makes no reference to the provisions of S. 8. Having pointed out that the transfer of an equity of redemption for consideration was the sale of an intangible thing within the meaning of S. 54, he said the same thing about the transfer of the mortgagee's interest and expressed his dissent, without further discussion from *Subramaniam* v. *Perumal Reddi* (2). It seems to me, with great respect, that the learned Judge gave too little weight to the provisions of S. 8, if indeed he considered them at all.

Those provisions of the section, which are new and were not, like the earlier part of the section, taken from the Conveyancing Act, 1881, are an application of a general rule of jurisprudence taken from the civil law and variously expressed in such maxims, as *res accessoria sequitur rem principalem* or *accessorium non ducit, sed sequitur suum principalum* Co. Litt 152 a. Though in *Walker* v. *Jones* (4) the Privy Council declined to say that in England the mortgage security could never be separated from the mortgage debt, Lindley, L. J., in *Patrick, In re* (5) was inclined to hold that a transfer of the security might be implied from a transfer of the debt, and in the note to this section in Mr. Ghose's Law of Mortgage it is stated that this is the law in America. It is clearly inconvenient that the security should be separated from the debt, and should remain in the hands of the transferor who has no further interest in it. The legislature has therefore, seen fit to enact that, unless a contrary intention is expressad or necessarily implied, the transfer of the debt shall pass forthwith the securities therefor, that is to say, by a statutory transfer without further act of the parties. Securities in the section must obviously include mortgages of immovable property which are the most valuable class of securities, and the operation of this beneficial statute cannot, in my opinion, be cut down and practically nullified by the provisions of S. 54, which require transfers of immovable property or intangible things by way of sale to be in a particular form.

Section 54 applies to transfers by act of parties and does not cover statutory transfer such as that provided in S. 8 on

(1) A. I. R. 1914 Mad. 353=23 I. C. 129.
(2) [1895] 18 Mad. 454.
(3) [1901] 24 Mad. 449.
(4) [1866] 1 P. C. 50.
(5) [1891] 1 Ch. 82.

grounds of policy and convenience. In any case the rule of construction contained in the maxim generalia specialibus non derogant is sufficient to show that the general provisions of S. 54 as to sales by act of parties cannot be construed as affecting the express provisions of S. 8 as to the transfer of the securities being attendant on the transfer of the debt. S. 8 speaks of a "debt or other actionable claim", and it has been argued that its operation has been affected by the definition of "actionable claim" inserted in the Act in 1900, which excludes debts secured by the mortgage of immovable or moveable property. The section however applies in terms to secured debts whether they are actionable claims or not, and if the legislature had desired to repeal this provision entirely, it would have done so. Full effect must no doubt be given to the legislative provisions which make registration essential to the validity of certain transactions in India, or render unregistered documents inadmissible in evidence in proving such transactions. The ordinary rules of statutory construction must nonetheless be applied to the provisions of S. 8, even if the result should be to permit unregistered transfer of mortgages. In the present case the debt has been transferred by the endorsement of the promissory note and the equitable mortgage passed with it. Seeing that the equitable mortgage was created by deposit of title deeds without registration, the anomaly would be if the transfer required registration.

The appeal is dismissed with costs.

Napier, J.—The assignment in this case was admittedly not for consideration but for collection. It is not therefore covered by any of the chapters special to certain classes of transfer in the Transfer of Property Act. S. 9 accordingly applies and the documents having been delivered with an intention to transfer, there is a legal transfer and title passed. I therefore agree that this appeal must be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 549

SPENCER AND KRISHNAN, JJ.

K. Ramachendra Thevar—Appellant.

v.

S. V. Velayutha Nadan—Respondent.

Second Appeals Nos. 1639 to 1644 of 1916, Decided on 17th April 1918.

(a) Madras Estates Land Act (1 of 1908), Ss. 3 (11), 13 (3) and 143—Payment by tenant of higher rate of rent before passing of Act—Contract to pay the same in future is implied.

Section 13 (3) does not preclude the Court from finding, from the payment of the higher rates for a long series of years prior to the passing of the Act, that an implied contract existed to pay at these rates in the future. The consideration for such an agreement may be presumed from the same facts as the agreement itself. [P 549 C 2]

(b) Madras Estates Land Act (1 of 1908), Ss. 3 (11), 13 (3) and 143—Levy of pada nazar is not valid.

Pada nazzar, not being a part of rent cannot be levied from a tenant. 31 *I. C.* 539, *doubted*. [P 550 C 1]

K. N. Aiyar—for Appellant.

P.M. Srinivasa Ayyangar, A. Chidambaram and *C. H. Nilkanta Mudaliar*—for Respondent.

Judgment.—The landlord in these suits under the Madras Estates Land Act appeals in respect of three items, namely Vanpayir, (2) Pada Nazzar, (3) Vagaira. On the first point, we think that the District Judge was in error in regarding the provisions of S. 13 (3) of the Act as precluding him from finding from the payment of higher rates for a long series of years prior to the passing of the Act, that an implied contract existed to pay at these rates in future. It was decided in *Venkata Perumal* v. *Ramudu* (1) that S. 13, applied to improvements made after the new Act came into force and had no retrospective effect. The Judge has referred to the fact that the Jamabandi accounts and Pattas show that these special rates have been paid since 1830, and we must now ask him to find as a question of fact whether the payments made by each the of tenants concerned in these appeals have been continuing for such a length of time that it may be properly presumed that they are based on an agreement between the parties and that there must have been some consideration for that agreement. We do not follow the judgment of the learned Judges that decided *Arunachelum Chetty* v. *Syyad Aahmed Ambalam* (2) so far as they expressed an opinion that consideration for agreement implied from payments for a number of years must depend on independent proof for its existence and cannot be presumed from the same facts as the

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(1) [1915] 39 Mad. 84=27 I. C. 688.
(2) [1916] 31 I. C. 539.

agreement itself: vide *Prayaga Doss Jee Varu* v. *Venarama Naidu* (3).

On the second point, the District Judge has found that Pada Nazzar was not a part of rent, there is evidence to support his finding and the name itself suggests that it is a payment of the description referred to in S. 143, rather than in S. 3 (11), of the Act. We think this was rightly disallowed. On the last point it has not been shown that any crops other than those described in Cl. 9 of the Patta were grown in the suit Faslis and therefore, the omission of the word "vagaira" in the Pattas for that Fasli is immaterial. The clause as amended by the lower Court may stand in the present Patta.

Finding on the first point is to be on the evidence on record and is to be returned within two months. Ten days will be allowed for filing objections.

(In compliance with the order contained in the above judgment, the District Judge of Ramnad at Madura submitted the following)

Finding.—I am directed to find as a question of fact:

"Whether the payments made by each of the tenants concerned in these appeals have been continuing for such a length of time that it may be properly presumed that they based on an agreement between the parties and that there must have been some consideration for that agreement."

'Both the presumptions referred to in the issue are presumption of fact and as observed by their Lordships in *Prayaga Doss Jee Varu* v. *Venkama Naidu* (3), "there is no principle by which Courts are to be enabled to make the one presumption and disabled from making the other, and the consideration may be of the same implied nature as the covenant to pay."

Before referring to the evidence adduced in the cases before me, it may be useful to quote another important observation of their Lordships in the said second appeals that:

"the distinction between contract rates and customary rates is a very subtle one as between landlords and tenants and that the facts and the evidence to prove a contract where the contract is a very old one are almost the same as those on which a custom to pay enhanced rents has to be proved, if such a custom is valid."

Now we have three tenants concerned in these cases. One of them holds Pattas Nos. 457 and 42. Patta No. 457 corresponds to old Pattas 266 and 372. Exs. 11, 11 (a) and 11 (b) are Muchilikas for Faslis 1292, 1299 and 1300 respectively. Es. A to A (6) are Pattas for Patta No. 266 for Faslis ranging from 1305 to 1317. Exs. B to B (2) are Pattas for Pattadar No. 372 for Faslis 1310 to 1382. Exs. 11 (c) and 11 (d) are Muchilikas for recent Faslis 1319 and 1320. It will be noticed that the earliest of these documents relates to Fasli 1292 (1882-83.) Another tenant is concerned with Patta No. 150 and the documents 17 (a) and 17 (b) are for Faslis 1305 and 1306. They are the earliest Faslis for which Pattas and Muchilikas are produced. The third tenant holds Patta No. 433. In respect of his holding the earliest Muchilika produced is for Fasli 1291. These documents would show that in the case of two of the tenants, Vanpayir rates have been levied for over thirty years and in the case of the other for about twenty years. This does not mean that Vanpayir rates were not levied earlier. D. W. 1 proves a number of old Jamabandi accounts, which show that cropwar assessment was levied in respect of lands in the village for a long series of years commencing so early as 1830. D. W. 2 swears that the several cropwar rates deposed to by him are very old rates and have not been subject to any changes within his knowledge. In fact P. W. 1 speaking on behalf of himself and of the other tenants deposed that "we have been paying special rates for Vanpayir." The tenants object to those rates now merely because they have been advised that there has been a change in the law in their favour. But for this impression this dispute would not have arisen either in these cases or in the numerous other cases which have recently come up before the Courts in this District. In fact it was accepted in the lower Court as an undisputed fact that the tenants were paying these special rates from time out of memory. If the fact of yayment was in itself a matter of dispute, the landlord would have put into Court a much larger quantity of documeutary evidence in support of his claim. Even as the evidence stands now, I think it establishes the landlord's claim. I would therefore return a finding in the affirmative on the issue remitted by the High Court.

(These second appeals and the memorandum of objections coming on for final hearing after the return of the findings of the lower appellate Court upon the

(3) [1918] 44 I. C. 641.

issue referred by this Court for trial, the Court delivered the following:)

Judgment. — We accept the lower Court's finding about Vanpayir. The decree will be varied accordingly.

In place of Cl. (b) in the District Court pattah at p. 24 of the printed papers, we direct Cl. 9 in the form of patta approved by the Special Deputy Collector at p. 20 to be inserted. In other respects the District Judge's patta will stand for the suit Faslis. The parties will pay and receive proportionate costs throughout.

S.N./R.K. *Decree varied.*

A. I. R. 1919 Madras 551

SPENCER AND KRISHNAN, JJ.

Audi Raju Pyrappa and *another* —Defendants—Appellants.

v.

Audi Raju Syma Rao and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 460 of 1917, Decided on 7th August 1918, against decree of Temporary Sub-Judge, Cuddapah, in Appeal Suit No. 273 of 1916.

Madras Hereditary Village Offices Act (1895), S. 10—Enfranchisement of karnam's inam—Divided members are not entitled to share in property at date of enfranchisement with other members of coparcenary of of title-holder.

A person, who belongs to a family having a hereditary interest in a Karnam's inam and becomes divided in status from the holder of the office for the time being, cannot when that inam is subsequently enfranchised by the Government, claim a share in the lands that formed the emoluments of the office of Karnam.

When the land is enfranchised from the condition of service, it does not become partible among all persons having hereditary interest in the office through descent from the original grantee, but is partible only among those who belong to the joint family of the holder of the office at the time of enfranchisement. 26 *Mad.* 339 and *A. I. R.* 1915 *P. C.* 230, *Cons.* 30 *Mad.* 434 (*F. B.*); 30 *I. C.* 889, *Expl.* [P 552 C 1]

Per *Spencer, J.*—Till an inam is enfranchised the family of the grantee has a possible right of enabling the Government to select a member from any one of its branches and a potential right of holding the property as joint family property. As soon as enfranchisement takes place, what was a potential or contingent right becomes a substantial right under Hindu law, for those members of the family of the inamdar, who by reason of their co-parcenary have an equal right to enjoy with him the ordinary joint family property. No one belonging to a divided branch of that family would have a right to come in and take a share of the property of the joint family. [P 552 C 1,2]

Per *Krishnan, J.*—So long as the lands remain unenfranchised, the office holder has the exclusive right to their enjoyment and the succession devolves, under Madras Act 3 of 1895, on a single heir according to the general custom and rule of primogeniture. Each of the other members of the family has only a possible right of succeeding to the office and the emoluments thereof, a contingent interest dependent on his becoming the nearest qualified heir when the office falls vacant. Such a contingent interest cannot be said to be kept alive in favour of a divided member so as to give him rights in the property when enfranchised unless, at any rate, there is evidence to show that such right was reserved at the time of partition and recognised by the parties. [P 551 C 1]

T. V. Venkatarama Aiyar—for Appellants.

P. Narayanamurthy — for Respondents.

Spencer, J.—The question that has arisen for determination in this second appeal is whether a person, who belongs to a family having an hereditary interest in a karnam's Inam and becomes divided in status from the holder of the office for the time being, can, when that inam is subequently enfranchised by the Govrnment, claim a share in the lands that formed the emoluments of the office of karnam. In other words, when an inam is enfrachised from the condition of service, does it become partible among all persons having an hereditary interest in the office through descent from the original grantee or only among those who belong to the joint family of the holder of the office at the time of enfranchisement? The respondent's pleader relies upon an observation of Bhashyam Aiyangar, J., at p. 354 in *Gunnayan* v. *Kamakchi Ayyar* (1)

"that in the absence of any evidence to the contrary, it must be presumed that the family of the parties were the holders of the hereditary office up to the date of the enfranchisement of the Inam."

The "family" referred to in that sentence was the family of the parties to an unreported case [Second Appeal No. 222 of 1896]. All the parties to *Gunnaiyan* v. *Kamakchi Ayyar* (1) were members of an undivided family. Therefore any observations that occur in that judgment must be understood as having no express reference to the claims of any members who had become separated from the family of the holder of the office at any date before enfranchisement. *Pingala Lakshmipathi* v. *Chalamayya* (2), which mentions the rights possessed by "other persons" in the item

(1) [1903] 26 Mad 339.
(2) [1907] 30 Mad. 434 (F.B.).

of the enfranchisement, does not attempt to define the class to which such "other persons" must belong in order to have such rights. There was no decision of the point which has now arisen. In *Karri Ramayya* v. *Villori Jagannadham* (3) the rights of the members of a joint family having a hereditary interest in a service inam were recognized, but we expressly declined to consider what would be the position of the parties if the family had been divided at the time of enfranchisement as there was no evidence of division and as the point was not taken in the appeal memorandum. As there appears to be no reported case directly on the point, it is necessary to consider what is the legal position of persons belonging to the families in the names of which karnam inams have been registered. Under S. 10, Cl. 2, Madras Act 3 of 1895, the succession to the office of karnam devolves on a single heir according to the general custom and rule of primogeniture governing succession to impartible zamindaris in Southern India. Under Cl. 3, when a vacancy occurs, the Collector appoints the nearest qualified heir in the order of succession to the last holder of the office. The person so appointed is under S. 13, entitled to recover the emoluments of the office from any other parson into whose hands they may have fallen, emoluments being defined in S. 4 as including lands.

Thus at the moment when enfrachisement takes place, no one can have a better title to the lands attached to the office than the registered holder of the office. All other members of his family have up to then no more than what, in the words of the Judicial Committee in dealing with the succession of an impartible estate in *Thakurani Tara Kumari* v. *Chaturbuj Narayan Singh* (4) may be described as a contingent interest. In the language of the learned Judges who recently decided Appeal No. 178 of 1917 (unreported),

> "till enfranchisement the family had a possible right of enabling the Government to select a member from any of its branches and a potential right of holding the property as joint family property when in the enfranchisement the Government disannexed the emoluments from the land and enfranchised it."

As soon as enfranchisement takes place what was a potential or contingent right becomes a substantial right under Hindu law for those members of the family of the inamdar, who by reason of their coparcenary have an equal right to enjoy with him the ordinary joint family property. No one belonging to a divided branch of that family would have a right to come in and take a share of the property of the joint family. Of course a title-deed that happened to be issued by the Government in favour of a person who was not in the family of the holder of the office at the time of the enfranchisement, would confer no legal title against the true owners of the property see the observations at the top of p. 349 in *I.L.R.* 26 *Mad.* So in the present case the plaintiff having by his father's suit of 1885 become divided from the family of the defendants, is not now entitled to claim a share in the suit lands, which in consequence of the act of enfranchisement in 1889 became the joint family property of the defendants' branch and liable to partition only among the undivided members of that branch as it existed on the date of enfranchisement. Seeing that a right to a partition of the lands, which only became in 1889 the joint property of the defendants' undivided family, did not at any time become vested in the plaintiff, the question of limitation discussed in the judgments of the lower Courts and argued at the hearing of the second appeal does not arise. Much less is it necessary to consider whether the plaintiff possesses any right to succeed to the share of Giremma, as she had no more than a contingent interest at one time in the office of Karnam and the emoluments attached thereto, an interest that did not materialize. The appeal must be allowed and the suit dismissed with costs throughout.

Krishnan, J.—This second appeal relates to two items of lands which at one time formed the emoluments of a Karnam office which was hereditary in the joint family of defendant 1 and his brothers. In 1885 Ramayya, one of the brothers, and the father of the plaintiff and of defendant 3 sued defendant 1 and others for the partition of their family properties in Original Suit No. 3 of 1885 and obtained a decree for it. No mention was made of these lands in that suit. They were then in the exclusive enjoyment of defendant 1 who was the office-holder or Karnam at the time. In 1889

(3) [1915] 39 Mad. 920=30 I. C. 889.

(4) A. I. R. 1915 P. C. 30=42 Cal. 1179=30 I. C. 833=42 I. A. 192 (P.C.).

these lands were enfranchised in defendant 1's name, and it is found by both the lower Courts that he has continued in exclusive enjoyment of these lands for the last 24 years without giving any share in the profits to the plaintiff or his brother defendant 3. Plaintiff has brought this suit now, claiming a ¼th share in them and for partition and delivery to him of that share. The lower Courts have given him a decree as also to his brother defendant 3, holding that on enfranchisement they became entitled to the shares claimed in spite of the previous partition decree in Original Suit No. 3 of 1885 and that their claim was not barred by limitation as proof of mere nonparticipation in the profits was not sufficient for the purpose and as there was no proof of ouster or exclusion of plaintiff and his brother to their knowledge from the enjoyment of such profits. Defendant 1 and his son, defendant 2, have appealed to us against that decree. The claim as regards the item 3 of property was dismissed by the first Court and no question arises about it now.

The first point taken before us by the learned vakil for the appellants is that plaintiff and his brother have not proved that they are entitled to any share at all in the Inam lands. This question depends upon whether the plaintiff's branch of the family had any existing interest in the lands on the date of the enfranchisement and upon what exactly was the effect of the enfranchisement in the name of defendant 1. After the ruling of the Full Bench in *Pingala Lakshmipathi* v. *Chalamayya* (2) it cannot be contended that by the enfranchisement in his name defendant 1 got an exclusive title to the lands, in fact the appellant's vakil did not so contend. There the Full Bench accepting the view of Sir Bhashyam Ayyangar, J., in *Gunnaiyan* v. *Kamakchi Ayyar* (1) laid down that the effect of the enfranchisement in cases like the present was

"to disannex the Inam from the office and convert it into ordinary property and release the reversionary rights of the Crown, but that it did not confer on the person in whose name the title-deed was given any right in derogation of those possessed by other persons in the Inam at the time of the enfranchisement."

We are bound to follow this ruling and make it the basis of our decision, though it is stated that the question is now before the Privy Council for decision and though it is not altogether free from doubt. Applying this principle we must see whether plaintiff's branch was possessed of any rights in the Inam lands at the date of the enfranchisement. On that date they had ceased to be members of the joint family of defendant 1, for it is conceded that though the decree in Original Suit No. 3 of 1885 was subsequently declared to be unexecutable it completely put an end to the co-parcenary existing between them previously. The appellant argues that the benefit arising from the enfranchisement of the lands should be extended only to the members of the joint family of the person in whose name the title-deed is given as it existed at the date of the enfranchisement and to no others. There are some observations of Sir Bhashyam Ayyangar, J., in *Gunnaiyan* v. *Kamakchi Ayyar* (1) in favour of this argument, but as the learned Judge had not in his contemplation the case of an enfranchisement after partition we cannot treat them as authority here; as pointed out by my learned brother, neither the observations in this case nor those in *Karre Ramayya* v. *Villoori Jagannadham* (3) are of any authority on the point before us. The respondents' vakil has, however drawn our attention to three unreported decisions of this Court in Second Appeal No. 49 of 1911, Appeal No. 79 of 1917 and Appeal No. 176 of 1917, where the enfranchisement took place after partition. In those cases persons who had divided off from the persons who subsequently obtained the title deeds for the enfranchised lands were held to be entitled of shares in those lands. They are, no doubt, authority for holding that partition before enfranchisement is not in itself conclusive of the question whether a person has rights or not in the enfranchised lands. But in all those cases there were circumstances justifying the inference that was drawn in them, that in spite of the partition the rights of the divided members were kept alive in the inam lands at the date of enfranchisement.

In Second Appeal No. 49 of 1911 the learned Judges say that it was not disputed that the land was treated as property in which all the members of the family had an interest; in Appeal No. 79 of 1917 they say "there can be no doubt the lands were enjoyed in common."

Appeal No. 176 of 1917 followed the ruling in Appeal No. 79 of 1917. These rulings thus show that even though a person may have been divided off from the person who subsequently obtained the title deed for the enfranchised land, he may prove that his right was kept intact at the partition and claim his share.

So long as the lands remain unenfranchised, the officer-holder has the exclusive right to their enjoyment and the succession devolves under Madras Act III of 1895 on a single heir according to the general custom and the rule of primogeniture. Thus, as obsevred by my learned brother, each of the other members of the family has only a possible right of succeeding to the office and the emoluments thereof, a contingent interest dependent on his becoming the nearest qualified heir when the office falls vacant.

We can scarcely hold that such a mere contingent interest is kept alive in favour of a divided member so as to give him rights in the property when enfranchised unless at any rate there is evidence to show that such right was reserved at the time of partition and recognized by the parties. I am not able to argee with the respondent's contention that every person who is shown to be the lineal descendant of the original grantee of the inam, however remote he may be from the person who got the title-deed, and whatever the length of time may be when his branch divided off from the branch holding the office and whatever may be the number of subsequent partitions in the family, must be held to have a share in the lands when enfranchised unless it is proved against him that his right had become extinguished. I think that will be extending the rule laid down in *Gunnaiyan* v. *Kamakchi Ayyar* (1) much too far. In the present case except the fact that the karnam office was hereditary in family when the plaintiff's father was a member of it there is nothing to show that the lands in question were treated as joint family property either before or after enfranchisement or that any rights in them were reserved in plaintiff's father's favour when he sued for partition and got his decree. There was no reference to those lands in the plaint in Original Suit No. 3 of 1885 and though it is 24 years now since the enfranchisement took place, no claim to these lands seem to have been put forward by the plaintiff till now and no share in the profits was enjoyed by him or by his brother all this time. There is no proof hereof any common enjoyment as in the unreported decisions cited above and they are all thus clearly distinguishable from the present case. The lands were all along being enjoyed by defendant 1 and if the plaintiff's branch had any rights in them and wanted such rights to be kept alive after partition, they should have reserved them in some manner. They may have failed to do so because the prevalent view at the time was that the lands when enfranchised would belong to the person to whom the title deed was given by the Government, but they cannot for that reason alone be consequently allowed to allege a right which if they had it, they did not take care to preserve.

I am, therefore of opinion that on the findings in this case plaintiff and defendant 3 have failed to show that they are "other" persons referred to in the Full Bench case as having rights in the inam lands at the time of enfranchisement. Their claims must therefore fail and it is unnecessary to consider the other questions raised. I agree to the order proposed by my learned brother.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 554

AYLING AND KRISHNAN, JJ.

Badmi Seshiah—Defendant—Appellant.

v.

Katti Chinna Marippa and *another*—Plaintiff and Defendant—Respondents.

Civil Misc. Appeal No. 171 of 1918, Decided on 17th October 1918, against order of Dist. Court, Bellary, in Appeal Suit No. 114 of 1917.

Civil P. C. (5 of 1908), S. 47 and O. 21, R. 103—Right of suit under R. 103 is not restricted by S. 47.

Order 21, R. 103, Civil P. C., which gives a right of suit to a party who is not a judgment-debtor, is not restricted by the general provisions of S. 47. 23 *Mad.* 361 (*F. B.*), *Expl.* [P 554 C 2]

B. Somayya and *B. Bhima Row*—for Appellant.

C. Narasimhachariar and *A. Narasimha Aiyar*—for Respondents.

Judgment.—Plaintiff is not a judgment-debtor; and O. 21, R. 103, Civil P. C., specially gives him a right of suit. This rule is not, in our opinion, restricted by the general provisions of S. 47,

Civil P. C. The decision in *Ramaswami Sastrulu* v. *Kameswaramma* (1) was passed under the old Code; and we may respectfully add, does not consider the distinction between a party to the suit and judgment-debtor as defined in the Code. The appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1900] 23 Mad. 361 (F. B.).

A. I. R. 1919 Madras 555

ABDUR RAHIM AND SESHAGIRI AIYAR, JJ.

Alagappa Chettiar—Plaintiff—Appellant.

v.

Lakshmanan Chettiar and *others*—Defendants—Respondents.

Appeal Suit No. 62 of 1917, and Civil Misc. Appeals Nos. 173 and 306 of 1917, Decided on 14th March 1918, against decree of Sub-Judge, Tuticorin and Dist. Judge, Tinnevelly.

Trusts Act (1882), Ss. 5 and 6—Trust-deed empowering trustees to sell moveables and immovables and collect outstandings—Deed containing no words of transfer—Document does not create trust nor, document being indivisible, rights of trusteeship even in respect of moveables.

Under S. 5, a document purporting to be a deed of trust must contain words of transfer in order to operate as a trust and vest the property in the trustee as the legal owner, although no particular form of expression is necessary. Mere intention to create a trust however is not sufficient. [P 556 C 1]

Where a document which was described as a trust deed was executed in favour of a person empowering the latter to sell all moveable and immovable properties of the executant and to recover the outstandings and distribute the assets rateably among the creditors, but the deed contained no words of transfer.

Held: (1) that the document did not create a trust under Ss. 5 and 6, Trusts Act; 17 *I.C.* 176, *Expl.*

(2) that as the document was one and indivisible, it did not create any rights of trusteeship even in respect to moveable property;

(3) that no security or charge was created in respect of the moveable property in favour of the trustee. [P 556 C 1, 2]

Quaere.—Whether the trustee could sell the properties of the executant? [P 556 C 2]

C. V. Ananthakrishna Aiyar — for Appellants.

T. R. Venkatrama Sastri and *K. V. Krishnaswami Aiyar*—for Respondents.

Abdur Rahim, J.—The common question in all these appeals relates to the interpretation of Ex. 1, which is described as a deed of trust. The contest is between the Official Receiver appointed in the insolvency of Pachaperumal Chetty, and some of his creditors who are said to have been appointed trustees of the property of the insolvent for the benefit of all the creditors. The lower Court has held that the Official Receiver is entitled to possession of the assets of the insolvent as they had vested in him, and not the person described as trustees Ex. 1. Ex. 1 was executed on 25th October 1913, and Pachaperumal Chetty was adjudicated an insolvent on his own application in April 1915. So, if there was a valid trust for the benefit of his creditors created by Ex. 1, the claim of the trustees will prevail against that of the Official Receiver.

It is necessary for the creation of a trust that the property should be transferred to the trustee. But reading Ex 1. it is quite clear that there are no words of transfer to be found in it, either with respect to the immovable property or the outstandings or moveables. What Ex. 1 does is to give power to the person named therein to sell all the properties belonging to the insolvent and to recover the outstandings, and to distribute the assets rateably among the creditors. The document, as already mentioned, is described as a trust deed and it was duly registered. But the appellant has not been able to point out any expression in the document which could possibly be construed as creating a transfer or assignment of the properties in favour of the so-called trustees. The mere description of the deed as a trust-deed can have no effect, if as a matter of fact the deed does not purport to transfer or assign the property to the so-called trustees. We have been referred to a decision in *Kondu Kanhuji Dhavde* v. *Vishnu Moreshvar Bhat* (1), where it is laid down by Chandavarkar, J.,

"Words of conveyance, it has been held, are not absolutely necessary to create a transfer."

The learned Judge however does not mention any authorities, where it has been so held; and Mr. Ananthakrishna Aiyar was not in a position to produce any in support of this proposition. He relies on a passage in the well-known judgment of the Privy Council in *Hunoomanpersaud Panday* v. *Mt. Babooee Munroj Koonweree* (2), which I shall notice presently. It seems to me with

(1) [1913] 37 Bom. 53=17 I. C. 176.

(2) [1854-57] 6 M. I. A. 393=2 Suth 29=1 Sar. 552 (P.C.).

the utmost respect to the learned Judge who decided *Kondu Kanhuji Dhavde* v. *Vishnu Moreshvar Bhat* (1) that it is a novel proposition that a deed of transfer does not require any words of conveyance. If all that was meant was that no particular words or forms or conveyance are necessary, there would be no difficulty in accepting such a statement, and that is all that is stated by the Privy Council in the judgment alluded to. What they say is:

"Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses."

But although a particular form of expression is not necessary, some expression must be there which could be construed as being intended to create a transfer. But where there are absolutely no words of transfer, no question of construction arises at all for there is nothing to be construed. If we were to say that Ex. 1 in this case created a transfer in favour of the persons named therein, we should be so holding without any sort of language to support such a construction. S. 6, Trusts Act requires for the creation of a trust that the trust property should be transferred to the trustee. It is in these words:

"Subject to the provisions of S. 5, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create thereby a trust (b) the purpose of the trust (c) the beneficiary and (d) the trust property, and unless the trust is declared by will or the author of the trust is himself to be the trustee transfers the trust property to the trustee."

Mr. Ananthakrishna Aiyar has argued that if we can possibly hold that the executant of the deed intended to create a trust, then that would be sufficient although words of transfer were wanting. But the question of intention is dealt with in the section with reference to whether a trust was intended to be created, and not as doing away with the necessity for a transfer of the properties to the trustees. If the intention to create a trust is existent, then the Act requires that there must be a transfer of the property to give effect to it, but merely an intention to create a trust is not sufficient except in the two cases mentioned. It would be going against well established law regarding transfer of property to say that mere intention to transfer is sufficient without compliance with the requirements for a valid transfer. I think therefore it is perfectly clear that we cannot regard Ex. 1 as validly creating a deed of trust in favour of the creditors. Mr. Ananthakrishna Aiyar sought to distinguish the case of outstanding and moveable property. But the document deals with both properties and the same language is used with respect to all the properties; and there is nothing, as already pointed out, in that language which could possibly be construed as transferring the rights of the insolvent in his properties, either moveable or immovable, to the persons mentioned in the deed.

His next argument upon this document was that we must hold it to have the effect of creating a security in his client's favour. Here again there are no words of transfer. The mere handing over of certain documents books of accounts and so on would not create any security; at any rate outside the Presidency towns. We have not dealt with the question whether Mr. Ananthakrishna Aiyar's client has any rights to sell the property of the insolvent under Ex. 1, apart from the question whether the property has vested in his client as trustee. That question does not arise in these appeals. In the result, all the appeals are dismissed with costs. There will be two sets of costs in Appeal No. 62 of 1917 and there will be costs for the Official Receiver alone in the two miscellaneous appeals.

Seshagiri Aiyar, J.—I agree. I am inclined to think that the intention of the parties was to create a deed of trust. It is engrossed on a stamp paper for Rs. 15 which is the usual stamp for executing a trust deed, and the document is styled a "trust deed." Apparently the parties intended that there should be a trust deed. But that is not enough under S. 5, Trusts Act to create a deed of trust. The intention to declare a trust may be spelled out of the document. But there must be words of conveyance before the property itself vests in the trustee as legal owner. In the document Ex. 1 those words of conveyance are not to be found; and therefore it is incapable of vesting the property in the trustee and of defeating the rights of the trustee in bankruptcy. As pointed out by my learned brother, if Chandavarkar, J., intended to lay down that no words of conveyance are necessary to effectuate a

transfer, I am respectfully unable to agree with the learned Judge. If what he meant to say was that no particular forms of words are necessary to connote a conveyance, I entirely agree. But if the judgment in *Kondu Kanhuji Dhavde* v. *Vishnu Moreshwar Bhat* (1) goes further, I respectfully dissent from it. As regards the contention of Mr. Ananthakrishna Aivar that Ex. 1 is capable of conferring rights of trusteeship in regard to moveable property, one answer is this that the document is one and indivisible and it was never the intention of the parties that moveable property should be taken without the immovable property. That to my mind is conclusive upon this question because if there are no words conveying immovable property, you cannot say that there is anything in the document which would convey moveable property.

As regards the argument that the document created a security or charge in respect of moveable property in favour of the trustees, I would draw attention to the case in *Mulraj Khatau* v. *Vishwanath Prabhuram Vaidya* (3) where the Judicial Committee point out that, where a policy of insurance was deposited, that would not be enough under S. 130, T. P. Act to confer on the person with whom the deposit was made the rights of an assignee of a chose in action. The same reasoning applies to the present case. The mere fact that he has been given the document of title would not, under S. 130 enable him to be the legal owner of the property. For all these reasons, I agree with my learned colleague that the appeals must be dismissed.

S.N./R.K. *Appeals dismissed.*

(3) [1912] 37 Bom. 193=17 I. C. 627=40 I. A. 24 (P.C.).

A. I. R. 1919 Madras 557

WALLIS, C.J. AND SESHAGIRI AIYAR, J.

Ramachandra Rao – Defendant—Appellant.

v,

Ramachandra Rao and *others*—Plaintiffs and Defendants—Respondents.

Civil Appeal No. 1 of 1918, Decided on 8th October 1918 against decree of Court of Addl. Tempy. Sub-Judge, Tanjore, in O. S. No. 23 of 1917.

(a) Hindu Law—Widow—Absolute estate—Gift in favour of female—In absence of any restraint absolute interest passes to donee.

There is no presumption that in all cases where gifts are made to Hindu females the donors intend to give them only estates for life. No difference should be made between a male and a female, provided the words of gift are sufficiently clear to convey the property. Unless there is an expressed or implied qualification to the contrary, the donor must be deemed to have conveyed all that he was possessed of in the property granted. If the language of the instrument is capable of conferring an estate of inheritance, considerations regarding the sex of the donee should be discarded. Where however the language is ambiguous recourse can be had to ordinary notions of Hindus, as a rule of construction in finding out what the intention of the donor was: 30 *All.* 84 *(P.C.)*, *Rel. on* 2 *I. A.* 7 *(P.C.)* and 35 *Cal* 896 *(P C.) Expl.*

[P 559 C 1, 2]

The rule laid down by the Privy Council in 2 *I. A.* 7 *(P C.)*; is a rule of construction to be applied only when there is some uncertainty or ambiguity in the language of the instrument of gift. [P 557 C 2]

(b) Hindu Law—Widow—She can make testamentary disposition in absolute estate.

Properties in which a Hindu widow has an absolute estate can be disposed of by her by a testamentary instrument: 7 *Mad.* 381 and 14 *Mad.* 274, *not Appr.* [P 560 C 2]

T. R. Ramachandra Aiyar and *T. S. Narayana Aiyar*—for Appellant.

K. Srinivasa Aiyangar—for Respondents.

Wallis, C. J.—Construing this very deed in Appeal Suit No. 74 of 1896, Collins, C. J., and Shephard, J., observed:

"There being no indication of intention to give a larger estate we must assume that the husband intended that a widow's estate only should pass"

The trend of the later decisions in this Court beginning with *Sambasiva Aiyar* v. *Venkateswara Aiyar* (1) is against making any assumption, and they appear to be supported by the judgment of the Judicial Committee in *Surajmani* v. *Robi Nath Ojha* (2), which cites with approval a ruling of Mitter, J., in *Mt. Kollany Kooer* v. *Luchmee Pershad* (3) that there is no presumption that a gift to a widow means a limited gift. We must I think take it to be now settled at any rate so far as this Court is concerned and until the decisions to which I have referred are overruled by higher authority, that the rule laid down by the Judicial Committee in *Moulvi Mohamed Shumsool Hooda* v. *Shewukram* (4) is a rule of construction to be applied only when there is some

(1) [1908] 31 Mad. 179.
(2) [1908] 30 All. 84=35 I. A. 17 (P.C.).
(3) [1875] 24 W. R. 395.
(4) [1874] 2 I. A 7=3 Sar. 405 (P.C.).

uncertainty or ambiguity in the language of the instrument before the Court. The question then is, is there anything in the terms of Ex. 3, which warrants the application of the rule. The opening recital is to the effect that the settler made "the following gifts (Inams)" of the properties belonging to him on the occasion of his adopting as his son a boy of ten years of age. There is, first, a gift of chattels and money to a maternal nephew, then directions that certain allowances of paddy should continue to be paid to two descendants of his maternal uncle, that six brahmins should be fed daily from the income of certain lands, and that a saffron allowance of Rs. 25 should continue to be paid to his sister. Then comes the disposition in favour of the widows. Of the remaining property the adopted boy

"is to be entitled to and enjoy one-half. "Of the remaining half these two persons, my senior wife Sowbagiavati Kamatchi and my junior wife Sowbagiavati Tulja shall each take a half."

On the language of this instrumnnt I have come to the conclusion that there is no sufficient reason for cutting down the disposition in favour of the widows. *Hirabai* v. *Lakshmibai* (5) was decided on the view that there is a general presumption that a gift to a woman is only of a woman's estate though on the language of that document which was different from the language here, the rule of construction laid down in *Moulvi Mohamed Shumsool Hooda* v. *Shewukram* (4) may have been applicable as was held, though with a different result in *Seshayya Narasamma* (6) Sir Charles Sargent however in the course of his judgment spoke of:

"the extreme improbability that, having adopted a son the testator should have intended to give more than a life state, or at the utmost, a widow's estate to his wife."

As I stated at the hearing, my very general impression derived from the cases which have come before me is that there is no such extreme improbability in this Presidency and my learned brother whose opinion on such a point is entitled to much greater weight is of the same opinion. I concur in the order proposed.

Seshagiri Aiyar, J.—I entirely agree. The suit is to recover possession of properties which were last in the enjoyment of one Boyee Tulja. Tulja Boyee's husband Ramojee Bavajee adopted plaintiff's father Bavajee. He executed Ex. 3 on 6th of August 1858, by which he settled one-half of his properties upon his adopted son and gave the other half to his two wives. Tulja Boyee the junior wife took possession of a fourth share under that settlement. The defendant claims under her will.

The points for consideration are whether Tulja Boyee took an absolute estate under Ex. 3 and whether she was competent to dispose of the property by a will.

I shall first deal with a few decisions of the Judicial Committee which were quoted as indicating the principles on which an instrument like the present should be construed. The learned Advocate General relied upon *Moulvie Mohamad Shamsool Hooda* v. *Shewukram* (4) and *Radha Prasad Mullick* v. *Ranee Mani Dassee* (7) Mr. Ramchandra Ayyar quoted *Surajmani* v. *Rabi Nath Ojha* (2). In the first two cases the facts were almost identical. In both of them the father gave properties to his daughter or daughters and their children. In both the Judicial Committee held that the daughter or daughters took only a limited estate and pointed out that, in construing Wills of Hindus, their ordinary notions as to the devolution of property may be taken into account. In these cases it was clear that the daughters and their children could not have been regarded as tenants in common, because the children were not mentioned by name and it was as a class that they were referred to. The question therefore was whether the words "and their children" should be regarded as mere surplusage or whether they should be referred to to ascertain the intention of the donor. Their Lordships held that, ordinarily, a Hindu would desire that his properties should remain in possession of his descendants, and that consequently the donor could not have intended to give absolute powers of disposition to the daughters. I do not think that these judgments are authorities for the proposition that in all cases where gifts are made to females, a Hindu must be deemed to have given them only an estate for life. On the other hand the decision in *Surajamani* v. *Rabi Nath Ojha* (2) relied upon for

(5) [1887] 11 Bom. 573.
(6) [1899] 22 Mad 357.
(7) [1908] 35 Cal. 896=35 I. A. 118 (P. C.).

the appellant shows that, in the opinion of their Lordships, no difference should be made between a male and a female, provided the words of gifts are sufficiently clear to convey property. They quoted with approval the dictum of Mitter, J., in *Mt. Kollany Kooer* v. *Luchmee Pershad* (3), wherein the learned Judge stated:

"We must hold that the gift in question was an absolute gift, unless it can be shown that, by the Hindu Law, a gift to a female means a limited gift or carries with it the effect of creating an estate similar to the 'widow's estate" under the law of inheritance. I am not aware of any such provision in the Hindu Law nor have we been referred to any authority in support of it."

There can be no doubt that the Hindu Law does not enunciate that women as donees can only take an estate for life. The Judicial Committee says at the end of p. 89 *of* 30 *All.*:

"Nothing has been found in the context here or the surrounding circumstances or is relied upon by the respondents, but the fact that the donee is a woman and a widow, which was expressly decided in the last mentioned case not to suffice."

The case referred to is *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy* (8). If we remember that Mitter, J's., decision in *Mt. Kollany Kooer* v. *Luchmee Pershad* (3) was given after examining at some length the dictum of the Judicial Committee in *Moulvie Mohamed Shumsool Hooda* v. *Shewukram* (4), it is clear that their Lordships advisedly approved the principle enunciated by Mitter, J. In recent years there has been practical unanimity in Madras as to the construction to be placed upon similar documents. The first decision was in *Sambasiva Ayyar* v. *Venkataswara Ayyar* (1) which was contemporaneous with *Surajamani* v. *Rabi Nath Ojha* (2), *Gudimetla Vencatarazu* v. *Bottozn Kottaya* (9), *Bodi Muttayya* v. *Kavoori Kodandaramayya* (10), *Ratna Chettiar* v. *Narayanaswami Chettiar* (11), *Gomattam Ramanuja Aiyangar* v. *Satagopachar* (12) and *Nimasivayam Pillai* v. *Kuthalalingam Pillai* (13) have decided that the sex of the donee is not a ground for cutting down an otherwise full estate. The learned Advocate General relied upon some decisions of the other High Courts. Most of them were earlier than *Surajmani* v. *Rabi Nath Ojha* (2) and I do not think it necessary to examine them at any length. I would only say with reference to the observations of Sir Charles Sargent in *Hirabai* v. *Lakshmibai* (5) that at any rate so far as the Southern Presidency is concerned, there is nothing improbable in a Hindu giving an absolute estate to his wife when he directs an adoption to be made to him. Cases have not infrequently come before us in which, in order to avoid possible conflicts between an adopted son and his widow, a Hindu has been found to give a portion of his property absolutely to his widow and the other portion to his adopted son.

In deducing a rule of construction, a few considerations should be borne in mind. S. 8, T. P. Act, lays down:

"Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is capable of passing in the property or in the legal incidents thereof."

Therefore unless there is an expressed or implied qualification to the contrary, the donor must be deemed to have conveyed all that he was possessed of in the property granted. The Judicial Committee in the Supplemental Volume of Indian Appeals at p. 47, *Jotendromohun Tagore* v. *Ganendromohun Tagore* (14), recognized this principle. Consequently, if the words employed are clear and unambiguous, no matter who the donee is, whether a male or a female, the language of the gift must be given effect to. This is what was laid down in *Surajmani* v. *Rabi Nath Ojha* (2). But there may be cases in which it may be necessary, owing to the language employed not being clear and precise or being superfluous, to find out the intention of the donor. In such cases, as the learned Advocate-General contended, the personal law of the donee may be taken into account. That is to say, the ordinary rule of inheritance applicable to him or her may be called in aid. This is not a rule of presumption so much as it is one for gathering the intention of the donor. Broadly speaking it may be said that if the language of the instrument is capable of conferring an estate of inheritance, considerations regarding the sex of the donee should be discarded. Where the language is ambiguous, then recourse can

(8) [1897] 24 Cal. 834=24 I. A. 76 (P. C.).
(9) [1912] 16 I. C. 139.
(10) A. I. R. 1914 Mad. 428=23 I. C. 594.
(11) A. I. R. 1914 Mad. 64=24 I. C. 796.
(12) A. I. R. 1915 Mad. 331=24 I. C. 20.
(13) [1917] 38 I. C. 840.
(14) [1873] I.A. Sup. Vol. 47=18 W.R. 359=2 Suth. 692=3 Sar. 82 (P.C.).

be had to ordinary notions of Hindus as a rule of construction in finding out what the intention of the donor was.

Now I shall turn to Ex. 3 and see whether, in the light of the above discussion, the documents confers only a life estate upon Tulja Boyee. It was not seriously argued that there is any material difference between the words employed in the case of the adopted son and the words employed in the case of the two wives. Nor was it argued that the words employed in the case of the adopted son were not capable of conveying to him absolute rights in the property. I therefore fail to see why a distinction should be made between the two classes of donations. Further the preamble of the deed says: "I am giving these properties as Inam." The donor was a Mahratta Brahmin who lived in Tanjore and the document was written in Mahratti. Wilson in his glossary says about the word inam:

"In India and especially in the south and amongst the Mahrattas, the term was especially applied to grants of land rentfree, and in hereditary and perpetual occupation."

In another dictionary by a Mahratta scholar the word 'inam' is defined as meaning "a grant in perpetuity without conditions." These definitions support the conclusions at which I have arrived. In my opinion the gift to Tulja Boyee was an absolute one. There are certain legacies which have been directed to be paid out of the estate. As they are in terms only for life, the main dispositions are not affected by these life grants.

It was next argued by the learned Advocate-General that even supposing that it was an absolute grant to Tulja Boyee, she was not competent to dispose of the property by will. He relied upon *Bhujanga Rau* v. *Ramayamma* (15) and *Nunnu Meah* v. *Krishnasami* (16). At the same time, he frankly admitted that the two decisions are inconsistent with the conclusions of the Judicial Committee in *Surajmani* v. *Rabi Nath Ojha* (2), where one of the widows who had acquired her property under a deed of gift from her husband disposed of it by a testamentary instrument. Their Lordships upheld the will of the Hindu widow. Reference may also be made to *Fateh Chand* v. *Rup Chand* (17), where it was held that a widow could dispose by will property which had come to her under a deed of gift. I am unable to find any valid reason for the view that properties in which a Hindu widow has an absolute estate cannot be disposed of by her by a testamentary instrument. These two Madras decisions must be deemed to have been overruled by *Surajmani* v. *Rabi Nath Ojha* (2) and *Fateh Chand* v. *Rup Chand* (17). A portion of the property in suit is governed by the decision of this Court : vide Ex. A. To that extent the defendants' claim is barred by res judicata. The decree of the Subordinate Judge must be reversed and the suit should be dismissed with costs, except in respect of the property which was the subject-matter of the suit under Ex. A The memorandnm of objections is also dismissed with costs.

S N./R.K. *Appeal allowed.*

(15) [1884] 7 Mad. 387.
(16) [1891] 14 Mad. 274.
(17) A.I.R. 1916 P.C. 20=38 All. 446=43 I.A. 183=37 I.C. 122 (P.C.).

A. I. R. 1919 Madras 560

WALLIS, C. J. AND SPENCER, J.

Ookerjee Cowasjee Oomrigar and *others* —Plaintiffs—Appellants.

v.

P. V. Sabhapathi Mudaliar and *another*—Defendants—Respondents.

Original Side Appeal No. 73 of 1917, Decided on 12th December 1918, from judgment of Coutts-Trotter, J., D/- 8th August 1917.

Specific Relief Act (1 of 1877), Ss. 19 and 121 (a) — Suit for enforcement of contract—Contract becoming incapable of specific performance—Court is not precluded from awarding compensation under S. 19 even in absence of prayer for such relief.

In a case where the claim falls under S. 21 (a), Specific Relief Act and cannot be specifically enforced, the plaintiff is entitled to claim compensation in the alternative under S. 19, and under the Explanation to that section, the Court is not precluded from granting it by the circumstances that the contract has become incapable of specific performance and that there is no prayer for such relief in the plaint.

Defendants agreed to purchase from the plaintiffs a money claim which the latter had against a third person. The defendants having made default, the plaintiffs sued on the contract but their plaint did not contain a prayer for compensation. At the date of suit the claim which the defendants had agreed to purchase had become barred:

Held: that, as the contract was not specifically enforceable under S. 21 (*a*), Specific Relief Act, it was competent to the Court to grant com-

pensation under S. 19 even though it was not asked for in the plaint: *A. I. R.* 1916 *P. C.* 147 *Dist.* [P 561 C 1]

C. P. Ramaswami Aiyar and *A. Nanabhoy Devay*—for Appellants.

P. Venkataramana Rau and *T. S. Rajagopala Aiyar*—for Respondents.

Judgment—This is an appeal from the judgment of Coutts-Trotter, J., in a suit brought by the plaintiffs on a contract by the defendant to purchase from them their claim against the estate of a deceased person for Rs. 2,225. Under the agreement executed by the defendant the plaintiffs were restored to their right to sue the estate of the deceased debtor when the defendant failed to pay at the due date, but they did not do so and their claim had become barred when the present suit was instituted. In these circumstances the learned Judge, following *Jatindra Nath Basu* v. *Peyer Deye Debi* (1), has held that the plaintiffs had disentitled themselves to specific performance of the contract by their failure to keep alive the claim against the estate of the deceased, which they agreed to sell to the defendant. Apart from this, the claim is not one which could be specifically enforced, as it falls under Cl. 21 (*a*) Specific Relief Act. The contract in *Jatindra Nath Basu* v. *Peyer Deye Debi* (1), on the other hand, was for the sale of a mortgage decree and was therefore a contract relating to immovable property, as to which the general rule is that compensation in money is not regarded as an adequate relief even to the vendor. That being so, the plaintiffs were entitled to claim compensation in the alternative under S. 19 and under the explanation to that section the Court is not precluded from granting it by the circumstances that the contract has become incapable of specific performance. Here there is a claim in the plaint for other relief which will cover compensation, and even in the absence of such a prayer, the Court may award it, *Callianji Harjivan* v. *Narsi Tricum* (2), *Sheo Niwaz* v. *Gopal* (3). We have therefore decided, before disposing of this appeal, to ask the learned Judge to assess the compensation payable to the plaintiffs for the defendant's breach of contract.

(1) A. I. R. 1916 P. C. 147=43 Cal. 990=43 I. A. 108=34 I. C. 69 (P.C).
(2) [1895] 19 Bom. 764.
(3) [1881] A. W. N. 22.

1919 M/71 & 72

(In pursuance of the order contained in the above judgment, the Judge sitting in the Original Side of the High Court submitted the following)

Finding—[*Civil Suit No.* 402 *of* 1916]—This case is referred to me, "to assess the compensation payable to the plaintiffs for the defendants' breach of contract." The compensation must, I think, be the amount that the defendant 1 ought to have paid, less whatever the claim against the estate of Manicka Mudaliar is worth, plus interest. The only evidence before me is that of P. W. 1 who says that he now knows that any claim against this man's estate was at any time worthless, and that it was from first to last an insolvent estate. Defendant 1 could have rebutted that. He has neither gone into the box nor called any witness; and defendant 2 has called no evidence to show that this estate is worth anything. In these circumstances the equation Rs. 2,225—X is a simple one because X=0. Therefore the principal debt I must find is worth Rs. 2,225. Mr. Oomrigar foregoes any claim for interest and is content to take judgment for the principal sum only. I may add that even if the estate was worth some small amount, I think that probably the interest foregone would far more than make up for the value that could be put upon this claim against the estate. (This original side appeal coming on for final hearing after the return of the finding of the Judge sitting on the Original Side of the High Court on the issue referred by this Court for trial, the Court delivered the following)

Judgment.—We accept the finding and under Cl. 3 of the agreement, by which the performance of the agreement was secured, reversing the decree, we pass a mortgage decree for the amount of damages so found on the security of the properties mortgaged by his deposit of title deeds with costs throughout payable out of the estate.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 561

KUMARASWAMI SASTRI, J.

Maharaja of Bobbili — Petitioner.

v.

Zamindar of Salur—Opposite Party.

Civil Revn. Petn. No. 1311 of 1917, Decided on 1st October 1918.

Civil P. C. (1908), O. 7, R. 10 and O. 41, R. 23—Plaint returned for presentation to proper Court after consideration of evidence—Remand by appellate Court for appointment of experienced commissioner to re-value properties is not competent.

Where a plaint is returned for presentation to a Court having pecuniary jurisdiction to entertain it and the order is passed on a consideration of all the evidence tendered before the Court, it is not competent to the appellate Court, to remand the whole case under O. 41, R. 23, merely because in its opinion the appointment of an experienced commissioner is expedient to re-value the properties. [P 562 C 1,2]

V. Ramesam—for Petitioner.

R. Narasimham for *B. N. Sarma*—for Opposite Party.

Judgment — The District Munsif found that the value of the suit was beyond the pecuniary limits of his jurisdiction and returned the plaint for presentation to the proper Court. He took all the evidence that was tendered before him. On appeal, the District Judge was of opinion that the evidence of the commissioner which was acted upon by the District Munsif was unreliable owing to his want of experience of the forests on the suit estate and that :

" it was desirable to get a valuation made by some officer of experience who has also knowledge of local conditions or is in a position to ascertain them."

He therefore reversed the order of the District Munsif and remanded the suit for disposal. Objection is taken to the procedure adopted by the District Judge on the ground that he has no power to reverse and remand the suit. I am of opinion that the objection is sound. All the evidence that was tendered was taken by the District Munsif and he dwelt with the question of the value of the property on its merits and on the evidence before him. No error of law is suggested. The function of the appellate Court in such cases is either to confirm or reverse the decision of the lower Court and when it is of opinion that the evidence on record is not sufficient to enable it to come to a proper decision, to call for additional evidence. If the decision of the lower Court is arrived at by the exclusion of relevant evidence or by admitting irrelevant evidence or is vitiated by any other irregularity, the appellate Court can call for a revised finding in the light of its observations. These are the powers which appellate Courts have under O. 41, Civil P. C., when the case has not been disposed of on a preliminary point by the lower Court and the appellate Court disagrees with it. The power to reverse and remand in such cases is given by R. 23, O. 41, Civil P. C, and though it has been held that the rule is not exhaustive, I do not think that recourse should be had to O. 41, R 23 when the proper course is to follow the procedure in O. 41, Rr. 24 to 29. In the present case the remand of the whole suit for disposal by the lower Court is, in my opinion, not warranted by the provisions of O. 41 Civil P. C. I set aside the order of the District Court and direct the appeal to the District Court be disposed of according to law in the light of the above observations. Costs will abide and follow the result.

S.N./R.K. *Case remanded.*

A I R. 1919 Madras 562

SPENCER AND KRISHNAN, JJ.

Ramadh Bibi Ammal— Defendant — Appellant.

v.

Kandasami Pillai—Plaintiff — Respondent.

Second Appeal No. 121 of 1916, Decided on 18th September 1917, against decree of Sub-Judge, Tinnevelly, in Appeal Suit No 455 of 1914.

(a) Limitation Act (1908), Arts. 75 and 132—Mortgage-bond— Stipulation for payment of interest by instalments and of principal on a specified date and for payment of whole amount due with compound interest on default when creditor requires—Mortgagee is not bound to exercise his option for entire amount on first default—Suit within 12 years of date fixed for payment of principal with compound interest held within time under Art 132.

A mortgage-bond provided for payment of interests accruing due once in every six months and for payment of the principal amount on a specified date, viz., 12th May 1900. The document proceeded: "In default, we shall pay, whenever you require, the interest accruing due for the days overdue at the aforesaid rate and the principal amount. In case of default in the payment of interest according to the due dates, you may recover, whenever you require and without reference to the due date fixed for payment of the said principal amount, the aggregate principal and interest amount found due on adding to the principal the interest due every six months together with the interests due at the aforesaid rate on such aggregate amount." The mortgagee did not exercise his option of suing for the entire amount on the first default, but brought his suit within 12 years of the date fixed for payment of the principal asking for compound interest according to the stipulation in the bond :

Held: (1) that the mortgagee was not bound to exercise his option of calling in the whole

amount on the first default; (2) that as the mortgagee did not exercise his option as aforesaid, the suit was within time under Art 132, Sch. 1. Lim. Act: 35 *I. C.* 418; *Foll*; 24 *Cal* 281; *not Foll*; 1 *I. C.* 49 *Dist.* [P 563 C 2]

(3) that the demand for compound interest at the time of instituting the suit did not constitute such an overt act as to have a retrospective effect on the accrual of the cause of action, the clause for the recovery of the principal being independent from the stipulation for compound interest. [P 564 C 1]

(b) Deed—Construction— "Whenever you require."

The words "whenever you require" are not equivalent to "forthwith" or "immediately": 20 *Mad.* 245; *not Foll*; 12 *I C.* 57; 16 *M. L. J.* 364 and 22 *Mad.* 24, *Foll.* [P 564 C 1]

(c) Minor—Decree against— Minor represented by guardian ad litem—Decree is binding except on ground of fraud.

A minor is bound by a decree in a suit in which he is represented by a guardian ad litem, except where the latter acts fraudulently, or where his interest are adverse to that of the minor. [P 564 C 1]

C. S. Venkatachariar—for Appellant.

S. T. Srinivasagopalachariar — for Respondent.

Spencer, J —Suit upon a hypothecation deed. In second appeal three arguments were advanced, which are (1) that the suit is barred by limitation, (2) that defendant was not liable as the hypothecation bond was executed to discharge certain decree debts for which she was legally liable and (3) that the clause providing for compound interest was penal and should be relieved against.

The suit hypothecation bond provides for payment of the principal on 12th May 1900, and it is conceded that, if the Court vacation be excluded, the plaint was presented within 12 years of that date. But it is argued that, as the bond contains a clause that in default of payment of default of payment of interest every six months. the principal and interest will become immediately recoverable, the cause of action accrued upon the first default for all that then remained owing of the whole debt. The authorities relied on in support of this proposition are *Perumal Ayyan* v. *Alagirisami Bhagavathar* (1), *Sitab Chand Nahar* v. *Hyder Malla* (2), which followed *Hemp* v. *Garland* (3) and *Reeves* v. *Butcher* (4), and the obiter dictum of Seshagiri Aiyar, J., in *Narna* v. *Ammani Amma* (5) to the effect that if the mortgagee claimed interest at the enhanced rate it might well be argued that that become due when the first default was committed.

The important clauses in the suit document are in these terms:

"We shall pay in cash the interest accruing due from this date at the rate of Rs. 1-4 0 per cent. per mensem, once in every six months, and the principal amount on 30th Chittarai of Andu 1075 (12th May 1900) and shall get back this document and the other documents given herewith. In default, we shall pay, whenever you require, the interest accruing due for the days overdue at the aforesaid rate, and the principal amount. In case of default in the payment of the interest according to the due date, you may recover, whenever you require and without reference to the due date fixed for the payment of the said principal amount, the aggregate principal and interest amount found due on adding to the principal the interest due every six months together with the interest due at the aforesaid rate on such aggregate amount."

I read these clauses as creating a right in the mortgagee to recover at his option, in case of default in payment of interest regularly every six months, the principal and interest before the date fixed for payment of the principal. But nothing has come out at the trial to show that the mortgagee exercised his option in that way and made a requisition for payment of the principal at any time prior to the transfer of his interests to the plaintiff by the assignment of 8th January 1909, by which date the principal had long become due under the other terms of the hypothecation deed. I think we should follow the recent decision of this Court in *Narna* v. *Ammani Amma* (5) so far as it decides that a mortgagee is not bound to take advantage of a default; and that the learned Judges of the Calcutta High Court who decided *Sitab Chand Nahar* v. *Hyder Malla* (2) were wrong in applying the principle of Art. 75, Lim. Act, which deals with defaults on promissory notes and instalment bonds to suits upon mortgages, which are governed by Art. 132, when the mortgage bond contains a clause leaving it to the option of the creditor to enforce the provision for immediate payment of the whole. The case of *Girindra Mohun Roy* v. *Bacha Das* (6) was one of an unregistered instalment bond which did not create a charge upon immovable property. The finding that in the circumstances of that case which were governed by Art 75, mere abstinence of the plain-

(1) [1897] 20 Mad. 245
(2) [1897] 24 Cal. 281.
(3) [1843] 4 Q. B. 519.
(4) [1891] 2 Q. B. 509.
(5) [1916] 39 Mad. 981=35 I. C. 418.
(6) [1909] 36 Cal. 394=1 I. C. 49.

tiff from bringing a suit to recover the whole amount did not amount to a waiver will not affect the principles upon which *Narna* v. *Ammani Amma* (5) was decided and this suit has to be decided. I am further of opinion that the words "whenever you may require," which occur in the suit hypothecation bond, should not be construed as equivalent to "immediately' or "forthwith"—which was the meaning given to the words "on demand" in *Perumal Ayyan* v. *Alagirisami Bhagavathar* (1) and that in this respect we should follow the decision of this Court in *Gopanna Mannadiar* v. *Muttu Velmani Gopanna Mannadiar* (7). In the absence of any overt act on the part of the plaintiff's assignor to indicate that he did at any time require payment of the principal amount before it became due in the regular course on 12th May 1900. I think that the suit is not time barred. I do not consider the demand for compound interest at the time of instituting the suit constitutes such an overt act as to have a retrospective effect on the accruing of the cause of action. Moreover, I read the clause for recovery of the principal as independent from the stipulation in the document for compound interest.

The other two contentions may be briefly disposed of. In the suits, Original Suits Nos. 11 of 1896 and 308 of 1897, in which decrees were obtained against the minor she was represented by her mother as guardian ad litem. It is not alleged that the guardian ad litem acted in fraud of the minor's interest or that her interest was adverse to the minor (in which case she might have been removed under O. 32, R. 9). The defendant is therefore bound by those decrees. Lastly in defendant's written statement she pleaded that if she was liable at all under the suit hypothecation deed, the amount recoverable from her was only Rs. 732 3-10, and not Rupees 1,088-13-2 as claimed in the plaint. As the appellate Court's decree provided only for payment of the lesser amount of these two it is not open to the appellant to contend now that even this amount should be reduced. The second appeal must be dismissed with costs.

Krishnan, J. — The chief question raised in this case is one of limitation. The material terms of the hypothecation deed sued on bearing on this question are set out by my learned brother in his judgment. It is conceded that Art. 132, Lim. Act applies and that if time is taken to run from the due date fixed in the deed the suit is in time. Under that Article time begins "when the money sued for becomes due;" the question, therefore for decision is when did the money become due in the present case was it at the date fixed in the deed or as the appellant contends, at the date of the first default? This depends primarily on the construction to be placed on the default clause in the deed referring to non-payment of the six-monthly interest on the due date. The words used are "you may recover whenever you require." That clearly gives an option to the mortgagee to anticipate the due date and call in his whole money if he so chooses; but he is not bound to do so. It is not alleged that the mortgagee made any demand for his money before the due date. He apparently did nothing either to take advantage of his option or on the other hand to waive his right to do so. It seems to me that when a due date is fixed and an option is given to the creditor to change it, it will be unreasonable to presume that he did change it when he did nothing at all to produce that effect. Plaintiff has sued on the footing that the due date has not been changed and to presume otherwise will be entirely to his prejudice now as his suit will have to be dismissed. If there is evidence that he did exercise his option the position is clear; but in the absence of such evidence, I am not prepared to make any presumption to his prejudice.

The appellant has argued that the question when the money became due is independent of the question whether the mortgagee exercised his option or not, and he has relied on the case of *Sitab Chand Nahar* v. *Hyder Malla* (2) That would depend upon whether the exercise of the plaintiff's option was or was not a condition for the defendant's obligation to pay before the due date to arise. Defendant was not bound to pay unless the plaintiff required her to do so, on the terms of the document here. In the Calcutta case cited the learned Judges held that on the document before them the creditor's right to recover the whole money accrued to him at once on the default of the debtor and that he had only a right to waive his right to recover that

(7) No. 27 of 1916.

money, if he so chose; of course on that view when the creditor was not shown to have waived his right his cause of action began on the date of default. The terms of that document are not fully set out in the report; but if there was nothing in it to interfere with the creditor's option to call in his whole money on default, I am not prepared to follow the ruling as it is against the view of this Court in *Narna* v. *Ammani Amma* (5), which with all respect to the Judges of the Calcutta Court, is I think correct. The principle that a man need not take advantage of a default clause in his own favour is, it seems to me, overlooked in the Calcutta case.

Furthermore in the present case money is to be paid by the defendant only on the mortgagee requiring her to do so. The words "when you require" have been held to imply a condition in *Nettakaruppa Goundan* v. *Kumarasami Goundan* (8) and in the recent case of *Goppanna Munnadiar* v. *Mutta Velmani Gopanna Mannadiar* (7). The interpretation put on the words "on demand" in a hypothecation deed in the earlier Madras case cited for the appellants, *Perumal Ayyan* v. *Alagirisami Bhogavather* (1), viz. that it is equivalent to "forthwith", has not been adopted in the later cases: see also *Karunakaran Nair* v. *Krishna Menon* (9) and *Vythilinga Nadan* v. *Narayana Sami Ayyan* (10). I am therefore unable to treat that case as an authority and must follow the more recent decisions of this Court. "You may recover whenever you require" is conceded to be tantamount to "We shall pay whenever you require."

For the above resons I hold that the plaintiff's cause of action arose only on the due date fixed and I agree that the suit is not barred by limitation. The appellant raised a further argument that the plaintiff having sued for compound interest, which became payable only on default, he should be taken to have exercised his option based on the default and therefore his cause of action for the whole money should also be taken to have arisen on the date of default. It is difficult to follow this argument as, on the terms of the deed, the enhanced interest becomes payable on default quite independently of any exercise of his option by the mortgagee; and therefore his claim for such interest cannot be treated as any indication of his having exercised his option to call in his full amount within the due date. Reliance was placed on the observation of Seshagiri Aiyar, J., in *Narna* v. *Ammani Amma* (5). But that is to the effect that

> "if the claim is for enhanced interest it may well be argued that that became due when the first default was committed."

The observation has no reference to the principal sum. I read it as referring to that portion of the enhanced interest which accrued for the period anterior to the due date fixed for the payment of the principal, and possibly such interest may be argued to be barred. Such a question however is not raised in this case and therefore need not be considered. Appellant next contended that, on a proper construction of the hypothecation deed, interest accrued due before the due date fixed, viz. 12th May 1900, was alone payable and not compound interest generally as charged by the plaintiff. The language of the deed is ambiguous and is capable of this construction, though the construction that it gave compound interest generally is also possible. It is not necessary to decide the question on the language of the deed, as defendant admitted in her written statement that on a proper calculation of the money due under the deed Rs. 732-3-10 were due and that as the appellate decree is given on that footing, she cannot be heard in second appeal on any question intended to reduce the amount still further either on the ground of construction or on the ground that the provision as to compound interest is a penal one. The provision for compound interest from the date of default is not necessarily a penal one.

It was finally urged that the suit mortgage, which was executed by the defendant's guardian to save her property from being sold in execution of the decree obtained against her with her mother as guardian ad litem, should be held to be not binding on her, because her mother was not a proper guardian for her in that suit. The question whether a guardian ad litem is a proper guardian or not is for the Court trying that suit to decide. Defendant cannot be allowed to raise the objection now, particularly as no allegation of fraud or legal capacity of the

(8) [1899] 22 Mad. 20.
(9) [1897] 20 Mad. 245.
(10) [1906] 16 M. L. J. 364.

guardian is made. I agree. The second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 566

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

The Official Assignee of Madras and *another*—Appellants.

v.

The Official Assignee of Rangoon and *another*—Respondents.

Original Side Appeals Nos. 27, 29 and 39 of 1918, Decided on 27th August 1918, from judgment and order of Bakewell, J., in Insolvency Petition No. 83 of 1917.

Presidency Towns Insolvency Act (1909), Ss 51, 17 and 22—S. 51 is not intended to give priority to adjudication by one Court over adjudication of another Court by reference to act of insolvency adjudicated upon—Priority of claims of Official Assignee is to be determined by priority in dates of vesting orders—Adjudication in one jurisdiction may be annulled in interest of general body of creditors.

Section 51 by which the insolvency is to relate back to the date of the commission of the first act of insolvency is a provision intended to enable the Official Assignee to recover property and has not the effect of divesting property which has been duly vested in an Official Assignee in accordance with law under a prior adjudication. [P 569 C 2]

The section is not intended to give priority to an adjudication by one Court over the adjudication of another Court by reference to the act of insolvency adjudicated upon: (1879) 10 *Ch. D.* 3; (1893) 1 *Q. B.* 455 and (1899) 1 *Q. B.* 612, *Dist.* [P 569 C 2]

On a creditor's petition in insolvency, a firm known as T. A R.A. R.M. firm was by the Madras High Court adjudicated insolvent on 23rd April 1917 for acts committed after March 1917. The Chief Court at Rangoon also adjudicated them as insolvents on 10th May 1917 for acts of insolvency committed in February 1917 in Rangoon. On motion by the Official Assignee of Rangoon, Bakewell, J., stayed the proceedings of the Official Assignee of Madras. The latter appealed against the order challenging the stay and the Official Assignee of Rangoon appealed praying that the proceedings of the Madras Official Assignee should altogether be annulled:

Held: (1) that the question of the priority of claims of the Official Assignees of Madras and Rangoon should be determined by priority in the dates of the vesting orders: (2) that, as the whole property of the insolvents had vested in the Official Assignee of Madras by virtue of the adjudication by the Madras High Court, the subsequent adjudication in Rangoon had nothing to operate upon and the properties could not vest in the Official Assignee of Rangoon till the Madras adjudication was annulled under S. 22, Act 3 of 1909; and (3) that as Rangoon was the principal place of business of the insolvents, the adjudication in Madras should be annulled in the interests of the general body of creditors and the properties should be administered in Rangoon. [P 567 C 1, 2; P 568 C 1, 2]

D. Chamier and *G. Krishnaswami Aiyar*—for Appellants.

S. Srinivasa Aiyangar, K. Srinivasa Aiyangar, S. Aravamudu Aiyangar, T. R. Ragavendra Row and *L. S. Veeraraghava Aiyar*—for Respondents.

Wallis, C. J.—These are cross-appeals from an order of Bakewell, J., in Insolvency by which, acting under S. 22, Presidency Towns Insolvency Act, he stayed the proceedings of the Official Assignee of Madras in Insolvency Petition No. 83 of 1917. In Original Side Appeal No. 27 the Official Assignee of Madras challenges the order of stay and Original Side Appeal No. 29 is an appeal to the same effect by one of the creditors, while in Original Side Appeal No. 39 the Official Assignee of Rangoon asks that the Madras Insolvency should not merely be stayed but annulled. No question was raised before the learned Judge as to the petition for annulment having been presented by the Official Assignee of Rangoon instead of by one of the creditors and it is unnecessary for us to consider the question, as to which we decide nothing. On 17th April 1917 two of the creditors of the firm of T. S. R. S. R. M. Ramanathan Chetty presented a petition for the adjudication of the firm to this Court, alleging that the firm consisted of Ramanathan Chetty and his son Annamalai Chetty and setting out various acts of insolvency. This was supported by an affidavit in nearly the same terms by Adaikappa Chetty, the agent of the petitioning creditors, and on 23rd April an order of adjudication was made. The order, which was drawn up by filling in a printed form, recites that the insolvents had committed acts of insolvency mentioned in the petition and does not specify the precise acts of insolvency on which the order was made.

This form may have been sufficient under the scheme of the old Act, in which the insolvency related back to the date of the petition, but, to enable due effect to be given to the provisions of the present Act, the acts of insolvency which are found to have been proved should be shown specifically in the order, and not be left to be gathered from a perusal of the affidavit. Another defect of the practice which has come to light is that the order on the creditor's petition was not

notified forthwith, as it should have been, in the Fort Saint George Gazette. On 10th May 1917 the T. A. R. A. R. M. firm was again adjudicated by the Chief Court of Lower Burma in respect of acts of insolvency found to have been committed in or about the month of February.

The affidavit in support of the Madras petition, on which this Court acted, did not allege with sufficient certainty any acts of insolvency prior to month of March; and therefore the acts of insolvency upon which the firm was adjudicated in Madras must be taken to have been later in time than the acts on which the adjudication was made in Rangoon, though the date of the adjudication in Rangoon was subsequent to the adjudication in Madras. Now in these circumstances it is contended for the Madras creditors and the Madras Official Assignee that the property of the insolvents wherever situated in British India having vested in the Official Assignee of Madras, subsequent adjudication in Rangoon had nothing to operate upon and that the property of the insolvents has never vested in the Official Assignee of Rangoon and cannot vest in him until the Madras insolvency is annulled under S. 22. In my opinion the whole property of the insolvents having vested in the Official Assignee of Madras by virtue of the adjudication here, there was nothing to vest under the subsequent adjudication in Rangoon. If authority be wanted for what appears to me to be an obvious proposition, it is to be found in the series of cases both at law and equity referred to in *Morgan* v. *Knight* (1), in which a later commission of bankruptcy had been held to be a nullity so long as the earlier commission was outstanding. In delivering the judgment of the Court of Common pleas overruling these decisions, Erle, C. J., observed that they rested on two propositions, one that an uncertificated bankrupt could have no property, and the other that if there is no property, a commission is void, by reason of the fact that there cannot be any effects administered under it. He then pointed out that it was not essential to the validity of a bankruptcy that the bankrupt should be possessed of property, and secondly, that in certain circumstances an uncertificated bankrupt might acquire property. It was not questioned in this case, or in any of the later cases in England that have followed it, that the later adjudication could not operate on the property which had once belonged to the bankrupt but had vested in the Assignee under the earlier adjudication. This was also regarded as beyond question by Strachey, J., and an appeal from his judgment by Farran, C. J., in *Re Aranvayal Sabhapathy Moodliar* (2). There are no doubt some observations of Henderson, J., in *William Waton, In the matter of* (3) as to the Official Assignee having some sort of title to assets which under an earlier bankruptcy in England, had vested in the English trustee, but they appear to have been made obiter and *Morgan* v. *Knight* (1), on which the later English cases proceed, was not cited to this Court.

It is said, however that assuming this to be so, the property vested in the Official Assignee of Rangoon by virtue of the fact that the adjudication in Rangoon was based on acts of insolvency earlier in date than those on which the order was made in Madras. Nonetheless, when the adjudication was made in Rangoon all the property of the insolvents had already vested in the Official Assignee of Madras and there was nothing on which the Rangoon adjudication could operate The provision in S. 17, that on the making of an order of adjudication the property shall vest in the Official Assignee is express, and there is no provision in the Act divesting the property so vested in that Official Assignee and transferring it to another Official assignee under a later adjudication. S. 51, no doubt, provides that the insolvency is to date back and to be deemed to commence at the date of the first of the acts of insolvency proved to have been committed within three months of the date of the presentation of the insolvency petition, but this is a provision intended to enable the Official Assignee to recover property in the hands of third parties, and has not the effect of divesting property which has been duly vested in an official assignee in accordance with law under a prior adjudication. The point moreover has been expressly decided by the House of Lords in *Geddes* v *Mowate* (4), a case of competition between an

(1) [1864] 15 C. B. (n. s.) 669=33 L. J. C. P. 168.

(2) [1894] 21 Bom. 297.
(3) [1904] 31 Cal. 761.
(4) [1824] 1 Glyn & J. 414.

earlier Scotch sequestration and a later English bankruptcy. The Englih bankruptcy, which was before the Statute of 6 Geo. 4, was governed by the Statute of Elizabeth and the subsequent Acts, under which the doctrine of relation back was applied without the restrictions which have been imposed upon the doctrine in modern statutes. It was there held by the House of Lords that the Scotch sequestration, which under the Sequestration Act operated on the bankrupt's estate in England and took effect from the date of the presentation of the petition on 26th January, was not superseded or annulled by an English Commission of bankruptcy granted in the month of March by relation back to the act of bankruptcy on which it was founded, which was committed on 4th January. As observed by Mr. Dicey citing this case, priority depends on the date of the assignment, and not on the date of the commission of the act of bankruptcy (Conflict of Laws, Note to Rule 113). In British India we have not only four insolvency jurisdictions under the Presidency Towns Insolvency Act, but also the very numerous jurisdictions under the Provincial Insolvency Act, so that cases like the present may not infrequently arise. In all such cases it should, we think, be recognized that the vesting depends on priority of adjudication, and that steps should at once be taken to annul the prior adjudication where it is convenient that the estate should be administered by another jurisdiction. Great confusion might ensue if competing Assignees or Receivers where to have concurrent authority to realise the insolvent's estate independently of one another, instead of the insolvency being in one jurisdiction only at a time and the other jurisdiction being required to act in aid of it, if neeessary.

It follows that the estate of the insolvents is now vested in the Official Assignee of Madras and not in the Official Assignee of Rangoon. The question then arises whether we should annul the Madras Insolvency and leave the estate to be administered in Rangoon. Bakewell, J., was of opinion that in the interests of the creditors, the estate should be administered in Rangoon, and unless we are prepared to differ from him as to this, we think we are bound to give effect to this view by annulling the insolvency in Madras and allowing the title of the Rangoon Official Assignee to operate on the assets. The insolvents are Nattukottai Chetties, who, according to their custom, have their permanent home in the southern districts of this Presidency, where their families reside, and carry on business in India, Burma and the Near East. The insolvents carried on business in this way both in Madras and Rangoon, but there can be no doubt that Rangoon was their principal place of business, and that latterly little or no business was done in Madras. While in Madras for nearly a year after the adjudication no assistance was given to the Official Assignee to enable him to get in the assets, the Official Assignee of Rangoon, who did not come to know of the prior Madras Insolvency until the middle of December 1917, was enabled with the assistance of the local creditors to make considerable progress with the winding up of the estate. Properties which had been mortgaged by the insolvents were sold, and the surpluses recovered for the general body of creditors, and various suits were instituted against the debtors of the estate.

The chief ground on which we have been asked not to annul the Madras Insolvency but to allow it to proceed is, that with knowledge of the prior insolvency in Madras, the Official Assignee of Rangoon entered into a contract in April of this year to sell valuable properties of the insolvents in the Coimbatore District of this Presidency in one lot for five lacs of rupees. It is alleged, and has been strongly pressed, that this sale was at a serious under value, and that, if the property had been sold in lots, very much higher prices would have been realised, and counter offers to purchase in one lot at an advance of half a lac were placed before the Court.

As regards the action of the Official Assignee of Rangoon in proceeding to enter into the contract of sale, it cannot be said, having regard to the observations in *William Watson, In the matter of* (3), that the law was clear. Even before Bakewell, J., the point as to the absence of authority does not appear to have been very strongly pressed as the learned Judge does not deal with it in his order. There were, also, circumstances connected with the property which the Official Assignee of Rangoon may have considered

to necessitate immediate action. We do not think that in these circumstances the conduct of the official assignee in proceeding with the administration or in entering into the contract of sale, affords sufficient ground for refusing to make the order of annulment, which we consider on other grounds to be desirable Nor do we think that the terms of the contract afford such a ground. Further than this it is unnecessary for us to go, and we express no opinion whatever as to this contract, because we think it is a question for the Rangoon Court to deal with after the annulment of the Madras Insolvency. In order that the creditors should have an opportunity of questioning it, if so advised, in the Rangoon Court, we have decided to make the annulment conditional on the Official Assignee of Rangoon undertaking not to execute the deed of sale for two months from this date, which will give time for an application to the Chief Court, and on his paying the costs of the Official Assignee of Madras both here and before the learned Judge as between solicitor and client out of the estate. As regards the memorandum of objections we set aside so much of the order of the learned Judge as makes the petitioning creditors and Thiayagaraya Chetti liable for the costs of the Official Assignee of Rangoon.

Seshagiri Aiyar, J.—I entirely agree with the judgment of the learned Chief Justice. As was pointed out by Strachey, J., in *Re Aranvayal Sabapathy Moodaliar* (2) an adjudication of insolvency by one Court is not a bar to the jurisdiction by another Court exercising similar powers. S. 22, Insolvency Act by implication recognizes concurrent adjudications. It may be, as was pointed out in *William Watson, In the matter of* (3), that the subsequent adjudication may give a sort of contingent a reversionary interest in the assets of the insolvency in the event of the previous order being set aside. The further question is whether we should annul the adjudication made in Madras. The Madras adjudication was undoubtedly earlier in date. The learned Advocate-General referred to the Madras petition and the order of adjudication thereon as showing that the title of the Madras Official Assignee was inferior to that of the Rangoon Official Assignee. He relied upon S. 51 of the Act, which declares that the insolvency of the debtor shall be deemed to have relation back to the time of the commission of the act of insolvency on which an order of adjudication is made. In my opinion, this section was not intended to refer to the conflicting claims of different assignees. As was contended by Mr. Chamier, its operation should be limited to questioning titles created by the insolvent in favour of third parties since the date of the act of insolvency complained of in the petition. If the other contention were upheld, the result would be that there would be a complete vesting order under one of the adjudications from a particular date, and an equally effective order by another adjudication from an earlier date. In my opinion, S. 51 was not intended to give priority to an adjudication by one Court over the adjudication of another Court by reference to the act of insolvency adjudicated upon The decisions in *Learoyd, Ex parte, Fowids, In re* (5), *Pollitt, In re, Minor, Ex parte* (6) and *Hirth, In re, Trustee, Ex parte* (7), relied on by the Advocate-General and which were given under the corresponding section of the English Bankruptcy Act, are only authorities for the proposition that, as between the trustee in bankruptcy and a creditor of the insolvent, the title of the former relates back to the act of insolvency mentioned in the petition. Lord Esher, M. R., in *Pollitt, In re, Minor, Ex parte* (6) gave this definition of relating back:

> "The result of the relation back is, that all subsequent dealings with the debtor's property must be treated as if the bankruptcy had taken place at the moment when the act of bankruptcy was committed. The debtor must be considered as having become a bankrupt the moment the deed was executed."

It is true that the decision of the House of Lords commented on by Dicey in his book under R. 113 related to acts of adjudications of bankruptcy made under different statutes. Nonetheless it seems to me that this principle should be applied to adjudications made under the same statute. Dicey in commenting upon the rule says:

> "The rule probably holds good where the earliest of several bankruptcies, and the assignment under it, takes place in a country beyond the limits of the United Kingdom, namely, Victoria or Prussia."

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(5) [1879] 10 Ch. D 3=48 L J. Bk. 17.
(6) [1893] 1 Q. B. 455=62 L. J. Q. B. 236.
(7) [1899] 1 Q. B. 612=68 L. J. Q. B. 227.

As was pointed out by the learned Chief Justice, there is nothing in the Presidency Towns Insolvency Act which says that a vesting order once made can be divested except it be by annulling the adjudication altogether. I am therefore of opinion that the Madras adjudication, which was earlier in date, did vest all the properties of the insolvent in the Madras Official Assignee, notwithstanding the fact that the act of insolvency complained of in the petition for adjudication is said to have been committed on a date later than the act of insolvency with reference to which the Rangoon order of adjudication was passed. On the question of convenience as to which of the two Courts should administer the estate, I entirely agree that the Rangoon Official Assignee should have the preference. I agree in the order proposed by the learned Chief Justice.

S.N./R.K. *Order varied.*

A. I. R 1919 Madras 570

PHILLIPS AND KUMARASWAMI SASTRI. JJ.

A. T. S. Rajam Bhattar—Plaintiff—Appellant.

v.

Singarammal and *others*—Defendants—Respondents.

Second Appeal No. 813 of 1916, Decided on 1st August 1918, against decree of Dist Judge., Chingleput, in Appeal Suit No. 311 of 1914.

Hindu Law—Religious office—Sale of office of paricharaka to stranger is void.

Where the office of paricharaka is a religious office, the sale of the office to a person unconnected with the family that holds the office is void as being opposed to public policy. 1 *Mad.* 225 (*P. C.*), *Foll.* 27 *I. C.* 400 and 6 *Bom.* 293, *Dist.* [P 570 C 2]

G. S. Venkatarama Aiyar—for Appellant.

C. Narasimhachariar, K. S. Krishnaswami Aiyangar and *T. M. Vedantam*—for Respondents.

Judgment.—The question for decision is whether the purchase by plaintiff of the office of Paricharaka is valid. From the finding as to the duties of Paricharaka it is clear that it is a religious office. It also appears that plaintiff is not connected with the family that held the office. In *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi* (1) the Judicial Committee expressed their opinion that a custom which allowed the sale of a trusteeship for the pecuniary advantage of the trustee would be bad in law. The trusteeship referred to in that case was the Uraima of a Malabar temple. In a prior portion of the judgment we find the following:

"The first question is whether independently of custom, persons holding such a trust are capable of transferring it at their own will. No authority has been laid before their Lordships for this proposition; principle and reason seem to be strongly opposed to such a power and particularly to such an exercise of it as has taken place in this case."

In *Kuppa Gurukal* v. *Dorasami Gurukal* (2) it was held, following the dictum of the Privy Council in the above case, that alienation of religious trusts and offices is generally illegal, although it might be valid in exceptional circumstances such as when the transfer was to the next heir to the office. This principle was followed in *Annasami Pillai* v. *Ramakrishna Mudaliar* (3) and in *Lakshmanaswami* v. *Ranganna* (4) it was held that the sale of a religious office was opposed to public policy, and a similar view was taken in *Sundarambal Ammal* v. *Yogavanagurukkal* (5). We have not been referred to any authority directly to the contrary, although a custom recognizing the validity of a transfer to those who by birth or marriage are entitled to hold the office was held to be reasonable in *Mahahamaya Debi* v. *Haridas Haldar* (6) and in *Mancharam* v. *Pranshankar* (7) a transfer to one next in the line of succession was also held to be valid. These exceptional cases need not be considered now for the transfer in the present case was made for consideration to a stranger. In accordance with the dictum in *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi* (1) which has been followed by all the subsequent decisions of this Court, we hold that the alienation sued on was invalid and dismiss this second appeal with costs.

S.N./R.K. *Appeal dismissed.*

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(1) [1876] 1 Mad. 235=4 I. A. 76=3 Sar. 68 =3 Suth. 362 (P. C.).

(2) [1883] 6 Mad 76.
(3) [1901] 24 Mad. 219.
(4) [1903] 26 Mad. 31.
(5) A. I. R. 1915 Mad. 561=38 Mad. 850=23 I. C. 72.
(6) [1915] 42 Cal. 455=27 I. C. 400.
(7) [1881] 6 Bom. 293.

A. I. R. 1919 Madras 571

SADASIVA AIYAR AND SPENCER, JJ.

Deivasikamani Nataraja Desikar—Plaintiff—Appellant.

v.

Valliammai Achi and *another*—Defendants—Respondents.

Second Appeal No. 1485 of 1917, Decided on 3rd October 1918, against decree of Temporary Sub-Judge, Ramnad, in Appeal Suit No. 5 of 1917.

(a) Hindu Law — Religious endowment—Mahant is trustee.

The mahant of a mutt is a trustee, in law, of the mutt properties. [P 571 C 2]

(b) Limitation Act (9 of 1908), Art. 134—Property conveyed to Mahant for benefit of mutt—Transaction is conveyance in trust.

Where property is conveyed to the mahant of a mutt not for his personal use, but for the benefit of the mutt, the transaction is a conveyance in trust, within the meaning of Art. 134. [P 572 C 1]

(c) Limitation Act (9 of 1908), Art 134—Alienation of mutt properties not beneficial to mutt is not valid—Limitation is 12 years from date of alienation

A permanent alienation of mutt properties by a mahant for purposes not beneficial to the mutt is beyond his powers, and a suit to recover properties so alienated must be instituted within 12 years of the date of the alienation, otherwise it will be barred under Art. 134. [P 572 C 1]

R. Ganapathy Aiyar—for Appellant.

P. S Narayanaswami Aiyar — for Respondents.

Spencer, J.—This suit was brought by the mahant of the Thiruvannamalai mutt to recover possession of certain lands sold by his predecessor in 1895 to the father of defendants 1 and 2. He alleged that the sale was for no necessity and that it was not binding on the mutt. The suit was decreed in the Court of the District Munsif but on appeal the Subordinate Judge dismissed it as barred by limitation.

The questions raised in the second appeal are first whether the mahant of a mutt is a trustee or a life tenant; secondly, whether Art. 134, Limitation Act applies to this case; and thirdly, whether the alienation was void or voidable, it being suggested that if it was only voidable, the cause of action to set it aside would only arise on plaintiff's accession to the headship of the mutt. On the first point in *Ram Parkash Das* v. *Anand Das* (1) and *Basudeo Roy* v. *Jugalkishwar Das* (2) the Judicial Committee of the Privy Council have laid it down that the mahant of a mutt is a trustee of the mutt properties. In *Baluswami Aiyar* v. *Venkitaswamy Naicken* (3) it was held that a mahant was a trustee and not a life tenant as regards the properties of the mutt. In *Obla Venkatachalapathi Aiyer* v. *Thirugnana Sambanda Pandara Sannadhi* (4) a doubt was raised whether this proposition had not been too broadly expressed in *Baluswami Aiyer* v. *Venkitaswamy Naicken* (3). In *Kailasam Pillai* v. *Nataraja Tambiran* (5), this question was again discussed and Benson and Wallis, JJ. said that it could not be predicated that a mahant was a trustee in all cases, but it must depend on the constitution of the particular institution. Sankaran Nair, J., said that in the absence of evidence to the contrary the mahant was not a trustee and that he was not a life-tenant either. In *Muthusamier* v. *Sree Sree Methanithi Swamiyar* (6) it was said that the position of a mahant was analogous in many ways to that of the estate of a Hindu female heir, and in *Vidyapurna Tirtha Swami* v *Vidyanidhi Tirtha Swami* (7) it was observed that the mahant was not a mere trustee but was a corporation sole.

The last named authorities contain attempts to strictly define the position of a mahant by comparing it to the position of Hindu females or corporations sole in English law. But they do not show that generally speaking, the Mahant is not a trustee. The learned Judges who decided these cases were careful not to say that the Mahant of a Mutt was not a trustee. I think that he is not the less a trustee, because his position has been in same respects compared to that of a Hindu female or to that of a corporation sole in English law. On the whole, there is no good reason for distinguishing the case of this Mutt from those which came under the consideration of the Privy Council in their latest rulings. I hold that the plaintiff and his predecessor were trustees in law. The next question is whether the suit property was "conveyed or bequeathed in trust" within the meaning of Art. 134, Lim Act. Ex. 2 is the document under which

(1) A. I. R. 1916 P. C. 256=38 I. C. 583=43 Cal. 707=43 I. A. 73 (P.C.).
(2) A. I. R. 1918 P. C. 37=45 I. C. 818. (P.C.)
(3) [1917] 40 Mad. 745=40 I. C. 531.
(4) [1917] 42 I. C. 273.
(5) [1910] 33 Mad. 265=5 I. C. 4.
(6) [1915] 38 Mad. 356=19 I. C. 601.
(7) [1904] 27 Mad. 435.

this property was conveyed by the perpetual lessees under the Devastanam. It is dated 25th July 1886 and the Mutt became the perpetual lessee from that date subject to an annual payment to the Devastanam. As the property was not conveyed to the Mahant for his personal use but sold to him for the benefit of the Mutt, there can be no doubt that the transaction was a conveyance in trust. Lastly, the Privy Council case in *Abhiram Goswami Mohant* v. *Shyam Charan Nandi* (8), which is relied on for the appellant as showing that an alienation by a Mahant for a purpose not beneficial to the Mutt would be good for the lifetime of the Mahant for the time being, was the case of a lease in which the personal right of the Mahant was put forward. There would have been no injury to the estate of the Mutt by the granting of a lease for the Mahant's lifetime, but a permanent lease would have been an alienation beyond his powers, and in this sense the Privy Council must be understood as holding that the lease was only valid during the lifetime of the Mahant in office. Ex. 1 being a document of out-and-out sale executed in October 1895, this suit brought in 1914 more than 12 years after the sale, was clearly barred and the Subordinate Judge was right in deciding this point in favour of the defendants The second appeal is therefore dismissed with costs.

Sadasiva Aiyar, J.—I entirely agree with the conclusions and reasoning of my learned brother in the judgment just now pronounced by him. I only wish to add with the greatest respect to the decision in *Kailasam Pillai* v. *Nataraja Tambiran* (5) that it has always seemed to me a very startling proposition that the ascetic head of a Mutt, who is supposed to have renounced the world and all its vanities, whose fall from a strict life of continence or Brahmacharya disqualified him from holding the office of Matathipathi (which involves the initiation of others spiritually fitted into the holy order of Sanyasa) but who was (in degenerate mediaeval ages), however allowed to be the manager and the trustee and thus the legal owner of properties dedicated to the support and advancement of religion and charity generally and of a particular school of monastic institution and doctrine specially, should be considered not to be a trustee of any institution at all, unless the person who alleges him to be a trustee proves that fact by evidence. In the case in *Muthusamier* v. *Sree Sree Methanithi Swamiyar* (6) I had, with great respect to the decision in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (7), ventured to express serious misgivings about the soundness of the view conferring on the heads of these Mutts the status of corporation sole. I had also expressed grave doubts of the soundness of the prevailing view that these heads could spend the income of their Mutt institutions in even immoral, extravagant and inappropriate ways without question and without liability to removal for any misconduct and even for patent unfitness (through a notoriously profligate and unascetic life) to hold the position of the head of a monastic institution.

However I am clear that their Lordships of the Privy Council have in their recent decisions, referred to my learned brother's judgment, not accepted the view enunciated in *Kailasam Pillay* v. *Nataraja Tambiran* (5) or *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (7) and that these decisions are therefore no longer of binding force. As regards *Abhiram Gowswami Mohant* v. *Shyama Charan Nandi* (8) both Miller, J. and myself considered it carefully in *Muthusamier* v. *Sree Sree Methanithi Swamiyar* (6) and our opinion as to the exact scope of their Lordships' decision in that case is (I am glad to find) supported by the opinion of my learned brother.

S.N./R.K. *Appeal dismissed.*

(8) [1909] 36 Cal. 1003=36 I. A. 148=4 I. C. 449 (P.C.).

A. I. R. 1919 Madras 572

AYLING AND KRISHNAN, JJ.

Arunachalam Pillai—Defendant—Appellant.

v.

Vellaya Pillai and *others*—Plaintiff and Defendant—Respondents.

Second Appeal No. 348 of 1917, Decided on 8th November 1918, against decree of Sub-Judge, Madura, in Appeal Suit No. 12 of 1916.

Civil P. C. (5 of (1908), O. 22, R. 9—Death of plaintiff during pendency—Application for substituting by legal representative dismissed—Suit by legal representative—Defendant is estopped from contending that O. 22, R. 9 applied—Time spent in prosecuting

wrong remedy could be excluded under Limitation Act (9 of 1908), S. 14—Evidence Act (1 of 1872,) S. 115.

The mother of a last male owner brought a suit to obtain a declaration that an adoption made to the latter was invalid. During the pendency of the suit the plaintiff died, and the present plaintiffs sought to continue the suit but the defendants contended that they were not entitled to do so and the Court, allowing the contention dismissed the suit. The plaintiffs thereupon brought the present suit. The defendant, who was a defendant in the previous suit, contended that the suit was barred under O. 22, R. 9 by reason of the decree dismissing the previous suit and that it was also barred by time:

Held:(1) that it was not open to the defendant to contend that the previous decision was erroneous, and that the plaintiff's proper remedy was to continue the suit first filed. (2) that the plaintiffs were entitled under S. 14 to claim a deduction of the interval between the date of their applying to continue the previous suit and the date of the Court's order dismissing that suit. [P 573 C 2]

K. R. Guruswami Aiyar and *A. Subramanya Aiyar*—for Appellant.

T. R. Ramchandra Aiyar and *K. S. Ganapathi Aiyar*—for Respondents.

Judgment.—Two grounds are argued in appeal: (1) that the present suit is barred under O. 22, R. 9, by reason of the decree of this Court in Second Appeal No. 1384 of 1910 dismissing under O. 22, R. 3 the previous suit filed by the mother of the last male owner for a declaration against the adoption (Original Suit No. 678 of 1906 on the file of the Court of the District Munsif of Dindigul, (2) that the present suit is barred by limitation. The first plea is one which, we think, appellant is estopped from raising in the present proceedings. The plaintiff in the former suit died; and when the present plaintiffs sought to continue the suit, the present appellant (defendants in both suits) contended that they were not entitled to do so. This Court, in the view of the law which prevailed until the Privy Council decision in *Venkatanarayana Pillay* v. *Subbammal* (1), allowed this contention and dismissed the suit. Plaintiffs have now, accepting that decision, filed a fresh suit; and we think appellant cannot be allowed now to turn round and contend that the previous decision was erroneous and that their proper remedy was to continue the suit first filed, vide *Jagannadha Rao* v. *Kurmayya* (2) and *Assan* v. *Pathumma* (3).

As regards limitation, we think plaintiffs are entitled to claim under S. 14, Limitation Act, a deduction of the interval between the date of their applying to be allowed to continue the original suit and the date of this Court's order in second appeal dismissing the suit. This deduction, if allowed, will admittedly save limitation. Their application was finally dismissed in effect on the ground that it was one which the Court was not competent to entertain; and we think the words "other cause of a like nature" in S. 14 are wide enough to cover such a case. The other objection to the application of the section raised by Mr. Guruswami Aiyar for appellant is that the Court was not really unable to entertain it, but only thought it was unable. We think this distinction is without force. This Court, following the view of the law then prevalent, considered that the Munsif's Court could not entertain the application, and decreed accordingly and we think the same effect must be given to its decision in the present connexion as if it had been correct. It would be most unreasonable to hold (for instance) that a party who filed an application in the wrong Court was entitled to the benefit of the section: but that one who filed an application in the right Court, which erroneously believed itself to be the wrong Court, was not so entitled. We hold that the suit is not time barred. The second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1915 P. C. 124=38 Mad. 406=42 I. A. 125=29 I. C. 295 (P. C.).

(2) [1907] 17 M. L. J. 314.

(3) [1899] 22 Mad. 494.

A. I. R. 1919 Madras 573

WALLIS, C. J. AND SPENCER, J.

Nani Kutti and *others*—Plaintiffs—Appellants.

v.

K. P. P. P. Achuthan Kutti Nair and *others*—Defendants—Respondents.

Second Appeal No. 1266 and 1267 of 1917, Decided on 9th October 1918 against the decree of the Temporary Sub-Judge, Palghat, D/- 19th February 1917.

(a) Malabar Law — Tarwad — Partition—Consent of adult members is necessary.

Under Malabar law a partition can only be effected by and with the consent of all the adult members of the tarwad. [P 574 C 1]

(b) Malabar Law—Tarwad—Partition per stirpes or by tavazhies by adult members is valid—Minors on attaining majority cannot impeach.

It is competent to the adult members of a Malabar tarwad to make a partition per stirpes or by tavazhies and their act in effecting such a partition cannot be questioned by the minor members on their attaining majority. (P. 574 C 1, 2)

C. Madhavan Nair—for Appellants.

K. P. M. Menon, *C. V. Ananthakrishna Aiyar*, *A. Sivarama Menon*, *K. B. Venkatachela Aiyar* and *T. Eroman Unni*—for Respondents.

Judgment.—In view of the findings of the lower appellaate Court in these cases, Mr. C. Madhavan Nair, who appears for the appellants, has only questioned the decision as regards the partition deed, Ex. C. This raises a question of Malabar law of some importance on which we have derived much assistance from his argument and those of Mr. K. P. M. Menon and Mr. C. V. Ananthakrishna Aiyar for various respondents. The division under Ex. C is a division of the tarwad properties per stirpes, that is to say allotting an equal share to each stirpe or Tavazhi. It is, of course, well settled in Malabar that there can be no partition at all, except by the consent of all the adult members. As regards the minor members of the tarwad it was observed by Sankaran Nair J., in *Parakutti* v. *Kelapan Nair* (1),

"such a partition would ordinary be binding on the minors, but if on attaining majority, they are able to show that they have been prejudiced, that partition could be reopened so far as they are concerned, and they would be awarded the share which should have been set apart for them; but subject to this, the partition is final as between those who were parties to it."

This appears to be an application of the similar principle which has been applied with regard to partitions on the East Coast. As to such partitions Mr. Ananthkrishna Aiyar has referred us to the decision of Srinivasa Iyengar, J., in *Yeechuri Ramamurthy* v. *Yeechuri Ramamma* (2), where it was pointed out that partitions effected by the adult members of the family are binding on the minor members, in the absence of negligence or fraud. The only question then is whether this partition which is by consent can be upset at the instance of certain members of the tarwad who were minors, on the ground that the division was per stirpes and not per capita. Now the authorities to which Mr. Ananthakrishna Aiyar has called our attention show conclusively that partition per stirpes, or what comes to the same thing partition by tavaznies, has, to say the least, a greater body of authority in its favour than partition per capita. He has referred us to Strange's Manual of Hindu Law, S. 389, where it is said that where such divisions are made, they would naturally be by tavazhies. Mr. Ormsby who was Chief Justice of Travancore, in his book on Marumakathayam law, says at p 2, para. 4:

"Where division takes place it will usually be according to the taivaries, or number of daughters of the original ancestress. Each taivari may similarly be subdivided, should the members consent thereto and so on, until individual proprietorship is arrived at. I am not aware that this rule has ever been questioned."

The fullest discussion of the question is to be found in Dr. Pandalai's Marumakathayam Law, 1914, p. 146 (which was not referred to before us) where the same result is arrived at, and several decisions of the Travancore High Court are referred to. In a recent case which came before the Privy Council, *Sulaiman* v. *Biyaththumma* (3), their Lordships alluded to this method of division by tavazhies as the proper mode of division. They say that this division

"was merely an application of the rule that division for the purpose of partition is stirpital, though as between the members of any class it is capital."

Mr Madhavan Nair explained this by saying that it only meant that divisions should be by tavazhies, but did not lay down that each tavazhi should have an equal share. But a division per stirpes which gave each stirpe an unequal share depending on the number of members in it, would be very like a division per capita, and was not, we think, what their Lordships intended. This division by Ex. C has been made in what appears upon authority to be the more approved form and therefore we think that the plaintiffs can have no right to question a partition effected in this manner. Further we have to bear in mind that a partition in Malabar depends upon the consent of all parties, and if we were to uphold the plaintiffs' contention, the one result would be to set this partition aside and to restore the original state of unity, because division per capita would in this case be without the consent of all the

(1) [1917] 34 I. C. 818.
(2) [1916] 33 I. C. 961.
(3) A. I. R. 1916 P. C. 217=39 I. C. 243 (P. C.).

adult members. It appears that with regard to some of the property of this family, it was divided per capita by Ex. B. That division is not attacked in the present case and we have not to consider it. What is contended is that the partition under Ex. C should also have been per capita, and should be upset because it is per stirpes. We are clearly of opinion that there is no ground for this contention. Therefore the appeal fails and must be dismissed with costs. Second Appeal No. 1267 of 1917 is also dismissed with costs.

In Memorandum of Objections in Second Appeal No. 1267 of 1917.

We must allow the memorandum and increase the fee in the lower appellate Court from Rs. 20 to Rs. 95. There will be no order as to costs of this memorandum of objections.

S.N./R.K. *Appeals dismissed.*

A. I. R. 1919 Madras 575

WALLIS, C. J. AND SPENCER, J.

(T. W.) Subbaroya Chetti—Defendant—Appellant.

v.

S. Subramania Iyer and *others*—Plaintiffs—Respondents.

Appeal No. 72 of 1917, Decided on 18th April 1918, against decree of Temporary Sub-Judge, Chinglepet, in Original Suit No. 4 of 1916.

(a) Trusts Act (1882), S. 66 — Presumption — Trustee of charitable endowment mixing trust funds with private funds—Presumption is that whole fund belongs to trust.

Where the trustee of a charitable endowment mixes up this private funds with the trust funds in the accounts, the presumption is that the whole of the funds belong to the trust and the onus is on the trustee to show that any portion of them is his private property [P 576 C 2]

(b) Trusts Act (1882), S. 73 — Removal of trustee—Trustee cannot be removed at instance of stranger in absence of proof of misconduct.

A Court will not be justified in removing a trustee of a charitable endowment who has long held the office, at the instance of strangers who have no better title, in the absence of clear proof of the trustee's misconduct. [P 578 C 1]

(c) Civil P. C. (1908), S. 92— Scheme—Association of strangers with trustee likely to lead to friction should be avoided.

In framing a scheme for the management of a trust, the association of strangers with the trustee which is likely to lead to friction should be avoided. Provision must however be made for periodical auditing of the accounts and for their inspection by those interested in the trust. [P 578 C 2]

T. R. Venkatarama Sastri and *M. S. Vaidyanatha Aiyar*—for Appellant.

P. R. Ganapathi Aiyar, V. C. Seshachariar and *K. S. Ramabhadra Aiyar*—for Respondents.

Judgment. — This appeal is against the judgment of the Temporary Subordinate Judge of Chingleput declaring certain properties to belong to the Shri Marundiswaraswami Temple at Tiruvanmiyur and settling a scheme for that temple. The suit was brought under S. 92, Civil P. C., with the consent of the Advocate General by Sir Subramania Aiyar, the President of the Dharmarakshna Sabha in Madras, and by the Village Munsif of Tiruvanmiyur, who was previously employed under the defendant's late father as the temple Shrotriam Amin, for the removal of the defendant from the trusteeship on account of the misconduct of himself and his ancestors, for an account of management of the temple affairs during the period when the defendant's father and defendant held office, for the recovery of properties alleged to have been misappropriated by the defendant and his family, for the appointment of new trustees, and for the settlement of a scheme for the proper management of the Devastanam.

The Subordinate Judge carefully investigated the charges made against the defendant. He found that the charges in respect of items 1 and 2 failed as the conduct of the trustees was justifiable. He found that the 2nd, 4th, 6th and 9th charges were unproved, that the 3rd and 5th charges were concocted by plaintiff 2 or his brother, P. W. 1; that the 7th charge was unfounded; and that the 8th charge related to a matter for which the defendant was not responsible. In the result he found that no definite charges had been brought home to the defendant. He considered that the management of the temple by the defendant's ancestors, though somewhat lax in respect of the mixing of their own accounts with the temple accounts, was not on the whole, dishonest. He declared that certain properties claimed on behalf of the temple by the plaintiffs belonged to the temple and that certain others belonged to the defendant. He considered that no sufficient ground had been shown for the removal of the defendant from the trusteeship and found that he was an inexperienced young man who had not

had a chance of showing that he could manage the temple affairs properly before the suit was launched; and he directed that the management of the temple in future should be by a Board of Trustees consisting of the defendant and two other persons to be appointed by the Court and that this Board of Trustees should be under the control of the Dharmarakshana Sabha of Madras. The defendant appeals against the decree in so far as it takes away the sole management from his hands and associates two strangers with him in the management. He also appeals against the finding of the Subordinate Judge that four lands in patta No. 35, item 6 of C schedule, belong to the temple and also against the finding that the Sanad Maniyam lands in Kariambakkam belong to the temple.

The plaintiffs have filed two separate memoranda of cross-objections against the finding of the Subordinate Judge that the defendant was the rightful trustee and had acquired a right by adverse possession. They also object to the finding that items 2 to 6 of A to C schedules in para. 50 of the judgment belong to the defendant and they ask to have the defendant altogether removed from the trusteeship. We may first deal with the items of property about which there are disputes. Patta No. 35 contains four numbers, 475, 474, 476 and 477. Of these the defendant claimed the whole of 474, 477 and part of 475 and 476. It appears from Ex. L-2 that these lands were purchased in 1893 for Appu Chettiar, who was the then Manager of the temple, by the temple Kanak (accountant), Thanikachallam Pillai. They were transferred to patta No. 11 and thence to patta 35 in Appu Chettiar's name. In Ex. L-2 under the heading "Accounts of receipt and expenditure of Maniyam Tiruvanmiyur Dharmam" there is an entry of Rs. 91 odd paid as teerva for the lands in patta Nos. 11 and 35, with the statement that these lands "belong to the Devastanam." This is almost conclusive in favour of the lands being the property of the temple. There is also the fact that Rs. 20 are shown in the temple accounts (Ex. M) as spent from the temple funds towards the purchase of these lands and the kist of the lands was also debited to the temple. We think that the Subordinate Judge was right in treating these lands as belonging to the temple. The next item is the Sanad maniyam lands in Kariambakkam. These lands were obtained by a sale deed, Ex Z, in favour of the defendant's father and his father's brother in 1890.

The sale was to pay off a mortgage in favour of another member of the defendant's family. The defendant has not shown that the Rs. 100 for this purchase came from private funds. In a case like the present, where it is clear that the funds of the temple and the funds of the family have not been kept distinct in accounts, the presumption is in favour of the temple: see *Neelayathakshi Ammal* v. *Taluk Board of Mayavaram* (1) as to the duty of trustees to keep their property distinct from the trust property and to maintain accounts of all loans taken from one property for the benefit of the other. We confirm the Subordinate Judge's finding upon this portion of the defendant's claim.

Turning now to the lands claimed in the memorandum of objections the first is Chinnamuthan Chavadi land. This land was obtained under a 99 years' lease granted by Lord Clive in 1801 in favour of Mari Chetti of Tirupassoor. Under a partition between him and his elder brother in 1804 this land fell to the share of Mari Chetti. Before the 99 years' lease expired a renewal was granted in the name of the defendant's father under Ex. 13. Three sums obtained as compensation for acquisition of portions of this land by Government were credited by the defendant's father to the temple and the income and expenses arising out of possession of this land have all been entered in the temple accounts: see Exs 59, 19, 26, 21 and 22. Ex. 19 is headed "Account of Tiruvanmiyur Marundiswaraswamiar." The Subordinate Judge, having regard to the facts that the defendant's family conducted trade in yarn and advanced from their Maligai accounts large sums to this temple thinks that these advances may have been intended as gifts to the temple and that the rents and profits derived from the land may have been taken by the family in compensation for the expenses incurred out of their own trade for the temple. The respondents' pleader goes so far as to describe the Maligai accounts as an alias for temple accounts. But in our opinion he has

(1) [1911] 34 Mad. 333=12 I. C. 440.

not established so much. We find that in some places, the temple is entered as a debtor of the family. The Maligai accounts go back to a time before the family had anything to do with the temple and we find a system of debit and credit between the Devastanam and the Maligai. There are also separate accounts of individual members of the family on certain pages of the Maligai accounts. The view taken by the Subordinate Judge is that as on the whole there was always a balance of indebtedness in favour of the Maligai as against temple it is probable that the temple income being insufficient the defendant's ancestors were in the habit of lending money from their own funds to supplement the temple funds without keeping any sharp distinction between the two.

The entry in Ex. 19 at p. 449 of Tiruvanmiyur Marundiswaraswami temple "purchase of Seemai yarn" stands by itself and has not been satisfactorily explained. But it is an account of 1876 and the heading in the name of the temple is inconsistent with the theory that the temple was the sole owner of all the Maligai trade. Ex. 49 at p. 668 shows that this account was in existence when Tirupassoor Subbaraya Chetti the last trustee previous to the alienation by Sundarammal was alive and it thus appears that the defendant and his father only followed the precedents of previous trustees in entering debit and credit items between the temple and the Maligai. A Commissioner was appointed to examine these accounts, and in his evidence he stated that the yarn account had not been brought to his notice until the trial. It appears to have been an afterthought to make much of this solitary heading. On the whole we do not consider it proved that all the profits made from the Maligai should belong to the temple. But in respect of this particular land we think that the onus is, as before explained upon the defendant to prove that the property belongs to himself when he is shown to have mixed his own funds and the temple funds in his accounts; and the evidence of compensation paid in respect of portions of this land having been credited in favour of the temple and the debit and credit entries in the temple accounts for Chinnamuthan Chavadi outweighs the evidence adduced on behalf of the defendant and is sufficient for a finding that Chinnamuthan Chavadi is the property of the plaint temple.

The next item Palavakkani lands and a house in Brodie's Road follow the result of the finding as to Chinnamuthan Chavadi, because it appears that these properties were purchased out of money obtained in land acquisition proceedings when a portion of Chinnamuthan Chavadi lands were acquired by the Government. This land was mortgaged under Ex. T to the defendant's father for Rs. 2,000. He took the mortgage as trustee of the temple and he again leased it under Ex. T in that capacity. The interest obtained under the lease-deed was received by the defendant's father and he signed the receipts, Ex. U series, as trustee of the temple. We find that this item is temple property.

Item 5—Pallipattu and Kottur lands were purchased in the name of Appu Chetti, defendant's granduncle. The Subordinate Judge holds that these lands are the private properties of Appu Chetti. They are now stated to be in possession of Abboy Chetti. Abboy Chetti is not a party to the suit. We do not think that we should interfere with the finding of the Subordinate Judge that these lands are the private properties of Appu Chetti. *Item* 6—Odaikuppam lands were mortgaged to Appu Chetti in 1884. He brought a suit in 1891 on the mortgage and got a decree and became the purchaser in execution. He has since disposed of the lands by Ex. F in 1903 in favour of Karimunnessa Begam, who is not a party to this suit. No declaration can be made in favour of the temple in respect of these lands and the respondent's pleader has expressed his willingness to drop this item. The Subordinate Judge held that the defendant's father, having been trustee of the temple for over 12 years from 1878, must be deemed to have become the rightful trustee by adverse possession and that the defendant as heir to his father must also be deemed to be a rightful trustee. The last trustee in the family of the founders of this charitable institution was Tirupasoor Subbaraya Chetti, who died in 1868 leaving a widow Minakshi Sundarammal.

This widow executed a powernama in favour of Oothakadu Subbaraya Chetti,

who was her uncle's son and the defendant's grandfather He had two sons, Kandasami Chetti and Namasivaya Chetti. The latter died a lunatic and the defendant's father Kandasami Chetti died in 1911. Assuming that Sundarammal had no authority to alienate the trusteeship to persons not standing in the direct line of the founder the defendant and his grandfather and father have been in actual management of the temple trust since 1868. Although limitation will only begin to run from the death of the widow: see *Sulraja Kakramaya* v. *Subrada Padayya* (2) and *Neelakanta Rao* v. *Narayanaswami Aiyar* (3), there is an interval of more than 12 years since Sundarammal's death in 1881 and the institution of this suit. The Subordinate Judge therefore was of opinion that the defendant had established a right by adverse possession in his favour. We think it unnecessary to pronounce an opinion on this point. The defendant and his predecessor have been in possession of the office for many years and we should not be inclined to disturb his possession and depose him at the instance of strangers unconnected with the family of the former trustees, who have themselves no better title than the defendant and do not suggest that there is any one living who has a better hereditary title than the defendant, unless he was clearly guilty of misconduct and it appeared to be for the clear benefit of the trust that he should be deposed.

We agree with the Subordinate Judge's finding that the plaintiffs have failed to prove that the defendant was guilty of any misconduct or fraud upon the revenues of the temple. It is unnecessary to discuss the charges in detail. Arguments were addressed to us at some length in respect of the 5th charge, which related to a sum of Rs. 59-8-0 paid for casuarina posts, also in respect of the 14th item of liability which was concerned with a sum of Rs. 1,250 of temple money deposited with a Nattukottai Chetti firm, and lastly in respect of a double entry of Rs. 150 in the Devastanam Kurippu Ex. 47 at p. 296, coupled with the defendant's admission that he used to take cash out of the temple balance for his own private use. It is sufficient to say that the entry of the first of these items was made by plaintiff 2's brother, that plaintiff 2 took away the temple accounts in order to set up a case of misappropriation against the defendant and that, in these circumstances, any evidence against the defendant coming from that source is tainted and not worthy of any credit. As for the item of Rs 1,250 the statement of P. W. 3, a Gomasta of the Nattukottai Chetti firm, that no temple money was ever kept in deposit with that firm was not of much value when taken with his admission in cross examination that he had not brought his firm's accounts and that without them he could not say what money had been received by the firm. The last item of Rs. 150 is not one of the items upon which any charge has been founded in the plaint. It may be that a satisfactory explanation is forthcoming for the entry as it stands, but until the defendant has had a chance of explaining, it cannot be assumed that the amount has been misappropriated.

Mr. Venkatarama Sastri contended on behalf of the appellant that the association of two strangers along with the defendant in the management is likely to lead to friction and he quoted *Mahomed Ismail Ariff* v. *Hajee Ahmed Molla Dawood* (4), in support of this contention. He suggests that instead of the scheme propounded by the Subordinate Judge, the defendant should be left to manage the trust subject to an arrangement for exhibiting the accounts for the examination of worshippers in a manner similar to that in the scheme of the Malleswara and Keshava Perumal temples in *Annasami Pillai* v. *Ramakrishna Mudaliar* (5). We think there is considerable force in his contention The manner in which the accounts have been kept in the past shows the necessity of a periodical audit being made, and this is conceded on both sides to be one of the conditions that should be embodied in the scheme. At the same time it does not appear to be desirable that the management of this temple should be placed under the control of a self-constituted body having its headquarters in the Presidency Town. We therefore direct in substitution for the scheme provided in the Subordinate Judge's decree as follows:

(2) [1910] 7 I. C. 715.
(3) [1917] 37 I. C. 733.
(4) A. I. R. 1916 P. C 132=43 Cal. 1085=35 I. C 30=43 I. A. 127 (P. C.).
(5) [1901] 24 Mad. 219.

(a) The defendant is confirmed in the office of the sole Dharmakarta of the suit temple. (b) After defendant's lifetime the office shall descend in succession to his eldest male heir. (c) An annual audit of temple accounts shall be made at the temple expenses. (d) Suitable persons shall be appointed by the members of the Saidapet Taluk Devastanam Committee for the time being as auditors to make the audit of the temple accounts for the year. Failing them the appointment of auditors shall be made by the District Court on the application of worshippers. (e) The results of such audit shall be posted in a conspicuous spot at the entrance of the temple and shall be kept exposed to view for the space of one month. (f) The Dharmakarta shall allow worshippers of the temple to inspect the temple accounts between the hours of 3 and 5 p. m., on one day of every week and for that purpose shall cause the books and accounts to be kept in a conspicuous place in charge of one of his subordinates. (g) Among the books to be kept for the examination of worshippers the Dharmakarta shall maintain registers showing the various moveable and immovable properties belonging to the suit temple as also all the valuable moveable properties inclusive of jewels. (h) The Dharmakarta shall have the said registers duly revised once a year. (i) The Dharmakarta, from time to time and whenever the surplus funds of the temple exceed the sum of Rs. 3,000, shall invest the said surplus funds in any of the modes mentioned in S. 20, Trusts Act.

The net result is that the appeal succeeds as regards the scheme and fails as regards the lands in Patta No. 35 and the Maniyam lands of Kariambakkam. The memorandum of objections succeeds as regards the Chinnamuthan Chavadi and the Palavakkam lands and the house in Brodie's Road and fails as regards the Pallipattu and Kottur lands, the Odaikuppam lands, and the prayer to remove the defendant from the management. Each party will bear his own casts in this Court.

S.N./R.K. *Appeal partly allowed.*

A. I. R. 1919 Madras 579

ABDUR RAHIM AND BAKEWELL, JJ.

Bolusawmy and *another*—Defendants—Appellants.

v.

Venkatadri Appa Rao—Plaintiff—Respondent.

Appeal No. 204 of 1916, Decided on 17th August 1917, against order of Sub-Judge, Kistna, in Misc. Appeal No. 61 of 1915.

Madras Estates Land Act (1908), Ss. 3 (16) and 20—"Tank beds"—Meaning explained.

In using the expression tank-beds in S. 3 (16) the legislature was alluding to such class of tank-beds as are cultivable, i. e., as are capable of being cultivated when the tank has become dry or when there is no water in the tank in certain years. [P 579 C 1]

Where tank-beds are capable of being cultivated or used in any such manner, the rights of the landholders over them are not affected by the enactment of S. 20. [580 C 1]

Narayanamurthi—for Appellant.

Judgment.—The Subordinate Judge in his judgment says :

"The land involved in this appeal is admittedly cultivable tank-bed land and even at present admittedly the land is liable to submersion."

The question is whether the land is a raiyati Land within the meaning of S. 3 (16), Estates land Act, 1908. That clause says :

"Raiyati land means cultivable land in an estate other than private land but does not include (a) tank-beds; (b) threshing floors, cattle-stands, village-sites, etc., etc."

So far as tank-beds are concerned, what the legislature was alluding to was such class of tank-beds as are cultivable, that is to say, as are capable of being cultivated when the tank has become dry or when there is no water in the tank in certain years. Mr. Narayanamurthi for the appellants contends that what the legislature meant was the bed of a tank which is full of water. It is difficult however to assume that the legislature was dealing with land that could not be cultivated at all. S. 20 of the Act was also referred to by the learned Pleader. That section lays down :

"Threshing floors, cattle-stands, village-sites and other lands situated in any estate which are set apart for the common use of the villagers shall not be assigned or used for any other purpose without the written order of the District Collector;"

but with reference to tank-beds the section says :

"Nothing in this section shall apply to tank-beds in my estate or affect the rights of the landholders over them."

That seems to be a quite clear provision that so far as tank beds are capable of being cultivated or used in any such manner, the rights of the land-holders over them are not affected by the enactment of S. 20. Then Mr. Narayanamurthi seemed to argue that since this class of land does not come within the definition of "private land" we must take it as raiyati land, but there is no warrant or authority for that proposition. In fact the definition of "raiyati land" contemplates the existence of non-raiyati lands which are not private lands. If the land in suit is not raiyati the defendant is liable to be ejected, unless he could make out that all lands which are not private lands are to be treated on this same footing as raiyati lands. Such a presumption as we have said is clearly negatived by the wording of Cl. 16, S. 3. We therefore hold that the decision of the Subordinate Judge is right and the appeal must be dismissed with costs.

S.N./R.K *Appeal dismissed.*

A. I. R. 1919 Madras 580

OLDFIELD AND SESHAGIRI AIYAR, JJ.

K. A. M. A. K. Kaliyappa Nadar—Plaintiff—Petitioner.

v.

G. N. Grigori Pillai and *others*—Defendants—Opposite Parties.

Civil Revn. Petn. No. 704 of 1918, Decided on 19th February 1919, from decree of Sub-Judge, Tinnevelly, in Small Cause Suit No. 1546 of 1917.

Limitation Act (1908), Art. 75—Instalment bond—Whole amount to be paid on default "on demand without reference to future instalments"—All instalments ceasing to run in 1910—Suit in 1917 within three years of demand held barred.

Where a bond dated 1901 and payable by instalments provided that the whole amount due should be paid, in default of any instalment, 'on demand without reference to future instalments'.

Held: that after all the instalments had ceased to run in 1910, a suit brought in 1917 within three years of a demand made for payment was barred; 9 *Mad.* 271 and 48 *I. C.* 191, *Foll.* [P 583 C 2]

Per *Seshagiri Aiyar, J.*—The provision for demand is to anticipate the due date and to enable the creditor to call in all the instalmentary payments without reference to the dates fixed for their receipt. When the instalments had ceased to run, there can be no question of demand or of exercising a right or option. [P 583 C 2]

K. V. Sesha Aiyangar—for Petitioner.

C. R. Subramahanya Aiyar—fo Opposite Parties.

Oldfield, J.—It is not disputed that a demand must be made by plaintiff before he can sue. The only question is whether he is entitled to postpone the starting point, from which time runs, indefinitely by postponing his demand. The decisions in *Mackenzie* v. *Tiruvengadathan* (1) and *Lachakkammal* v. *Sokkayya Naick* (2) conclude the matter. The civil revision petition is dismissed with costs.

Seshagiri Aiyar, J.—I feel no hesitation in agreeing with the conclusion of the Court below. The bond was executed in 1901 and the monthly instalments which would exhaust the loan would have come to an end in 1910. This suit was brought in 1917, within three years of a demand made for payment. The learned vakil for the petitioner contends that although the whole of the amount had become payable in 1910, it is open to him any time after that date to make a demand and to sue within three years of such a demand. In my opinion the provision for demand was to anticipate the due date and to enable the creditor to call in all the instalmentary payments without reference to the dates fixed for their receipt. When the instalments had ceased to run, there can be no question of demand. The language is "on demand without reference to future instalments." That language implies that the instalments are still running. When they had come to an end, there can be no question of exercising a right or option. I respectfully adopt the terse language of Muthuswamy Aiyar and Bandt, JJ., in *Mackenzie* v. *Tiruvengadathan* (1), where they say with regard to a document containing a similar stipulation:

> "In effect it creates a case of election as each instalment becomes overdue, and after the last instalment becomes overdue there can be no election, for the obvious reason that there are no two obligations to elect between."

A similar view was taken in *Lachakkammal* v. *Sokkayya Naick* (2). I am therefore of opinion that the Court below was right in dismissing the suit as barred by limitation. The petition should be dismissed with costs.

S.N./R.K. *Petition dismissed.*

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(1) [1886] 9 Mad. 271.
(2) [1918] 48 I. C. 191.

A. I. R. 1919 Madras 581 (1)

SADASIVA AIYAR AND BAKEWELL, JJ.

Meda Chinnasubamma—Appellant.

v.

Papiredi Gari Chinnayya — Respondent.

Second Misc. Appeal No. 71 of 1916, Decided on 10th October 1917, against order of Temporary Sub-Judge, Cuddapah, in A. S. No. 71 of 1916.

Civil P. C. (1908), Ss. 144 and 151, O. 21, R. 90—Order refusing to set aside execution sale reversed in appeal—Auction-purchaser not party to proceedings—Restitution, claim to, is not maintainable.

An order refusing to set aside an execution sale under O. 21, R. 90, Civil P. C., was reversed on appeal. The auction-purchaser was not a party to the proceedings. The judgment-debtor applied for restitution of the property from the auction-purchaser:

Held: (1) that S. 144 did not apply, inasmuch as no decree had been varied or reversed on appeal but only an order under O. 21, R. 90, refusing to set aside a sale in execution; (2) that an order could not be made under S 151 on the analogy of S. 144, inasmuch as the auction-purchaser was not a party to the proceedings instituted for setting aside the sale. [P 581 C 1]

V. Ramesam—for Appellant.

N. Chandrasakara Ayyar—for Respondent.

Judgment.—S. 144, Civil P. C., cannot in terms apply as no decree was varied or reversed, but only an order under O. 21, R. 90, refusing to set aside a sale in execution, was reversed by the appellate Court. Assuming that S. 151, Civil P. C., allows an order for restitution in appropriate cases, even though it does not fall under S. 144, Civil P. C., such an order cannot be made on the analogy of S. 144, unless the auction-purchaser was a party before the appellate Court which set aside the sale in the proceedings instituted for setting it aside. The mere fact that the decree-holder was a party to those proceedings will not suffice as the Court auction-purchaser is not the representative of the decree-holder. *Manickka Odayan* v. *Rajagopala Pillai* (1), which held otherwise, has been disapproved of in *Nadamuni Narayana Iyengar* v. *Veerabhadra Pillai* (2), to both of which decisions the present learned Chief Justice was a party.

The Munsif says that the auction-purchaser need not at all be a party to any proceedings for confirmation of or setting aside the sale. The petition for restitution does not expressly state that the Court auction purchaser was a party to the proceedings taken to have the auction sale set aside. No records have been produced before us to establish that fact. We therefore cannot hold that S. 151 empowers the Court to pass an order for restitution against the person not shown to be a party to, and so bound by the order of the appellate Court setting aside the sale. The appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1907] 30 Mad. 507.

(2) [1910] 34 Mad. 417=8 I. C. 429.

A. I. R. 1919 Madras 581 (2)

PHILLIPS AND KUMARASWAMI SASTRI, JJ.

Kadir Mohideen Sahib and *others*—Plaintiffs—Appellants.

v.

Abubakkar Sahib - Defendant—Respondent.

Second Appeal No. 1420 of 1917, Decided on 11th September 1918, against the decree of Sub-Judge, Coimbatore, in A. S. No. 142 of 1916.

Limitation Act (1908), S. 12 (3)—Appeal—Arrangements made for delivery of copies during vacation—Calling of printing charges on last Court day before vacation—Payment on re-opening day—Whole period of vacation should be reckoned.

Where under a rule arrangements are made by a High Court for delivery of copies during the Court vacation, it is necessary that all steps for obtaining copies should be taken during the vacation. [P 582 C 1]

Where therefore printing charges were called for on the last Court day before the vacation and they were paid only on the re-opening day of the Court:

Held: that the whole period of the vacation must be reckoned in computing the period of limitation: 49 *I. C.* 626, *Appl.*; 25 *Bom.* 584 and 19 *All.* 342, *Dist.* [P 582 C 2]

T. Narasimha Aiyangar; *K. Rajah Aiyar* and *R. Ganapathy Aiyar*—for Appellants.

S. T. Srinivasagopalachariar—for Respondent.

Judgment.—A preliminary objection is taken that this appeal has been filed out of time. It was originally filed on 30th July 1917 with a certified copy of the decree. The decree was passed on 31st March 1917, and therefore filing on 30th July was considerably more than 90 days after the decree. The time occupied in obtaining the certified copy is only seven days, and assuming that this presentation on 30th July was a valid presentation the appeal is clearly timebarred. If this presentation is not valid, we have to consider whether the presentation on 9th August

with the printed copies was in time. The application for printed copies was made on 11th April and printing charges were called for on 28th April. The Court closed for the annual vacation on the 29th. On 5th May the copy application was dismissed for default of payment of printing charges, and on the re-opening day, 2nd July, a fresh application for copies was put in and they were supplied on 6th August. The question is whether the appellant was bound to pay the printing charges called for on 28th April before the re-opening of the Court on 2nd July or, to put it in another form, whether the copy application was rightly dismissed on 5th May for non-payment; for if the period of the vacation cannot be deemed to be part of the period requisite for obtaining copies, the appeal is certainly out of time. It has been recently held by a Bench of this Court to which one of us was a party. Second Appeal No. 1545 of 1917 [*Komuru Appalaswami* v. *Palli Narayanaswamy* (1)] that when a party failed to take delivery of a copy during the vacation he was not entitled to deduct the period intervening between the time when the copy was ready and the end of the vacation, for in accordance with the High Court's rules, a notification had been published that arrangements would be made for granting copies during the adjournment of the Court. In accordance with that case the period of the vacation here also could not be deemed to be requisite for obtaining copy, for there was a notification that arrangements would be made.

In the Coimbatore Court from which this appeal is filed, the notification instead of saying that arrangements will be made for grant of copies reads: "Arrangements be made for delivery of copies", and it is contended that this did not mean that money will be received for printing charges. We think however that if arrangements are made for delivery of copies and applications are allowed to be put in up to the close of the last working day, it necessarily follows that arrangements will be made for all the necessary steps being taken between the application for copy and the final delivery, and one of these steps is the payment of printing charges. That the appellant was aware that this was the practice is shown by his affidavit, in which he says that he remitted the money on 1st May to his vakil and that his vakil omitted to pay it into Court. The whole period therefore of the vacation must be reckoned in computing the period of limitation; and the appeal is certainly out of time. Appellant cannot rely on the cases reported as *Tukaram Gopal* v. *Pandurang Sadaram* (2), and *Siyadatunnissa* v. *Muhammad Mahmud* (3) for he did not file the appeal on the day after he received the copies, and was guilty of a day's delay in paying printing charges.

It however appears that the only default committed by the appellant was in not seeing that his vakil paid in the printing charges he remitted. Except for this omission, he was throughout diligent and lost no time in again applying for copies and presenting the appeal after they were granted. Under S. 5, Lim. Act therefore we excuse the delay.

To turn to the merits: the plaintiffs sue for a permanent injunction restraining the defendant from opening a certain sluice and taking water from a channel. The District Munsif gave a decree restraining the defendant from opening the channel at the place where he has cut the side of the masonry channel. In appeal, the Subordinate Judge dismissed the plaintiffs' suit. The lattre's decree is based on the fact that there is no evidence that the defendant cut the brick built channel, and therefore the plaintiff is not entitled to an injunction. Objection is taken to this finding on the ground that there is a certain amount of evidence that the defendant cut the channel, and no doubt there is an ambiguous statement in the P. W. 1's cross-examination that the defendant cut this channel and also a statement in examination-in-chief of P. W. 5. However it is not alleged in the plaint that the defendant cut the channel, but, on the contrary, the defendant alleges in his written statment that the plaintiff breached the channel and the plaintiff took no issue on this point. The District Munsif based his finding as to the breach on his own personal inspection; but inasmuch as he did not see at the inspection the remainder of this channel which was

(1) [1919] 49 I. C. 626.

(2) [1901] 25 Bom. 584.
(3) [1897] 19 All. 342.

running underground, his inspection was not of very much value and in any case he should not have based a finding solely upon it. In the appellate Court, a fresh commission was issued and the Commissioner found traces of brick built channel underground, and it is this channel which the defendant alleges was used by the plaintiff in accordance with the permission granted by Government in 1878 and he further alleges that of late years the plaintiff has been using another channel up to the point T in the Commissioner's plan. No doubt there is a breach in the original brick built channel between the points T and L. But we think we must accept the Subordinate Judge's finding that the defendant did not cause this breach. In that view, the plaintiffs are not entitled to any injunction, and as regards the injunction prayed for that the defendant should be restrained from opening the sluice referred to which is on the defendant's land the plaintiffs have no right to interfere with it. The plaintiffs' suit must therefore fail.

But with a view to avoid further litigation we think it advisable to give the plaintiffs a declaration, to which the defendant consents, to the effect that they are entitled to restore the brick built covered channel to its original state between the points T and L. But it must be noted that the channel must be a covered channel, as that has been found by the Subordinate Judge to be the nature of the original channel. Subject to this declaration, the plaintiffs' suit is dismissed with costs throughout.

S.N./R.K. *Decree modified.*

A. I. R. 1919 Madras 533 (1)

AYLING AND PHILLIPS, JJ.

Sundaram Ayyar—Appellant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 655 of 1917, Decided on 21st November 1917.

Criminal P. C. (1898), S. 562—"Cheating" does not cover offence under Penal Code (1860), S. 420.

The word "cheating" in S. 562, Criminal P. C. cannot be given an extended meaning so as to cover an offence under S. 420, I. P. C.: *A. I. R. 1915 Bom. 145, Foll.; A. I. R. 1914 All. 191 Diss. from.* [P 583 C 2]

K. S. Jayarama Ayyar — for Appellant.

C. Narasimha Chariar—for the Crown.

Order.—The question for decision in this case is whether we can give an extended meaning to the word "cheating" in S. 562, Criminal P. C. so as to cover an offence under S. 420, I. P. C. (cheating and dishonestly inducing delivery of property, etc.). We should be glad to do so, as we recognize that equally strong reasons on public and humanitarian grounds may exist for lenient treatment of an offence under either section. On the other hand, a careful consideration of the wording of S. 562, Criminal P. C., seems to preclude the possibility of such a construction. If the term "cheating" is to be held to cover offences under Ss. 418, 419 and 420, I, P. C., which are included with S. 417 in the same group in Sch. 2, Criminal P. C., a similar extension must be allowed to the terms "theft" and "dishonest misappropriation." The former must be held to cover offences under Ss. 380, 381 and 382, I. P. C., and the latter offences under S. 404, I. P. C. But such a construction is impossible in face of the fact that the legislature has specifically mentioned "theft in a building" (S. 380, Criminal P. C.) in S. 562, Criminal P. C. in addition to simple theft (S. 379). The inference is irresistible that "theft in a building" was not intended to be included in the term "theft" and we cannot give a narrow interpretation in the case of "theft" and a wide one in the case of "cheating".

The view we have taken is in accord with that expressed by a Bench of the Bombay High Court in *Emperor* v. *Ramjan* (1). The only authority to the contrary is that of a single Judge in *Har Narayan* v. *Ramji Das* (2) from which we must respectfully dissent. We set aside the order of the Subdivisional Magistrate and direct him to dispose of the case according to law.

S.N./R.K. *Order set aside.*

(1) A. I. R. 1915 Bom. 145=31 I. C. 281.
(2) A. I. R. 1914 All. 191=23 I. C. 743.

A. I. R. 1919 Madras 583 (2)

AYLING AND KRISHNAN, JJ.

T. K. Parameswara Iyer and *others*—Petitioners.

v.

Land Acquisition Collector, Palghat and *others*—Opposite Parties.

Civil Revn. Petn. No. 853 of 1917, Decided on 22nd October 1918.

(a) Land Acquisition Act (1 of 1894), S. 18 (1)—"Any person interested" includes person claiming interest in compensation—Application by such person—Collector has no power to refuse to make reference.

The expression "any person interested" in S. 18, includes a person claiming an interest in the compensation. [P 584 C 1]

The Collector has no power on an application by a person setting out a claim to an interest in the compensation to make a reference, to decide whether the claim is well founded and he is not authorized to refuse to make the reference because, in his opinion, it is not. [P584 C 1]

(b) Civil P. C. (1908), S. 115—Proceedings under Land Acquisition Act are judicial—Collector refusing to make reference—High Court can revise order — Government of India Act (1915), S. 107.

Proceedings under Part 3, Land Acquisition Act are judicial in character and an order by the Collector refusing to make a reference is open to revision by the High Court under S. 115, Civil P. C., or under S 107, Government of India Act: 12 *C. W. N.* 241, *Foll.*; 36 *I. C.* 621, *Diss from.*; 32 *Cal.* 605 and 8 *I. C.* 107, *Expl.*

[P 584 C 2; P 585 C 1]

C. V. Anantha Krishna Aiyar and *P. S. Narayanaswami Aiyar* — for Petitioners.

V. Ramesam—for Opposite Parties.

Ayling, J.—In this case we are asked to revise an order of the Revnue Divisional Officer of Palghat dismissing petitioners' application under S. 18, Land Acquisition Act (1 of 1894), for a reference to the Court regarding his award of compensation for certain lands of a Devaswom acquired under the Act. The order is very brief and runs thus :

"These persons do not appear to be the accredited representatives of the Devaswom. The petition is therefore, rejected."

That the order is illegal hardly admits of doubt. S. 18 enables "any person interested, who has not accepted the award", to "require" a reference ; and S. 3 (*b*) defines "person interested" as including all persons claiming an interest in the compensation. As long as the application sets out a claim to an interest in the compensation, it is no part of the Collector's duty to decide whether the claim is well founded : and he is not authorized to refuse to make the reference merely because he may think it is not. Petitioners in their application in the present case undoubtedly claim an interest in the compensation as trustees and managers of the Devaswom to which the acquired property belongs ; and they have not accepted the award.

It is however contended by the Government Pleader that however illegal the Revenue Divisional Officer's order may be it is not one with which we can interfere either under S. 115, Civil P. C., or S. 107, Government of India Act, because it is not the order of a "Court" subordinate to this Court. He relies mainly on a recent decision of this Court in *Messrs. Best & Co., Ltd.* v. *Deputy Collector, Madras* (1), which undoubtedly supports him, although after careful and respectful consideration I am unable to agree with the view of the learned Judges. The latter is not based on independent reasoning so far as the judgment discloses, but on two earlier cases, which do not appear to bear the interpretation put upon them, and it is certainly opposed to the weight of authority in other Courts. The cases referred to are *Ezra* v. *Secy. of State* (2), and *British India Steam Navigation Co.* v. *Secy. of State* (3). An examination of them shows that both dealt with the power to revise the award of a Collector under S. 11 of the Act, and with the nature of the proceedings, which led up to, and terminated in such an award. Their Lordships of the Privy Council in the first case say that the proceedings resulting in this award are administrative and not judicial; and the learned Judges of the Calcutta High Court in the second case take the matter practically no further. They in fact specifically reserve the question before us of whether the order of a Collector refusing to make a reference under S. 18 is subject to revision by the High Court, while at the same time, they refer to a case of *Administrator General of Bengal* v. *Land Acquisition Collector* (4) in which it was held to be revisable. Neither case is therefore an authority for the proposition that it is not revisable.

On the other hand the case last quoted is clear authority for holding that there is a distinction between Part 2 and Part 3 of the Act, and that in rejecting an application under S. 18 a Collector acts judicially and his order is subject to revision by the High Court. Although Mookerjee and Sharfuddin, JJ., in *British India Steam Navigatiin Co.* v. *Secretary of State* (3) left this point open, as not necessary for the decision of the case before them, the decision in *Administrator-*

(1) [1916] 36 I. C. 621.
(2) [1905] 32 Cal. 605=32 I. A. 93 (P. C.).
(3) [1910] 38 Cal. 230=8 I. C. 107.
(4) [1908] 12 C. W. N. 241.

General of Bengal v. *Land Acquisition Collector* (4) was followed by another Bench of that Court in *Krishna Das Roy* v. *Land Acquisition Collector, Pabna* (5) as well as by a Bench of the Patna High Court in *Saraswati Pattack* v. *Land Acquisition Deputy Collector of Champaran* (6). I am moreover inclined to take the same view. The proceedings under part 3 of the Land Acquisition Act are undoubtedly judicial in character, and although the part played in them by the Collector is small, he is far from being a mere post office or channel for transmission of the representations of the persons interested. He has to determine whether the application satisfies the conditions of the proviso to S. 18, and in making the reference he has to set out the grounds of his own award, and his opinion as to what persons are really interested in the land acquired. I think he may be considered to be acting as a "Court."

I may add that unless such an order is open to revision it is not clear what remedy a person aggrieved by it possesses. In *Messrs. Best & Co., Ltd.*, v. *Deputy Collector, Madras* (1) the learned Judges were dealing with an application for a mandamus under S. 45 Specific Relief Act. The effect of proviso (d) to that section is to exclude cases where the applicant has any other specific and adequate legal remedy: and it was in order to determine whether this proviso applied that the question of the admissibility of a revision petition had to be considered. It was even argued before us that for this reason the ruling was an obiter dictum; but while this argument is unsound, the circumstances under which the point arose may perhaps be looked to. However that may be the remedy by way of "mandamus" is only available within the original civil jurisdiction of this Court: and I feel very doubtful how far the alternative reliefs suggested by the Government pleader (a suit for damages and a suit under S. 55, Specific Relief Act) are available to parties in the plight of the present petitioners. That some remedy should be at the disposal of parties aggrieved by an abritrary order like the one before us is incontrovertible. I am of opinion that the order is open to revision, and if so, it is certainly one which we should set aside. I would set aside the order of the Revenue Divisional Officer and direct him to make a reference to the District Court, as provided by law. Costs of this petition will be provided for in the District Judge's award.

Krishnan, J.—The main argument before us in this case has been on the question whether we have power under S. 115, Civil P. C. or under S. 107, Government of India Act to revise the order of the Revenue Divisional Officer as the Land Acquisition Collector, refusing to refer to the Court under Ss. 18 and 19 of Act I of 1894 the application filed by the petitioners under S. 18. The learned Government Pleader contended that in making his order the Divisional Officer was acting in his administrative capacity only and not as a Court subordinate to the High Court and therefore his order however illegal it might be, was not open to be revised by us under our revisional powers. He has relied on the ruling in *Messrs. Best & Co., Ltd.* v. *Deputy Collector, Madras* (1) in his favour. On the other hand the learned vakil for the petitioners has drawn our attention to the rulings in *Administrator-General of Bengal* v. *Land Acquisition Collector* (4) and *Saraswati Pattack* v. *Land Acquisition Deputy Collector of Champaran* (6), where under similar circumstances the High Courts of Calcutta and of Patna held that they had power to interfere in revision and did so.

Though the question is not free from difficulty, I am inclined to think that as between the two views above stated we should adopt the latter because it is consistent with the language and scheme of the Act and because if we do not do so, there will be no proper and adequate remedy to prevent a misuse of power by the Land Acquisition Collector who, by adopting the simple expedient of refusing to refer, may prevent an inquiry by Court into the correctness of his own award; at any rate in all cases arising outside the presidency towns. The remedy by mandamus under S. 45, Specific Relief Act, which was adopted in *Messrs. Best & Co., Ltd.* v. *Deputy Collector, Madras* (1), is available only within the ordinary original civil jurisdiction of the High Courts and not outside it. The learned Government pleader suggested that on the principles laid down in *Luchmeswar Singh* v. *Chairman, Darbhanga*

(5) [1912] 13 I. C. 470.
(6) [1917] 39 I. C. 650.

Municipality (7), *Gaekwar Sarkar of Baroda* v. *Gandhi Kachrabai Kasturchand* (8) and *Rameswar Singh* v. *Secy. of State* (9) the petitioners had a right to sue for damages; but even if this is so, about which I express no opinion, it is not an adequate or satisfactory remedy. It was also suggested by him that an action might lie under S. 55, Specific Relief Act, to direct the Collector by a mandatory injunction to make the reference he refused to make. No authorities have been cited in support of this suggestion and it seems to be of doubtful validity. But whether the petitioners have another remedy or not, I think we should interfere if we have the power to do so.

It seems to me that a careful consideration of the scheme and language of part 3 of the Act leads to the conclusion that the act of the Collector in refusing to make a reference under S. 19 is a judicial Act. Now it cannot be denied that the proceedings under part 3 which result in an award of the Court are judicial proceedings and by virtue of S. 54 the Court is subordinate to the High Court. Ss. 18 and 19 provide for the procedure to be adopted to initiate those proceedings. Ordinarily a proceeding is commenced in a Court of law by the presentation of a plaint or a petition to it; but the Land Acquisition Act has adopted a somewhat different method, viz., the presentation of the application to the Collector. If the requirements of S. 18 are complied with the Collector has no option but to make the reference, and in doing so, in addition to the statement to be sent by him under S. 19, Cl. (1), he has to attach a schedule of the particulars of the notices served and of the statements made by the parties. The objection petition itself is forwarded to the Court. The limitation fixed under S. 18 has also reference to the filing of the objection petition. It seems clear therefore that the proceedings which culminate in the Court's award commence with the filing of the application under S. 18. As soon as it is filed the matter of the amount of proper compensation assumes a litigious form and becomes a contentions proceeding between the owner and the Collector. It was held by Chandavarkar, J., in *In re Land Acquisition Act, In re Rustomji Jijibhai* (10) that the application under S. 18 is in the nature of a plaint in a suit. But whether it be a plaint or a petition I consider it to be the first step in the judicial proceedings and to be an integral part of it. It follows therefore that if the Collector decides to reject it or passes any orders regarding it he does so judicially and not administratively; for a judicial proceeding once commenced cannot be affected by administrative action. The questions that the Collector may have to decide under S. 18, viz., whether the applicant is a person interested within the meaning of the Act, whether the application is in proper form and whether it is in time are all questions that have to be decided judicially. If therefore the Collector takes upon himself to pass an order which has the effect of rejecting the petitioner's application and of preventing his claim being tried by the Court, I see no difficulty in holding that it should be treated as a judicial order subject to our revisional jurisdiction.

The ruling in *Messrs. Best & Co., Ltd.* v. *Deputy Collector, Madras* (1) has no doubt taken the contrary view, but with every respect to the learned Judges I regret I am unable to adopt it. The ruling in it on the point before us seems, as pointed cut by my learned brother, to be based entirely on what appears to be a wrong impresion of the scope of the rulings in *Ezra* v. *Secy. of State* (2) and *British India Steam Navigation Co.* v. *Secy. of State* (3), which the learned Judges purport to follow. Neither case dealt with a question such as the present one arising under Part 3 of the Act. The observation of the Privy Council is not, as stated in *Messrs. Best & Co., Ltd.* v. *Deputy Collector, Madras* (1), that the proceedings of the Collector are administrative "until the matter comes before the Land Acquisition Judge," but only that they are administrative "till they result in his award:" see *Ezra* v. *Secy. of State* (2).

In the second case above cited the question arose with reference to an application by the Secy. of State to direct the Collector to pass a fresh award under

(7) [1891] 18 Cal. 90=17 I. A. 90 (P. C.).
(8) [1903] 27 Bom. 344=30 I. A. 60 (P. C.).
(9) [1907] 34 Cal. 470.
(10) [1906] 30 Bom. 311.

S. 11. It was with reference to that that the learned Judges held, following *Ezra's* case (2), that they could not interfere in revision. When the case of *Administrator-General of Bengal* v. *Land Acquisition Collector* (4) was cited to them, they distinguished it on the ground that that case referred to a proceeding relating to the Collector's award. They did not dissent from that ruling; and it has since been followed by the same High Court in *Krishna Das Roy* v. *Land Acquisition Collector, Pabna* (5) and as already stated the Patna High Court has adopted the same view.

It would also appear that the attention of the learned Judges in *Messrs. Best & Co., Ltd.* v. *Deputy Collector, Madras* (1) was not drawn to the distinction between the position of the Collector under Part 2 of the Act and his position under Part 3. In the former he acts practically as an agent of the Government in fixing the price to be paid and in taking possession of the land which is acquired. His award is not binding on the owner as he can ask for a reference under S. 18; nor is the Government bound till possession is taken, as it can under S. 48 withdraw from the acquisition till then. It was with reference to these circumstances that his action was held to be an administrative one by the Privy Council. That ruling however is not decisive of the Collector's position under Part 3 where, as explained above, he seems to act in a judicial capacity as part of the Court and receives the objection petition and deals with it.

I therefore agree with my learned brother that we should follow the view in *Administrator-General of Bengal* v. *Land Acquisition Collector* (4) in preference to that in *Messrs Best & Co., Ltd.* v. *Deputy Collector, Madras* (1) and hold that we have power to interfere in revision with the order of the subdivisional officer. On the merits there can be no question that his order is wrong. In fact if the subdivisional officer had looked at the definition of "person interested" in S. 3 (b) of the Act, I think he would not have passed the order he passed. In rejecting the application on the ground stated by him, when he had no power to do so, he must be taken to have acted illegally in the exercise of his jurisdiction and we should therefore interfere under S. 115, Civil P. C. I agree to the order proposed by my learned brother.

S.N./R.K. *Order set aside.*

A. I. R. 1919 Madras 587

PHILLIPS AND KRISHNAN, JJ.

Emperor

v.

Lal Bage—Accused—Respondent.

Criminal Appeal No. 527 of 1917, Decided on 8th October 1917, against Acquittal of Sub-divl. Magistrate Guntur, in Crim. Appl. No. 90 of 1917.

Madras Police Act (1859), S. 46—Obtaining of money by demand of "manual" comes within S. 46.

The mere demand by a police officer of "mamul" or a customary payment with a view to extend his favour to the person making the payment is in itself a threat and consequently, the obtaining of money by such a demand comes within S. 46. [P 587 C 2]

E. R. Osborne—for the Crown.

K. P. Padmanabha Pillai—for Accused.

Judgment.—The prosecution case is that P. W. 4 paid three annas to accused as a "mamul." The demand of the "mamul" is spoken to not only by P. W. 1, but also by P. W. 2, and the payment of the money was witnessed by P. W. 4, the Circle Inspector. The Sub-Magistrate who tried the case believed these witnesses, and there is certainly no reason in our opinion for disbelieving P. W. 1 who made his statement to the Inspector at the earliest opportunity. Accused's story is that he paid three annas to P. W. 1 as earnest money for purchase of a goat, and that P. W. 1 returned the money as he withdrew from the bargain. D. Ws. 1 to 3 are examined in support of this story, but the prosecution witnesses were not cross examined as to their presence at the scene of offence and the Sub-Magistrate has given good reasons for rejecting their evidence. On the facts we think the Deputy Magistrate has paid too little regard to the opinion of the Magistrate who heard the evidence, an opinion in which we entirely agree.

As regards the point of law the Deputy Magistrate considers that all the elements necessary to constitute an offence under S. 46, Police Act are not established The mere demand of a "mamul" or customary payment made in order to obtain the favour of the official demanding it is itself a threat and consequently the obtaining of money by such a demand comes within S. 46, Police Act. In this case

we have also the evidence of P. W. 1 that he paid as the police were troubling him and in Ex. A he says the police threatened to take him to the police station. We therefore restore the conviction by the Sub Magistrate under S. 46, Police Act and confirm the sentence of inprisonment but reduce the fine to Rs. 15.

S N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 588

AYLING AND PHILLIPS, JJ.

(*Pydi Appala*) *Suryanarayana Kurmadasu Naidu* and *others*—Plaintiffs—Appellants.

v.

Inuganti Rajagopala Rao Garu—Defendant—Respondent.

Second Appeals Nos. 1725 to 1869 of 1913 and Memorandum of Objection in Second Appeal No. 1908 of 1913, Decided on 12th January 1915, against decrees of the Dist, Judge, Vizagapatam.

(a) Madras Estates Land Act (1 of 1908) S. 40 (2) (3)—"Commutation" of rent is not commutation in its narrowest sense.

The "commutation" of rent referred to in S. 40 is not commutation in its narrowest sense. It was intended to cover something more than a mere arithmetical calculation of averages or application of a market price to commute grain into money. [P 588 C 2]

(b) Madras Estates Land Act (1 of 1908), S. 40 (2) (3)—Rent—Determination of—Collector cannot exclude from consideration that actual collections were in excess than actual due.

In determining the rent to be-paid, the Collector cannot exclude from consideration the question whether the rents actually collected during the decennial period before suit were in excess of what was legally due to the landlord. [P 589 C 1]

(c) Madras Estates Land Act (1 of 1908), S. 40 (2) (3)—"Maramat" charges are not "rent in kind or otherwise".

Maramat charges are not "rent in kind or otherwise" within the purview of S. 40 of the Act and they lie outside the scope of the Collector's determination. [P 589 C 2]

Judgment. — The only important question raised in this appeal is whether the learned District Judge has correctly appreciated the scope of S. 40, Madras Estates Land Act; and in particular whether he was right in excluding from consideration the question of whether the rents actually collected during the decennial period before suit were in excess of what was legally due. The Deputy Collector found that the proper rent payable was a varam of half the gross produce, which gross produce he calculated to be 17½ pattis per acre. Applying to this the average market value which he calculated to be Rs. 57-3-2 per garce of paddy, he arrived at a rate of rent of Rs. 12 and Rs. 13 per acre (for different villages) or Rs. 36 and Rs. 39 per garce, a grace, as regards area, being taken to be equal to 3 acres. The District Judge, on the other hand, has declined to hear arguments as to whether the rent has been illegally or, as the Deputy Collector puts it, "whimsically" enhanced, and has simply applied an average market value of Rs. 65 per garce of paddy to the grain rents actually collected in the course of the ten years preceding the suit. With the question of whether Rs. 57-3-2 or Rs. 66 is the proper commutation rate (using the term in the strict sense) we are not now concerned. The only question is whether the District Judge was right in declining to consider whether the grain rent actually paid exceeded what was legally due: and this depends on the interpretation of S. 40, Madras Estate Land Act. The section is headed "commutation of rent" and the narrower interpretation (to which the learned District Judge is inclined) is that it provides for nothing more than the conversion, practically by an arithmetical process, into a fixed annual cash payment of grain rents or rents varying with the crop. The District Judge says;

"Section 40 does not, in my opinion, contemplate anything in the nature of a settlement of new rates of rent, but merely the ascertainment of new rates of rent fairly and reasonably equivalent to the grain rents actually in force."

The word "commutation" read by itself is certainly suggestive of this meaning; and we are bound to say that the section does not appear to have been happily worded or to be altogether free from doubt. There seems moreover to be no authority on the point. But on reading the section as a whole, we are forced to the conclusion that it was intended to cover something more than a mere arithmetical calculation of averages or application of a market price to commute grain into money. The term "settlement of new rates of rent" used by the District Judge rather lends itself to misinterpretation in the other directions: and we are not to be understood as staying that the method adopted by the Deputy Collector was proper. But the mere presence of Cls. 3 (b) and 3 (c) is sufficient indication that something more than commutation in the narrowest sense

was contemplated. The learned District Judge himself clearly feels the difficulty. He says Cl. (b), sub-S. (c) provides data for purpose of comparison. But the existence of such a standard of comparison indicates that it should be capable of being acted on. The section directs the attention of the Collector to Cl. (b) equally with Cl. (a) and the District Judge is driven to allow that the two clauses may

"provide two limits within which the Courts are at liberty in the exercise of reasonable and judicial discretion to fix the definite money rental required to be determined."

Clause (c) is equally significant. It directs the Collector to have regard to

"improvements effected by the land-holder or the raiyat in respect of the holding and the rules laid down by S. 32."

Now improvements effected by the raiyat cannot affect the rent; and the only possible meaning of the reference to them is that where a higher rent has actually been collected on account of them, matters should be set right by the Collector "in making the determination." Similarly with improvements effected by the land-holder, the meaning can only be that effect is to be given to the provisions of S. 32, if these would entitle him to a higher rent than the average ascertained under Cl. 2. It seems clear to us that the Collector in determining the rent to be paid is not intended to confine his attention simply to ascertaining the rent actually paid year by year and the proper market value of grain at the time of each harvest; but is authorized and directed to have regard to other considerations. It is argued in support of this narrower interpretation of S. 40 that Ch. 11 sufficiently provides for the determination of anything more than a mere commutation of grain into money. But that chapter provides no remedy for an individual raiyat; and even where a sufficiently large proportion of land-holders or raiyats apply, it is optional with Government to take action. In the present case, there are no improvements to be considered under Cl. (c) and we must accept the finding of the District Judge that the data available are not sufficiently reliable to render it possible to compare the rates arrived at under Cl. (a) with the rates paid for similar lands in the same or neighbouring villages under Cl. (b).

But it seems to us he was bound to consider the raiyats' plea that the rents actually levied during the decennial period were in excess of what was legally due. It is argued that S. 40 makes no provision for this. But as we have seen, sub-S. (3) must be understood as conferring a wide discretion and it is to be observed that Cl. (a) does not speak of rent actually collected but of rent accrued due, a somewhat notable variation from the language of the corresponding section of the Bengal Tenancy Act, which is otherwise closely followed. The plaint clearly states that the rent has been illegally enhanced and the enhanced rents forcibly levied and para. 10 of the written statement shows that this plea was well understood by the defendant. The Deputy Collector found as a fact that the rent had been arbitrarily or, as he puts it, "whimsically" enhanced from time to time. The District Judge acting on his interpretation of the section has declined to hear arguments on the question of enhancement; and herein we think he was wrong. His refusal goes to the root of the whole determination and we must accordingly call for a finding in the light of the above remarks on the evidence on record on the following issue.

What was the average value of the rent actually accured due under Cl. (a), adopting the District Judge's figure of Rs. 66 per garce? The finding should be submitted within two months, and seven days will be allowed for filing objections. The only other point argued relates to the maramat charges. We think appellants' contention that these are not "rent in kind or otherwise" within the purview of the section is correct and that they lie outside the scope of the Collector's determination. [The District Judge submitted a finding on the above issue, which was accepted by the High Court and the decree appealed against varied accordingly.]

Second Appeals Nos. 1726 *to* 1853 and *the Memorandum of objections in second Appeal No.* 1908 *of* 1913—These appeals and the memorandum of objections follow the decision in second Appeals No. 1725 of 1913.

S.N./R.K. *Decree modified.*

A. I. R. 1919 Madras 590

AYLING AND SESHAGIRI AIYAR, JJ.

(*I. K. T. K. M.*) *Sankaran Namboodripad*—Plaintiff—Appellant.

v.

(*S. N.*) *Ramasami Iyer* and *another*—Defendants—Respondents.

Civil Appeal No. 377 of 1916, Decided on 25th January 1918, against decree of Sub-Judge, Coimbatore, in O. S. No. 118 of 1915.

(a) Land Improvements Loans Act (1883), S. 7 (1)—Sale under S. 7 (1)—Provisions of Revenue Recovery Act apply to such sale—Sale is free from prior encumbrances—Madras Revenue Recovery Act (1864), S. 42.

The provisions of S. 42, Madras Revenue Recovery Act, apply to a sale under S. 7 (1) (c), Land Improvement Loans Act 19 of 1883. Such a sale is free from prior encumbrances. [P 590 C 2]

Per *Seshagiri Aiyar, J.*—The language of S. 7 (c) amounts to a declaration that the land is charged with the payment of the revenue. The effect of S. 42, Madras Act 2 of 1864 is not only to discharge pre-existing encumbrances upon property on which the arrear is due but also pre-existing incumbrances upon every property which is brought to sale for arrears of revenue due from the defaulter: 8 *I. C.* 414, *Foll.* [P 593 C 1]

The effect of S. 7 (1) (c), Act 19 of 1883 is to make a declaration on behalf of the Government that it has a first charge on the property for the loan advanced in respect of that property just as under S. 2, Madras Revenue Recovery Act, the Government has a first charge for arrears of Government revenue. [P 593 C 1]

(b) Land Improvement Loans Act (1883), S. 7—Loan for making improvement illustrated.

The fact that the first instalment of a loan taken under Act 19 of 1883 was applied towards meeting the expenses of agricultural improvements already started on the land or that an extension of time was granted by the Government to the borrower, does not make it the less a loan taken for making an improvement within the meaning of the Act. [P 590 C 2]

(c) Interpretation of Statutes—Doubt regarding construction of section—Proviso to section can be considered.

Per *Ayling, J.*—Where there is doubt as to the true meaning of the substantive part of a section it is legitimate to look to the words of a proviso to it in order to determine which interpretation is correct. [P 592 C 2]

Per *Seshagiri Aiyar, J.*—Where the language of a section is clear and unambiguous, the proviso should not be construed as adding to any right or disability created by the section, but where there is room for doubt regarding the construction of the section it has always been the practice to invoke the aid of the proviso to help in the proper interpretation of the section [P 593 C 1, 2]

C. V. Ananthakrishna Aiyar—for Appellant.

V. Ramesam—for the Crown.

Ayling, J.—The main point for our disposal in this appeal is the general question raised in the single issue framed: Whether the provisions of S. 42, Madras Act 2 of 1864 apply to a sale under S. 7 (1) (c), Land Improvement Loans Act (19 of 1883): in other words, whether such a sale is free of prior encumbrances. The Subordinate Judge has decided that it is and in my opinion he is right. The point is not covered by authority as the cases quoted on appellant's side, *Ramachandra* v. *Pitchaikanni* (1) and *Chinnasami Mudali* v. *Tirumalai Pillai* (2), all relate to sales under Cl. (a) [and not Cl. (c)], S. 7 (1). A comparison of the various Cls. (a), (b), (c) and (d) shows that the framers of the Land Improvement Loans Act considered that there was some substantial difference between a sale for arrears of land revenue of the land on which the arrears accrued and a sale for the same purpose of other lands, whether belonging to the defaulter or some one else. The same distinction was present to the minds of the learned Judges in the earliest of the above cases, *Ramachandra* v. *Pitchaikanni* (1): after referring to various sections of the Revenue Recovery Act they say:

"the intention is clear that the purchase is free of prior encumbrances only when the arrear is of public revenue of which the land is the first security by statutory declaration:",

and again, "arrear of abkari revenue is not due upon any specific land owned by the abkari renter." This in fact seems to be the main ground on which their decision is based. The judgment in *Chinnasami Mudali* v. *Tirumalai Pillai* (2) also draws the same distinction. The above decisions are therefore of no help to appellant in the present case, and indeed indirectly tend to a conclusion adverse to him. The learned vakil for appellant has argued that the words "in all or any of the following modes" and "as if" contained in S. 7 have reference solely to procedure and were not intended by the legislature to import the operation of S. 42, Revenue Recovery Act. The weak point in this argument is that he is unable to indicate (and we are unable to detect) any difference between the procedure laid down for bringing to sale the lands on which arrears of land revenue have accrued and other lands liable to sale for the same arrears. On this view

(1) [1834] 7 Mad. 434.
(2) [1902] 25 Mad. 572.

the inclusion of a special clause Cl. (c), is unexplained. In this connexion reference has been made to a decision of this Court in *Secy. of State* v. *Pisipati Sankarayya* (3), in which Miller and Munro, JJ., held that all sales of land for arrears of land revenue were free of encumbrances whether the lands sold were those on which the arrears accrued or lands belonging to the defaulter. It may be argued that on this view of the law the enactment of Cl. (c) in addition to Cl. (a) is in any case unnecessary. I think the explanation lies in the fact that the Land Improvement Loans Act is an Act of the Government of India and that there is no reason to suppose that it was framed with sole regard to the provisions of the Madras Revenue Recovery Act. Other Revenue Recovery Acts in force in 1883 recognized a distinction between the conditions of sale of land on which arrears had accrued and other lands belonging to the defaulter: vide Ss. 11 and 12, Bengal Act 7 of 1863, Ss. 94 (f) and (g) and 108, Central Provinces Land Revenue Act 18 of 1881 and Ss. 133 and 135 of Act 17 of 1876, Oudh Land Revenue Act. Even assuming therefore that the framers of the Land Improvement Loans Act shared the view of the Madras Act 2 of 1864 taken by the learned Judges in *Secy. of State* v. *Pisipati Sankarayya* (3), this is not inconsistent with their having deliberately distinguished the cases, having in mind the provisions of the Acts in force in other parts of India. Even in this Presidency so, far as I am aware, the *Secy. of State* v. *Pisipati Sankarayya* (3) was the first case in which the broader view of the applicability of S. 42 was expressed; and with all respect to the learned Judges in that case I am inclined to think the learned Judges who decided *Ramachandra* v. *Pitchaikanni* (1) were inclined to take the narrower view. There is no reason to suppose that the framers of S. 7, Land Improvement Loans Act, acted under the impression that there was no difference in this respect.

I am inclined to think that while the words "in all or any of the following modes" if they stood alone, might be indicative only of procedure some wider meaning should be attached to the words "as if" in Cl. (c), when contrasted with the words 'according to the procedure, etc.," in Cl. (d). The use of the latter words is significant and shows at any rate that the framers of the Act had other words in their minds which might have been more suitably employed to express the meaning contended for by appellant's vakil. There is however another argument to my mind conclusive on the point furnished by the proviso to the section which runs:

"Provided that no proceeding in respect of any land under Cl. (c) shall affect any interest in that land which existed before the date of the order granting the loan other than the interest of the borrower and of mortgagees of or persons having charges on that interest and where the loan is granted under S. 4 with the consent of another person, the interest of that person and of mortgagees of or persons having charges on that interest."

This clearly implies that the interests of prior mortgagees are affected by a sale under Cl. (c) and is in fact incapable of any other meaning Mr. C. V. Ananthakrishna Aiyar's only argument in this connexion is that the words of a proviso cannot be used to extend the operation of the section to which it is attached. This is no doubt true and is clearly established by the judgment of the Privy Council in the case on which he mainly relied, *West Derby Union* v. *Metropolitan Life Assurance Society* (4). But where there is doubt as to true meaning of the substantive part of a section it is surely legitimate to look to the words of a proviso to it in order to determine which interpretation is correct. This is recognized by Lord Herschell in his judgment in the very case referred to. It cannot be said that the words of the main part of the section are so clearly in appellant's favour as not to be at any rate ambiguous; and here we have a proviso which is perfectly compatible with one interpretation and clearly incompatible with another. It must also be noticed that one main objection of their Lordships to reference to provisos is inapplicable to the present case: viz., that provisos are frequently inserted simply to allay the apprehensions of persons against whom the Act was never intended to apply. This cannot be said of the exception against mortgagees which is contained in the proviso itself. There is nothing as far as I can see in the judgment of their Lordships in that case to preclude reference to the proviso for the interpretation of the section with which

(3) [1910] 34 Mad. 493=8 I. C. 414.

(4) [1897] A. C. 647=66 L. J. Ch. 726.

we are dealing: and it seems to me to be conclusive against appellant. I must therefore hold that a sale of land under Ss. 7 (1) (c) is free of encumbrances.

Two other objections raised on behalf of appellant may be briefly noticed. It is pointed out that Rs. 2,500 of the first instalment advanced was devoted to discharging a loan privately taken for the purpose of paying for an oil engine, the installation of which on the land was part of the improvements for which the loan was granted. Appellant contends that to this extent the loan from Government cannot be said to have been taken for the purpose of making an improvement within the meaning of S. 4 of the Act. No authority is quoted and I am unable to accept such a contention. A considerable time usually elapses between the application for a loan under the Act, and its disbursement to the borrower: and in the present case the borrower being anxious to set about the work arranged to purchase the engine on the hire purchase system, and apparently took a temporary loan from some private persons to enable him to discharge the earlier instalments. There is nothing in all this to affect the essential object for which the loan was taken from Government or the borrower's liability under the Act.

The second objection is that, because the first instalment of the loan was not utilized within the period allowed by the Government rules, the disbursement of the second instalment cannot be treated as the disbursement of a loan under the Act, and to the extent of that instalment no priority can be claimed for it over plaintiff's mortgage. This contention is also baseless: it is not denied that the first instalment had been utilized to the satisfaction of the Government officers on the specified improvements prior to the disbursement of the second instalment: and I fail to see how the action of Government in relaxing the strict operation of the rule regarding the time limit in favour of the borrower can prejudicially affect Government's right in this connexion. I would dismiss the with costs of respondent 2.

Seshagiri Aiyar, J. — Although I agree with the conclusion at which my learned brother has arrived, having regard to the fact that the point argued is practically one of first impression and to the important issues involved in its decision, I have ventured to add a few words of my own. The facts have been stated by my learned colleague and it is unnecessary to repeat them. The main point for consideration is, whether a sale for the loan advanced by the Government in respect of agricultural improvement of a property avoids previous existing encumbrances upon that property. I do not agree with Mr. C. V. Anantha-krishna Aiyar that unless the loan is advanced for making future improvements, the provisions of the Act have no application. Where in anticipation of a loan from Government work which satisfied the definition of the term 'improvement' is started, in my opinion, the loan must be taken to have been granted for the purpose of making the improvement. The test is not whether the improvement was subsequently made, but whether the money was applied for the construction of agricultural improvements upon the property. Nor do I think that the fact that time was extended for completing the work in regard to which the first instalment of payment was made in any way affects the validity of the subsequent advances. The provision in the rules for the completion of the work within the time stipulated is minatory in its nature, and it is as much open to the Government to extend the time for performance as it is open to any private party to do in respect of contract fixing a time for performance. The rules do not bind the Government to refuse the loan if the time stipulated has been exceeded.

On the main question I have been greatly influenced by the contention of the learned Government Pleader on the inutility of Cl. (a), Act 19 of 1883 if Cl. (c) of that section is intended to have the same result as Cl. (a). I am prepared to agree with the learned vakil for the appellant that the words "as if they were arrears of land revenue" would prima facie only attract the procedure prescribed in the Revenue Recovery Act and not the substantial declaration contained in Ss. 2 and 5 of that Act. The decisions of this Court have been uniform on that question: see *Ramachandra* v. *Pitchaikanni* (1), *Ibrahim Khan Sahib* v. *Rangasami Naicken* (5), *Kadir Mohideen*

(5) [1905] 28 Mad. 420.

Marakkayar v. *Muthukrishna Ayyar* (6) and *Muthusamier* v. *Sree Sree Methanithi Swamiyar Avergal* (7). But in Cl (c), S. 7 we have, in addition to the words "as if they were arrears of land revenue," a preceding and a subsequent clause which gives a different complexion to the policy of the Act. The first four words "out of the land" and the last five words "in respect of that land" make it clear that the loan granted is to be regarded as a first charge upon the property. In *Ramachandra* v. *Pitchaikanni* (1) which was under the Abkari Act, two eminent Judges of this Court, while holding that the words "in like manner as for the recovery of arrears of land revenue" only denoted the procedure to be adopted say:

"Arrear of abkari revenue is not due upon any specific land owned by the abkari renter."

That to my mind is the keynote to the construction of similar provisions in other acts. In the case of Abkari rent, in the case of income-tax, in the case of cesses under the Local Boards Act, the amount payable to the Government is not due in respect of any specified land, whereas the essence of the stipulation under Act 19 of 1883 is that the loan is payable out of and in respect of the land for improving which the loan is granted. In my opinion the language of S. 7, Cl. (c), amounts to a declaration that the land is charged with the payment of the revenue and when in addition to that declaration the legislature refers back to Act 2 of 1864, I am inclined to think that the provisions of Ss. 2, 5 and 42 of that Act are intended to be read with Cl. (c), S. 7, Act 19 of 1883. Whatever doubt there may exist on this question is removed by the proviso, which in distinct terms says that the interest in the land which is available to the Government is restricted to that to the borrower and to that of the mortgagee.

Mr. C. V. Ananthakrishna Aiyar addressed to us an elaborate argument upon the inadvisability of utilizing provisos to supplement the operative portion of a section. I adhere to what I said on this question in my judgment in *Annie Besant* v. *Emperor* (8). It is a well-known canon of construction that where the language of a section is clear and unambiguous, the proviso should not be construed as adding to any right or disability created by the section; but where there is room for doubt regarding the construction of the section it has always been the practice to invoke the aid of the proviso to help in the proper interpretation of the section. The observations of Lord Watson in *West Derby Union* v. *Metropolitan Life Assurance Society* (4), to which the learned Government Pleader drew our attention, support this principle and there is nothing in the judgment of the other noble Lords to throw doubt on the correctness of the dictum of Lord Watson. In my opinion the proviso is strictly and rightly in place in this particular instance. By the operative portion of Cl. (c) the legislature provided that out of the whole land the loan shall be realized. The proviso releases rights other than those of the borrower and of the mortgagee, e. g , the rights of an occupancy tenant. Therefore the proviso is aptly in place and has the further effect of elucidating the meaning of the operative clause.

There is only one other observation that need be made, and that is this: S. 7 provides for cumulative remedies to the Government to proceed against the borrower personally, they may proceed to sell the land; lastly, they may also proceed to sell the land given as collateral security. Now, under Cl. (a) when the legislature provided that the borrower can be proceeded against personally it would follow as a matter of course that his property can be attached and sold. It seems to me that even where properties other than those upon which revenue is due are sold under Act 2 of 1864, all pre existing encumbrances on such properties are wiped off. During the course of the argument I felt some title doubt as to whether the decisions of Miller, and Munro JJ., in *Secy. of State* v. *Pisipati Sankarayya* (3) was right. But on closely examining the sections of the Revenue Recovery Act, I feel that the effect of S. 42 is not only to discharge pre-existing encumbrances upon the property on which the arrear is due, but also pre-existing encumbrances upon every property which is brought to sale for arrears of revenue due from the defaulter. S. 32 to which Mr. C. V. Ananthakrishna Aiyar drew our attention, does not save the encumbrances as was contended. There-

(6) [1908] 26 Mad. 230.
(7) [1913] 38 Mad. 356=19 I. C. 694.
(8) [1917] 39 Mad. 1164=37 I. C. 607.

fore if the Government avail themselves of the remedy provided by Cl. (a) and if the words "as if they were arrears of land revenue" were to be construed as only indicating the procedure to be adopted, then it would follow that the previous existing encumbrances would subsist and that the Government would only be entitled to the surplus sale proceeds, if any after satisfying such encumbrances. If Cl. (c) is also to be similarly interpreted, the legislature must be deemed to have been guilty of redundancy. According to Mr. Ananthakrishna Aiyar, under Cl. (c) also, if a sale is effected for the loan the encumbrances would still subsist. I do not think Courts will be justified in imputing to the legislature the enacting of an unnecessary provision of law where they can give a consistent meaning to it otherwise. It is clear whereas under Cl. (a) the ordinary remedy is given under Cl. (c) the remedy of avoiding existing encumbrances is provided by the legislature. At first sight it looks as if the legislature was not conscious that under the Madras Revenue Recovery Act the sales of property other than those upon which arrears are due would not avoid the existing encumbrances. Very likely the Imperial Government had in mind the provisions of Bengal Act 7 of 1868, which by S 11 enables the Collector to sell only the tenure on which the rent is due and by S. 12 to exclude previous encumbrances only in respect of that particular tenure. The Madras legislature has given a more distinct remedy for arrears of revenue than is given in Bengal. However that may be there can be no doubt that the effect of S. 7, Cl. (c) is to make a declaration on behalf of the Government that it has a first charge upon the property for the loan advanced in respect of that property just as under S. 2, Revenue Recovery Act, the Government has a first charge for arrears of revenue. In this view, the decision of the Subordinate Judge is right and I agree that the appeal should be dismissed with costs of respondent 2.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 594

PHILLIPS AND KRISHNAN, JJ.

Yuna Ramanayakudu and *others*—Defendants—Appellants.

v.

Boya Pedda Basappa and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 511 of 1918, Decided on 17th January 1919, against decree of Dist. Judge, Kurnool, in Appeal Suit No. 3 of 1917.

(a) Civil P C. (1908), S. 64 and O. 21, R. 54—Attachment is effected when judgment-debtor prohibited from making alienation has opportunity of knowing that he is so prohibited.

An attachment of property is effected within the meaning of S. 64, when the judgment-debtor prohibited from making an alienation has an opportunity, afforded by the proclamation mentioned in Cl. 2, R. 54, O. 21, of the Code, of knowing that he is so prohibited and the mere writing of such an order behind his back and keeping it in the Court records does not amount to an order prohibiting alienation within the meaning of R. 54.

Where therefore a judgment-debtor executed a lease of his property which had been ordered to be attached but which was not actually attached in the manner provided by O. 21, R. 54, until after the execution of the lease :

Held : that the lease was not invalid. [P 595 C 1]

(b) Civil P. C. (1908), S. 64—Bonafides are immaterial.

No question of the bona fides of the alienee arises under S. 64. [P 595 C 1]

P. R. Srinivasa Aiyangar and *K. S. Ganesha Aiyar*—for Appellants.

E. S Chidambaram Pillai—for Respondents.

Judgment.—S. 64, Civil P. C., says that

" where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment shall be void as against all the claims enforceable under the attchment. "

The only question for decision in this case is whether on the date of plaintiff's lease the attachment had been made. No doubt an order had been passed a few days before the lease ordering attachment but O. 21, R. 54, Civil P. C., lays down the manner in which an attachment of an immovable property has to be made and those provisions were not complied with until long after the lease was executed. It is contended that the mere writing of an order to attach is sufficient to constitute attachment, but the rule says that the order must be one " prohibiting " the judgment-debtor and we

think that in order to make an order prohibiting, the person prohibited must have the opportunity, afforded by the publication mentioned in Cl. 2, R. 54, of knowing that he is so prohibited and the mere writing of such an order behind the judgment-debtor's back and keeping it in the Court records would not amount to an order prohibiting within the meaning of R. 54. A perusal of Rr. 43, 44, 46, 47, 48 and 51 to 53, O. 21, shows that the principle underlying the procedure in each case is to make the attachment known to the person affected by the order. In this view no attachment of the property had been made in this case and the lower Court's decree is right. Under S. 64, Civil P. C. no question of the bona fides of the alienee arises ; so this aspect of the case need not be considered. The second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 595

BAKEWELL AND KRISHNAN, JJ.

Maddipoti Peramma—Plaintiff—Appellant.

v.

Gandrapu Krishnayya and another—Defendants—Respondents.

Second Appeal No. 227 of 1917, Decided on 15th February 1918, against decree of Dist. Judge, Godavari, in Appeal Suit No. 323 of 1915.

Provincial Insolvency Act (1907), Ss. 18(3), 20 and 47—Sale by Official Receiver—Purchaser obstructed in taking possession—Insolvency Court has no jurisdiction to enquire into alleged resistance—Court directing removal of obstruction and delivery of possession—Suit for declaration of obstructor's title and injunction restraining delivery to purchaser is maintainable — Civil P. C. O. 21, Rr. 97 and 98.

The power conferred by S. 18 (3) is intended to enable the receiver to obtain control of the insolvent's property and not to provide for the determination of questions of title as between the insolvent and third parties. This provision is not intended to confer jurisdiction over a person against whom the insolvent has merely a right enforceable by suit. [P 595 C 2]

An Insolvency Court has, therefore, no jurisdiction to institute an inquiry under O. 21, Rr. 97 and 98, Civil P. C., into an alleged resistance to a purchaser at the Official Receiver's sale taking possession of the property. [P 596 C 1]

Where an order has been passed by the Insolvency Court directing the removal of the obstruction and delivery of possession to the purchaser, the aggrieved party has a right to file a suit for a declaration of his title and for an injunction restraining delivery of the property to the purchaser. It will not be correct to embody a prayer in such a suit for the setting aside of the order of the insolvency Court, as that is a matter within the jurisdiction of the High Court: 44 I. C. 847; 47 I. C. 398; and 43 I. C. 573; *Dist.* [P 596 C 1]

Per *Krishnan, J.*—Under S. 18 (3), Provincial Insolvency Act, the Court has power, in a proper proceeding instituted before it by the Receiver, to inquire into and decide on the merits of an adverse claim to possession set up by a third party. [P 596 C 2]

The rules of the Civil Procedure Code can be availed of only where S. 47, Insolvency Act, applies. To apply that section it must be shown that there was some proper proceeding under the Act in the insolvency Court, for S. 47 merely provides for the procedure to be adopted "in regard to proceedings under this Act." [P 596 C 2]

An order passed by an insolvency Court under O. 21, Rr. 97 and 98 without jurisdiction may be set aside by the High Court on appeal, but that does not bar a fresh suit by the aggrieved party. [P596 C 1]

B. Narasimha Rao and *D. Appa Rao*—for Appellant.

P. Narayanamurthy — for Respondents.

Bakewell, J.—Under S. 18, Provincial Insolvency Act, the appointment of a receiver vests the property of the insolvent in him, and under S. 20 it is the duty of the receiver to realize that property and he has power to sell it This power is exercised by virtue of the authority conferred by the statute and not of a decree or order of the insolvent Court directing a sale. There was therefore no proceeding before the Court with respect to such sale within the meaning of S. 47 and the rules of the Civil Procedure Code relating to the sale of property in execution of a decree or order do not apply. It is argued that under S. 18 (3) the Court had power to remove a person in possession of property of the insolvent from possession, but this power is evidently intended to enable the receiver to obtain control of the insolvent's property and not to provide for the determination of questions of title as between the insolvent and third parties This is indicated by the proviso to this sub-section, which limits this power to persons whom the insolvent has "a present right so to remove." I do not think that this provision was intended to confer jurisdiction over a person against whom the insolvent had merely a right enforceable by a suit. The parties to this suit were not parties to the proceedings in insolvency pending before the District Court in which the order in question purported to be made, and that Court was therefore not competent to

try the issue now raised between these parties aud its finding is not binding upon them (Civil Procedure Code, S. 11). I think however that the first prayer of the plaint is not correct in form in asking that the order of the District Court should be set aside; that is a matter within the jurisdiction of the High Court. The cause of action is the threat of the defendant to obtain possession of property by means of irregular proceedings and the prayer of the plaint should be for a declaration of plaintiff's title and an injunction. The appeal is allowed and the suit is remanded to the Court of first instance for trial on the merits. Costs throughout will abide the result.

Krishnan, J.—The facts of this case necessary for the disposal of this second appeal are these: The plaint property was sold by the Official Receiver as the property of the insolvent, defendant 1, and it was purchased by defendant 2. In attempting to take possession, defendant 2 was obstructed by the plaintiff who claimed the property as his own. Defendant 2 then applied to the insolvency Court to order the removal of the obstruction and to put him in possession. This petition was filed under O. 21, Rr. 97 and 98 Civil P. C., and the plaintiff and defendant 1 were made counter-petitioners. After a summary inquiry the Court passed an order for the delivery of the property to defendant 2. Plaintiff has brought the present suit for a declaration of his title and for an injunction restraining defendant 2 from taking possession under that order, and for possession if he is removed from possession pending suit. Both the lower Courts have dismissed the suit on the preliminary ground that it is not maintainable, plaintiff's only remedy being, according to them, an appeal against the order of the insolvency Court. Plaintiff contends before us that order is no bar to his suit, as it was passed without jurisdiction. A copy of the order has been filed in this Court as it was not filed in the lower Courts, and both sides have consented to this course.

I agree with my learned brother in thinking that the order of the insolvency Court was one passed without jurisdiction. It was sought to be supported as a competent order under S. 18, Cl. (3), Provincial Insolvency Act. or under S. 47 of that Act read with Rr. 97 and 98, Civil P. C.

Section 18, Cl. 3, is clearly intended, as pointed out by my learned brother, for the purpose of helping the receiver to get possession of the insolvent's property: under it the receiver but on one else can apply to the Court to direct a third party who is in prossession of the insolvent's property to deliver it up to him, if the insolvent has a "present" or actual subsisting right to its possession. I consider that under that section the Court has power, in a proper proceeding instituted before it by the receiver, to enquire into and decide on the merits of an adverse claim to possession set up by a third party, adopting the proper procedure for it. But in my view this question does not arise in this case, as no application whatever was made by the receiver under the section. He elected to sell the property as that of the insolvent leaving it to the purchaser to take such steps as he thought fit, to get possession of it. The application to the Court was made by the purchaser under Civil P. C. and the receiver was not even a party to it : such an application clearly does not lie under S. 18. The purchaser is a stranger to the insolvency proceedings and by his purchase he got no more rights than the insolvent himself had, to get possession of the property from the third party. The rules of the Civil P. C. can be availed of only if S. 47, Insolvency Act, applies. To apply that section, it must be shown that there was some proper proceeding under the Act in the insolvency Court; for S. 47 merely provides for the procedure to be adopted "in regard to procedings under the Act." See *Guntapalli Narasimhayya* v. *Malapati Veeraraghavulu* (1). As that has not been shown, it is clear that the order of the Court on the application of the purchaser deciding in a summary way that plaintiff has no title to the property and that he should give up possession was without jurisdiction.

That being so I am of opinion that the order cannot be treated as a bar to the plaintiff's suit and that the suit is maintainable as an ordinary civil suit. Under S. 41, Evidence Act, it is open to the plaintiff to show that the order pleaded against him was delivered by a Court not competent to do so, that is, not having jurisdiction to do so and he has done that in the present case. It may have been open to him to apply to the

(1) [1917] 41 Mad. 440=42 I. C. 525.

High Court to set aside the order as one without jurisdiction, but it cannot be said that he was bound to do so or that it was his only remedy, though he would have been well advised if he had adopted that course. He was entitled to choose his remedy and the fact that he did not choose to come to the High Court cannot affect his right of suit under the general law. I think therefore his suit is maintainable. The case of *Hajee Abdul Lateef Sahib* v. *Official Assignee of Madras* (2) and the case referred to in the foot-note to it, *Official Assignee* of *Madras* v. *Manayar Karasu Ammal* (3), were both cases which arose under the Indian Insolvency Act and were brought to contest orders passed by the Madras Insolvency Court between the Official Assignee on the one side and the third party claiming title on the other. The orders being with jurisdiction under S. 7 of the Act, the suits were held not maintainable. These cases are thus clearly distinguishable from the present case. The case of *Pita Ram* v. *Jujhar Singh* (4) is also distinguishable, as that was a case where the third party had himself elected to apply under S. 22, Provincial Insolvency Act, as he was entitled to do, and though he had a right of suit as well, the learned Judges held that as he had elected to adopt one remedy and failed, he could not be allowed to fall back upon the other. Such a question does not arise at all in the present case. Here the plaintiff was brought into the Insolvency Court by the purchaser that and in a proceeding which the Court was incompetent to adopt the fact that he did not plead to the jurisdiction of that Court cannot give that Court jurisdiction nor can it be treated as an election of his remedy by the plaintiff. The Allahabad case therefore does not apply.

No other authority has been cited before us. I am, for the reasons above stated, of opinion that the lower Courts were wrong in dismissing the plaintiff's suit as not maintainable. I would therefore set aside their decrees and remand the suit to the District Munsif for trial and disposal on the remaining issues. As pointed out by my learned brother, the prayer in the plaint to set aside the order of the District Judge is not correct in form; but it is not material to the plaintiff and will therefore be disallowed. I agree to the order proposed by my learned brother as to costs also.

S.N./R.K. *Appeal allowed.*

(2) [1918] 40 Mad. 1173=44 I. C. 847.
(3) [1918] 40 Mad. 1173=47 I. C. 398(*foot-note*)
(4) [1918] 39 All. 626=43 I. C. 573.

A. I. R. 1919 Madras 597

SESHAGIRI AIYAR, J.

Poyyali Naicker — Defendant — Petitioner.

v.

Subba Naicker — Plaintiff — Opposite Party.

Civil Revn. Petn. No. 413 of 1917, Decided on 24th April 1918, against judgment of Dist. Munsif, Tuticorin, D/- 11th December 1916.

(a) Civil P. C. (1908), S. 11—Implied adjudication may operate as res judicata.

Actual adjudication on an issue in a suit is not necessary to constitute the decision res judicata in a subsequent suit. If the decision come to in the earlier suit impliedly decides the point which is in issue in a subsequent suit, it would be res judicata: *A. I. R.* 1915 *Bom.* 222 and 13 *I. C.* 860, *Foll.* [P 598 C 1]

(b) Civil P. C. (1908), S. 11—Co-defendant—Absence of conflict of Interest interse—Decision is not res judicata.

Where the parties to a suit were co-defendants in an earlier suit and there was nothing to show that there was a conflict of interests inter se between them, the decision in the earlier suit will not operate as res judicata in the subsequent suit: 29 *Mad.* 515 and *A. I. R.* 1915 *Mad* 26, *Dist.* [P 598 C 2]

K. Raja Aiyar—for Petitioner.

C. Krishnamachariar — for Opposite Party.

Judgment.—The suit is brought by the karaswan against the defendant whom he alleges to be a subscriber to the chit. The defendant denied he was a subscriber. The District Munsif came to the conclusion that the defendant's plea is barred by res judicata by virtue of the decision in Small Cause Suit No. 1400 of 1915 on the file of the District Munsif's Court, Tuticorin. In that suit a third party who claimed to be a subscriber to the chit fund brought a suit against the present plaintiff and the defendant, who were arrayed as defendants 1 and 2, respectively, for recovering the amount of the subscription which he had paid. Defendant 1 pleaded that he had asked defendant 2, who was also a subscriber to pay the amount, and consequently he was not liable. Defendant 2 pleaded that he was not a subscriber at all and that he never undertook to pay the plaintiff. After the pleas were recorded the plaintiff in the previous suit

exonerated defendant 1, and was content to take a decree against defendant 2 alone. The District Munsif states in his judgment in that case:

"I find that no reason has been shown why the plaintiff should institute a false suit against defendant 2. If defendant 2 and defendant 1, were on bad terms, there is no reason whatsoever why plaintiff should lend himself to the designs of defendant 1.

The judgment does not decide any rights inter se between defendants 1 and 2. There is nothing in the pleadings to which I have been referred which in terms say that the liability undertaken by defendant 2 was as a subscriber It may be a case of novatio. The plaintiff to whom money was due from defendant 1 might have agreed to take it from defendant 2 and to give up his claim against defendant 1. The records of the suit are not inconsistent with the view that defendant 1 was exonerated because there was a new agreement with defendant 2, who undertook the liability which defendant 1, was under. The conclusion in the previous suit does not necessarily entail the finding that defendant 2 was a subscriber. Therefore in my opinion the present plea is not barred by res judicata on the face of the pleadings and of the judgment in the former suit. I do not agree with the contention of the petitioner's vakil that there must be an actual adjudication. If the decision come to impliedly decides the point which is now in issue, it would be res judicata. That was recognized even in Bombay. See *Fakirchand Lallubhai* v. *Naginchand Kalidas* (1). In this Court a Bench, to which I was a party, has held that all findings which are necessary for giving the ultimate decision will be res judicata. *Sankaramahalingam Chetty* v. *Muthulakshmi* (2). But the real difficulty as regards the judgment of the District Munsif arises from the facts that not only was the claim against defendant 1, withdrawn, but that there was no adjudication regarding the right of defendants 1 and 2 inter se. In *Ramachandra Narayan Narayan Mahadev* (3). West, J., stated the law thus:

"But for this effect to arise, there must be a conflict of interest amongst the defendants and a judgment defining the real rights and obligations of the defendants inter se."

Following the decision the Madras High Court in *Narasimha Ammal* v. *Srinivasa Ragava* (4) say:

"The necessity for an active controversy between the co-defendants is uniformly recognized."

Applying the principle enunciated by these two decisions, it seems to me that the conclusion come to in the previous case cannot be regarded as res judicata because there has been no adjudication regarding the rights of the defendants inter se. The learned vakil for the respondents drew my attention to the decision in *Kandiyil Cheriya Chandu* v. *Zamorin of Calicut* (5). In that case the learned Judges specifically put the plea of res judicata on the ground of active contest. This is what Benson and Bhashyam Aiyangar, JJ., say in that case:

"The then defendant 6 not only supported the then plaintiff but took an active part in the controversy and was represented by a vakil in all stages of the suit both in the Courts below and in the High Court."

They further say that an adjudication is absolutely necessary to decide the rights of the two defendants inter se. That case does not help the respondent. The decision in *Nallappa* v. *Vridhachala* (6) proceeds upon the principle of equitable estoppel, which has no bearing on the present case. For these reasons I am of opinion that the previous decision does not operate as res judicata in the present case and that there must be an inquiry into the facts of the case. I reverse the decision of the District Munsif and remand the suit to him for disposal on the merits. Costs to abide the result.

S.N./R.K. *Case remanded.*

(1) A.I.R. 1915 Bom. 222=40 Bom. 210=33 I.C. 423.
(2) [1918] 43 I. C. 860.
(3) [1887] 11 Bom. 216.
(4) [1910] 33 Mad. 112=5 I. C. 760.
(5) [1906] 29 Mad. 515.
(6) A.I.R. 1915 Mad. 36=37 Mad. 270.=25 I.C. 888.

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*A. I. R. 1919 Madras 598
Full Bench

WALLIS, C. J., SADASIVA AIYAR AND SPENCER, JJ.

Annaya Tantri — Defendant—Appellant.

v.

Ammaka Hengsu and *others*—Plaintiffs—Respondents.

Second Appeal No. 1868 of 1916, Decided on 18th April 1918.

*** Hindu Law — Religious endowment—Archaka—Female is not disqualified.**

Per *Curiam* (*Sadasiva Aiyar, J.*, dissenting).—A Hindu widow is not disqualified by reason of her sex from inheriting the service and emoluments of an archaka office held by her husband; *A. I. R.* 1915 *Mad.* 561, *not Foll*; 19 *I. C.* 337: (*P.C.*), *Expl.* and *Dist.* [P 605 C 1]

Per *Wallis, C. J.*—The succession to temple offices is governed by user, which is taken to represent the intentions of the founder, and in Southern India the user in the case of temple Archakas is that the office is hereditary and descends in the ordinary course of succession to women, who are not themselves competent to perform the duties of the office by ministering in the temple and perform them by deputy. [P 604 C 1]

Per *Sadasiva Aiyar, J*—There is no distinction in principle between the incompetency of a claimant to the office of archaka by reason of sex and the incompetency due to any other cause. So long as a Hindu widow is held incompetent by reason of her sex from performing the duties of a priestly office, she is also incompetent to inherit the service and emoluments of the office.

[P 605 C 2; P 606 C 2]

B. Sitarama Raw—for Appellant.

K. P. Lakshmana Rao—for Respondents.

Order of Reference

Seshagiri Aiyar, J.—The question for consideration in this second appeal is whether the plaintiff, a widow, is entitled to recover possession of the property which was enjoyed by her husband and his predecessors by doing archaka service in a temple. The Courts below have given her a decree for possession. Mr. Sitarama Rao, relying on *Sundarambal Ammal* v. *Yogavanagurukkal* (1), has argued at some length that as the plaintiff is not competent to perform the archaka service, she is not entitled to the property. Ayling and Hannay, JJ., in *Ramasundaram Pillai* v. *Savundaratha Ammal* (2) and Kumaraswami Sastri and Phillips, JJ., in *Rajeswari Ammal* v. *Subramania Archakar* (3) have dissented from *Sundarambal Ammal* v. *Yogavanagurukkal* (1). In these circumstances, it becomes necessary to consider the question in some detail as to which of these conflicting views should be followed. In *Sundarambal Ammal* v. *Yogavanagurukkal* (1) Sadasiva Aiyar, J., who delivered the leading judgment, lays stress upon the duties attaching to the archaka office as opposed to rights, and says that the emoluments should go only to those who are competent to perform the services. It is true that from the point of view of the worshipper, it is the fitness of the archaka for the discharge of his duties that has to be considered. From the point of view of the archaka, the question of secular rights is more important. In considering the relative importance of the two functions and in endeavouring to reconcile these two conceptions, the historical aspect of the grant for service in temples may be considered. It is often said that there is nothing in the Hindu law texts on the question. It may seem strange that in a country where religion plays such an important part in the daily concerns of the people, there should be so little about succession, etc., to religiou institutions and offices in the writings of the rishis or of their commentators. The reason is not far to seek.

In the Vedas and in the ancient Smritis, we do not hear of the founding of temples. It is to the Puranic age that we own their existence. In Manu's days, the only religious teacher was the ascetic sanyasi. He gave instructions to his disciples, who in their turn spread the light of wisdom among the lay people. There were no places of worship, and no images to worship. It was to Budha that India owes the introduction of fixed places of worship and of ordained orders of preachers. In Budhism there are three essentials: (a) adoration of Budha, (b) observance of his laws and (c) the congregation. Budha instituted the order of monks and nuns with a view to religious instruction being imparted to the uninitiated; places of shelter or refuge were founded in order that the world-weary may retire to them and receive religious consolation. From these simple beginnings a disciplined army of Bikshus came into existence and edifices known as monasteries were erected to afford facilities for prayer, consultation and contemplation. It is to this period that we owe the founding of temples in Southern India. The followers of Budha pursued a policy which was resented by the orthodox. Temples for the worship of Siva and Vishnu were established mostly by non-Aryans at or about this time to circumvent the Budhistic influence.

The second period begins with the advent of Sankara. He found that the ancient worship of the elements was losing bold on the popular mind, and that the people were being led by the precepts

(1) A. I. R. 1915 Mad. 561=38 Mad. 850=23 I. C. 72.
(2) A. I. R. 1915 Mad. 725=27 I. C. 440.
(3) [1916] 40 Mad. 105=32 I. C. 975.

of Budhism into the track of atheism. He had to fight blind orthodoxy behind him and materialism ahead of him. He adopted a compromise. He founded Mutts which took the place of monasteries. He founded various orders of Sanyasins who were enjoined to lead celibate lives and to impart religious instruction. He undoubtedly succeeded in driving Budhism from the land: and he laid the foundation for institutions which cannot be said to have fully served the purpose which he had in mind. The successors of Sankara did not find it easy to console the religiously-inclined by the doctrines of advaitic philosophy. Sankara was described as the pseudo-Budha. The common people hankered after something more real than is to be had in the severely logical philosophy of Sankara. Three philosophers, who gave prominence to the existence of a personal God, diverted public attention from Sankara's teachings. The Vaishnavaites, the Madhwas and the Saivites founded independent Mutts where the Dvaitic philosophy was taught. They had to proceed a step further. They accepted control over existing temples and encouraged the construction of new temples in honour of the particular deity they represented as the supreme being.

As this is a rough summary of events, I should not be understood as saying that all the temples in India came into existence only in the way I have described. There were apparently some Independent institutions. By this time, the Puranas had gained a hold on the popular mind, and the worship of the Avatars of Vishnu and of the manifestations of Siva came to be regarded as the essential features of religious life among the people. Rich endownments were made for the upkeep of the temples. But the priests capable of rendering services in these institutions had to be found. It has always been the belief in India that the nearer a man is to God, the farther is he from him. The following slokas from the writings of Vaidyanatha Dikshiter express the ultra-orthodox and conservative view of the office of an archaka in a Hindu temple. The above slokas (verses) may be translated thus: "Saathathapa" says:

"A Vipra, (Brahmin), though well versed in Vedas, who performs pooja for the sake of money for a period of three years, is known as the devalaka; such a person becomes incompetent to perform the usual havya and avya krites enjoined on Brahmins."

Again it is said in the Samgraha:

"A vipra, who, though he may be well versed in the four Vedas, is desirous of getting money, and who performs the worship of the gods for the sake of another will be considered equal to a chandala. The devalakas are classed under three heads: Some as karmadevalakas; others as kalpadevalakas; and the rest as Kuddhadevalakas. He who knows the precepts as ordained in the Aagamas and makes a living by performing worship to Rudra and Kali is called sudhadevalaka, and is excluded from taking part in all. A person performing pooja will not become a devalaka if the worship is conducted in accordance with the sacred injunctions of the rishis. Therefore with all care the pooja should be conducted according to the precepts of the Vedas, or, done in the Vaidika fashion. He is called a karmadevalaka who performs the worship of the gods always in a kamya form (i. e. for the sake of attaining some desired object) and is incompetent to perform the ordinary karmas. An archaka, even if he is an authority on the four Vedas and knows the rites prescribed in pancharatha but is devoid of deeksha or consecration, is known as kaladevalaka."

Then the propitiatory ceremonies for these sinful acts are prescribed:

"A vipra who sells for another the Nitya Karmas, such as snanam (bathing), isbtapoortham (performance of pious or charitable deeds, performing sacrifices, and digging wells and doing other acts of charity), uposhanam (fasting) and vrathams (religious acts of devotion) as are ordained in the Shruthis and Smritis has to undergo, by way of prayaschitam, maghasnanam in the month of Maagha; and, after performing thrice the chandrayanam at the full moon should diminish his food by one mouthful every day during the dark fortnight till it is reduced to zero at the new moon, and so on, then he attains the highest purity."

The archakas having been looked down upon in the above manner, naturally great inducements had to be offered by liberal grants of land and by the promise of perquisites. That is how the archaka office came to be founded. I have thus far given a brief outline of the origin and spread of temples and of the manner in which the archaka office was instituted. My survey shows that the founder of the temples looked to the due discharge of the services in the temple as his primary and sole object. The archaka accepted his position as giving him primarily a means of livelihood and to his posterity, and as ultimately enabling him to minister to God. The existence of various inams in the names of the archakas is irrefutable evidence that rich endowments were granted to them to bind them to the service of the deity. These endowments were intended, and in most cases expressed to be, from genera-

tion to generation. It may be assumed that the donors were not over-anxious to make hereditary grants to the donee's family without regard to the latter's capacity to perform religious worship; but the law would not have permitted them to stipulate that the property shall be enjoyed only by those competent to minister in the temple They must have trusted to chance to see that the descendants of the donees carried on the good work for which their predecessors were given grants.

Sadasiva Aiyar, J., asks why, if that must be presumed to have been the intention of the donor, should the inheritance go to persons who by themselves are incapable of discharging the duties. The answer is that Courts and even legislatures must trust to the same chance which the founders calculated upon when they endowed the archaka office. What reason have Courts for holding that a reversioner would be a more welcome minister of religion than the gumastah employed by a widow to perform the services? It would be an ideal to be sought after, if the community interested in temple worship were to be permitted to select on the death of an archaka a person competent to fill his place. Even in this view, can we trust to society here or elsewhere to be guided in the selection of an archaka solely by considerations of religious merit and fitness? There is no guarantee that a nominee of the community would be a fitter archaka than the proxy of the widow. Non constat, he would be worse than a male reversioner of the last archaka. Under such circumstances, there cannot be much room for doubt, that society would prefer that the secular rights with the obligations to do or to get done the spiritual duties should vest in the line of heirs to whom private property would descend. The confirmation of numerous grants in this Presidency by the Inam Commissioners in the name of the widows and daughters of the deceased archakas indicates that the Government of the country have recognized the principle of heredity as the only safe guide in such matters. I see no reason why Courts should not be guided by the executive action of the Government in these matters.

I shall briefly refer to one other reason why the principle of heredity should not be departed from in the case of these offices. It is common knowledge that the Archakas of a temple form a caste among themselves. They are a select people. In the case of the great temple at Chidambaram, they claim to have come down to earth with the deity. They do not intermarry with the other Brahmin sects. Among these people, the moment that a boy is married, he gets a share in the emoluments of the Archaka office. This testifies to the solicitude of this class of people for an early expansion of the sect. In the case of other Siva temples, the Archakas are known as Gurukkals. Unfortunately they are adminishing race. They are not permitted to take brides from other Brahmin sects; and worship in a temple cannot be performed by a Brahmin who is not a Gurukkal. In the Vaishnava temples, there are two prominent classes of Archakas: the Pancharatras and the Vaiganasas. I do not believe even these intermarry. A temple whose services are performed according to Pancharatra rituals cannot be served by a Vaiganasa Archaka and vice versa. These limitations show that the field of choice for the Archaka service in Hindu temples is very limited. It would often lead to the application of the principle of escheat, if the grants made for their services are not continued in the line of the heirs of the last male Archaka.

I have referred to the above considerations out of deference to the views of my learned brother Sadasiva Aiyar, J. No one shows more anxiety than the learned Judge that the true intent of a grant should be strictly enforced. I respectfully share his anxiety, but as I have shown above, the change that he gives his sanction to, while upsetting fixity of tenure and disturbing long understood and enforced notions of rights of property, is not calculated to bring the Courts any the nearer to the administration of the golden rule that competency to minister and capacity to inherit should go hand in hand. I am therefore unable to hold that the widow is not entitled to inherit her husband's property granted for the performance of religious services.

I shall now examine the case-law on the point to see how far the learned Judge's conclusions are supported by decided cases. I shall first deal with *Mohan Lalji* v. *Tikait Sri Gordhan*

Lalji (4), which apparently has not been considered in any of the three decisions of this Court, and on which Mr. Sitarama Rao naturally laid great stress. The facts of the case must be examined in some detail in order to show that while it does not lend support to the contention of the learned vakil, it can be regarded as an authority for the proposition I have suggested. The temple in respect of which the office was claimed belonged to the Gossain sect of Vallabhachariars.

The Vallabhachariars, as explained in the judgment of the HighCourt of Allahabad in *Mohan Lalaji* v. *Madhsudan Lala* (5), from which there was an appeal to the Judicial Committee in *Mohan Lalji* v. *Tikait Sri Gordhan Lalji* (4). are a Vaishnava sect of religious teachers who founded temples. The question before the Judicial Committee was whether the grandson by the daughter of the last male Archaka was entitled to succeed to the office and the emoluments in preference to the reversioner of the last male holder. It was found in that case that the Gossain sect of Vallabhachariars took daughters from a sect known as the Bhat in marriage. On the marriage of the Bhat daughter into the Gossain family she was initiated into the Mantram of the Gossain sect. The ritual in a Gossain temple was essentially different from the ritual observed by the Bhats in their temples. The Gossain daughters were similarly married by Bhats, and I take it, although it is not so mentioned in either the judgment of the High Court or in that of the Privy Council, that the Gossain daughter marrying a Bhat husband would be initiated into the Mantram of the Bhat sect. I must not omit to mention a statement in the judgment of Right Honourable Mr. Ammer Ali that the daughters of a Gossain, although married into a Bhat family, remained in the Gossain house. In these circumstances the question was whether in a temple whose rituals were of the Gossain sect, a Bhat grandson of the last male Gossain could inherit the office and the emoluments. The Judicial Committee held that he could not. It is stated in the judgment of the Board that after the death of the last male holder his widow and his daughter were in enjoyment of the office and emoluments. Mr. Sitarama Rao suggested that the widow and the daughter were competent to perform the religious worship in the Gossain temple. There is no express mention of their having officiated in the temples. From my experience of South India I cannot believe that where a large congregation of males assemble for worship, a female would be allowed to perform religious service within the temple. In the north the Gosha system is prevalent and seclusion of women is more pronounced than in the south; and I would require very strong evidence to hold that the widow and the daughter of the deceased male Gossain were as a matter of fact officiating as priestesses in the temple. I must take it that they employed deputies to perform their duties. If my surmise is correct it lends great support to the proposition that so long as the service can be done by a proxy, there can be no objection to women inheriting the office and emoluments of an Archaka.

Then it was argued, if a proxy was held competent to perform the duties, why should not a Bhat grandson have deen allowed to inherit the office and the emoluments on the understanding that he should employ a Gossain priest to officiate in the temple. The position of a widow or daughter and a grandson are not in pari materia. In the case of a grandson he starts a new line of descendants, and to countenance the employment of a perpetual gumastah in the case of males would not be right: therefore the Judicial Committee held that as a grondson suo moto is entitled to minister in the temple and as the grandson was of Bhat origin and incompetent to perform religious worship in a Gossain temple, he should be discarded in favour of a Gossain reversioner who was competent to perform religious worship by himself. In that judgment however it is pointed out that ordinarily the descent of debutter property vesting in an officiating priest would go to the ordinary heirs of the last holder, unless there was some usage or course of devolution or some other circumstance to indicate a different mode of devolution. The conclusion of the Judicial Committee was that in the particular case, the circumstances and the usage pointed to a mode of devolution different from that of the ordinary des-

(4) [1913] 35 All. 283 = 40 I. A. 97 = 19 I.C. 337 (P.C.).
(5) [1910]32 All. 461 =6 I. C. 77.

cent of property. In my opinion this decision is no authority for the proposition that competency to officiate is a sine qua non of capacity to inherit. On the other hand the fact that the widow and the daughter were allowed to inherit the office and the emoluments is a strong indication that service in a temple can be rendered by a proxy so long as the essential nature of the worship is not departed from. Now I shall deal with the other cases bearing on the question. In *Tangirala Chiranjivi* v. *Raja Manikha Rao* (6) Benson and Sundara Aiyar, JJ. said:

"The District Judge has assumed that the minor a female and a person unlearned in the Veda would lose the right to the service in the temple. There is no basis for the assumption."

My experience of life in this Presidency is that in innumerable cases services in a temple are performed by proxies employed by women. In *Mujavar Ibrambibi* v. *Mujavar Hussain Sheriff* (7) referring to the competency of a Mahomedan lady to perform the duties of Majavar of a durga which was not of a secular nature, Turner, C. J., and Kindersley, J., stated that it was not proved "that the plaintiff had ever participated in the profits or performed the duties by proxy," thereby indicating that if she had got the service done by a proxy she would have been entitled to the office. In *Sheshu Ammal* v. *Soundaraja Aiyar* (8) the learned Judges state:

"They further explain that an Archaka Meerassee, which is the species of Meerassee involved in suit No. 111 of 1846, on the file of the Hindu Sudder Ameen referred to by the Civil Judge, and a Poorohita Meerassee, also instanced by the Civil Judge, may descend to a female and the functions thereof be performed by deputy."

These are all the Madras decisions, and Mr. Ganapati Aiyar in his book on Religious Endowments after reviewing these authorities has come to the conclusion that it has been the uniform practice in Madras to allow females to inherit the Archaka service and the emoluments. In Bombay the same view has been held. In *Keshavbhat* v. *Bhagirathibai* (9) the learned Judges state the law thus:

"Finally with respect to the objection that a Hindu female cannot perform the duties which attach to the office for the maintenance of which the allowance was granted, it may be observed that the defendant has not proved the existence of any usage in conformity with his allegation."

So the burden was cast upon the object or to show that the usage was different. At the end of the judgment the learned Judges reserved liberty to the reversioner to bring a separate suit to support his position that a widow was not competent to inherit the office and the emoluments of Archaka. In *Sitarambhat* v. *Sitaram Ganesh* (10) the learned Judges of whom Couch, C. J., was one, proceeded on the assumption that the priestly office would descend in the ordinary line of succession through daughter to her son. The decision in *Dhuncooverbai* v. *Advocate-General* (11) may be explained away, as Sadasiva Aiyar, J., suggests on the ground that the office inherited by the widow was not a purely religious one. The decisions of the Calcutta High Court also support this proposition. In *Poorun Narain Dutt* v. *Kasheessuree Dosee* (12) the learned Judges say:

"It has been held in the Court that a woman can be a muttawali, and that the profits of a debutter can be received by a female."

They held in that case that a woman can succeed to the office. In *Joy Deb Surmah* v. *Huroputty Surmah* (13) an issue was sent down to ascertain whether a female can succeed to a priestly office. The report does not say what the result of the finding was. In *Mitta Kanth Audhikaree* v. *Nirunjun Audhikaree* (14). Sir Richard Couch says that the right of performing worship of an idol follows the same line of succession as that of private property. In *Mahamaya Debi* v. *Haridas Haldar* (15). Mookerjee J., says at p. 475 (of *I. L.R. 42 Cal.*)

"There is no question that a Pala in the Kalighat Temple is heritable and it is immaterial whether the heir is a male or female the custom in this rsepect is established beyond doubt"

These are all the authorities available on the question. None earlier than 38 Madras [*Sundarambal Ammal* v. *Yoga-vanagurukkal* (1)] has been cited in which it has been laid down that a female is not entitled to inherit a priestly office and the emoluments. The decisions are practically uniform and it would lead to an unnecessary disturbance of rights of property, if we introduce the innovation that a female is not entitled to succeed to

(6) A. I. R. 1915 Mad. 505=25 I. C. 283.
(7) [1881] 3 Mad. 95.
(8) [1853] M. S. D. A. 261.
(9) [1866-67] 3 B. H. C. R. A. C. J. 75.
(10) [1869] 6 B. H. C. R. A. C. J. 250.
(11) [1899] 1 Bom. L. R. 743.
(12) [1865] 3 W. R. 179.
(13) [1871] 16 W. R. 282.
(14) [1875] 14 B. L. R. 166=22 W. R. 437.
(15) A. I. R. 1915 Cal. 161=42 Cal. 455=27 I. C, 400

an Archaka office or emoluments. As regards the quotation from Jagannatha's Digest which Sadasiva Aiyar J., has extracted in his judgment, I may say that I have read it very carefully and there is no expression in it of any decided view one way or the other. The author quotes the contentions of both sides and leaves the reader to draw his own inference from the two statements. I am rather inclined to think that the weight of argument, if any is in favour of giving females their right to hold religious office. Although I have come to this conclusion, having regard to the strong view held by Sadasiva Aiyar, J , and having also regard to the fact that it is necessary that a uniform principle should be enunciated in this matter to guide the Courts below, I think it desirable that the following question should be referred for the opinion of the Full Bench, namely:

"whether a Hindu widow is incompetent by reason of her sex from inheriting the service and emoluments of a priestly office held by her husband."

Napier, J.—I agree that this question should be referred to a Full Bench in the terms suggested by my learned brother

Opinion

Wallis, C. J.—It is well settled that the succession to temple offices is governed by user which is taken to represent the intentions of the founder, and it is not disputed that in this part of India the user in the case of temple Archakas is that the office is hereditary and descends in the ordinary course of succession to women who are not themselves competent to perform the duties of the office by ministering in the temple and perform them by deputy. The opinion of the Pandits in *Sheshu Ammal* v. *Soundaraja Aiyar* (8) shows that this was then the recognized usage. The question appears to have first come before the Court in 1910, but since that time there have been numerous decisions where the user has been recognized and enforced, and all the Hindu members of the Court with one exception have been parties to these decisions, which also are conformable with the decisions of other High Courts. The only authority the other way is the judgment of Sadasiva Aiyar, J., in *Sundarambal Ammal* v. *Yogavanagurukkal* (1), who considered that on principle a personally disqualified heir could not inherit the office and delegate the duties to others. In the argument before us it was again contended that the decision of the Privy Council in *Mohan Lalji* v. *Tikait Sri Gordhan Lalji* (4) was in accordance with this view and must be taken to have overruled the other cases. In that case the office of Archaka had descended to the widow and daughter of the last male Archaka, and the question was whether the daughter was to be succeeded by her son or by the reversioner of the last male holder. The Archakas were Gossains and there was a usage among them that females continued to belong to their father's kul or family after marriage. On this ground apparently the daughter had been allowed to fill the office even though married to a member of the Bhat community who was incapable of filling it.

No question arose in that case as to the right of the widow and her daughter after her to fill the office and it does not appear whether while they held it they performed the duties in person or by deputy. What their Lordships had to consider was whether on the daughter's death the office should go to her son and her descendants, a line of heirs who as Bhats would be incapable of performing its duties, or should revert to the male heirs of the last male holder. Their Lordships at p. 288 (of *I. L. R.* 35 *All.*) observe that the rule as to the Shebaitship being vested in the heirs of the founder:

"must from the very nature of the right be subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship:"

and they say later on that:

"to allow the plaintiff's claim to an admittedly Ballav temple where the rights are performed according to Ballav ritual, which it is clearly established, they cannot perform would in their Lordships' judgment, defeat the purpose for which the worship was established."

A contrary decision would have involved the devolution of the office to a line of heirs incompetent to perform its duties. Moreover, the plaintiff's claim in that case was not shown to be in accordance with any well-recognized user, which is the best evidence of the founder's intentions. I do not consider that this decision of their Lordships warrants us in overruling the numerous decisions of this Court in conformity with the decisions of other Courts, by which the widow and daughter of the last male Archaka are held entitled in accordance with the established user to succeed to the office of

Archaka discharging its duties by deputy and to transmit it to their heirs, who as male heirs are preferred to female, will generally be competent to perform the duties in person. Sadasiva Aiyar, J., for whose opinion I have a great respect considers, if I rightly understand him that the established custom of female succession to this office is of so mischievous and objectionable a character that it cannot have been intended by the founder. That view is not shared by Seshagiri Aiyar, J., who has considered this aspect of the case in the Order of Reference, or by the other Hindu members of the Court who have considered the question. We should not in my opinion be justified in overruling on this ground the numerous decisions of this Court in which the usage has been recognized and enforced, unless its mischievous character had been established beyond all doubt or controversy. This has not been done and I feel bound to answer the question in the negative.

Sadasiva Aiyar, J.—I have carefully re-considered my decision in *Sundarambal Ammal* v. *Yogavanagurukkal* (1) in the light of the later decisions of this Court qnoted by my learned brother Seshagiri Aiyar J' in his order of Reference, also of his own keen and yet considerate criticisms (if I may be permitted to say so) of my said decision and also of the opinions of my Lord and of Spencer J. on this reference. I am notwithstanding, unable to convince myself that my opinion was erroneous. On the other hand the decision of their Lordships of the Privy Council in *Mohan Lalji* v. *Tikait Sri Gordhan Lalji* (4) lends, in my opinion strong support to my conclusion. With respect, I am unable to agree with Seshagiri Aiyar J. that the widow and daughter of the last male Shebait of the Ballavacharya Gossain sect in the Privy Council case must have been not competent to perform the duties of the office and must have "employed deputies to perform the duty", and that their enjoyment of the emoluments of the office during their lifetime must be due to their having performed the duties through such deputies and not directly. On the contary, it seems to me clear from the report that the out-of-date unshastraic custom obtaining in the south by which Dharmapathnies (who are Sahadharmacharinees of their husbands) are considered incompetent to pronounce Mantrams and do religious duties along with (and even solely in the absence of) their husbands does not obtain among the Ballavacharya Gossains, one of the vaishnavite sects which are in several respects much more liberal in the treatment of women and birth Sudras than other sects though many Vaishnative sects might have become very degenerate in other respects. I am further unable to see that my conclusion as to Jagannatha's opinion and the weight of the authority of the texts quoted by him being in my favour is wrong. A general rule has been laid down by their Lordships of the Privy Council that where a person is incompetent to perform the rites of a religious office, it would defeat the very purpose for which the worship was established, if he (including of course "she") is allowed to inherit the office. Any usage inconsistent with such purpose is clearly invalid in law. See *Palaniappa Chetty* v. *Deivasikamony Pandara Sannadhi* (16).

I am unable to appreciate any distinction in principle between the incompetency of the claimant to the office by reason of sex and the incompetency due to any other cause. I do not think that the pronouncement of their Lordships of the Privy Council can be got round through any such distinction.

Though "law" is not always logical and though the narrow point referred to us relates to inheritance by a person incompetent by reason of sex alone for performing the duties of a religious office, I do not think that the considerations of the difficulties which are aggressively prominent when we take the four analogous cases (1) of a male heir being incompetent by reason of conversion to another faith when the inheritance opens (2) of his becoming incompetent after the inheritance opens, (3) of a female heir being incompetent by reason of conversion before the inheritance opens and (4) becoming incompetent after the inheritance opens can be kept out of mind in deciding the present reference especially having regard to the provisions of Act 21 of 1850. Coming to the weight to be given to practice and usage many pernicious and unshastraic usages have crept into the Hindu religious and social systems during dark medieval days and through efflux of time. Most of them entered

(16) A. I. R. 1917 P. C. 33=40 Mad. 709=44 I. A. 147=39 I. C. 722(P. C.).

gradually and insidiously through the tendency of that subtle materialism which sometimes parades as strict orthodox spirituality. The letter is exalted over the spirit the so-called hereditary rights are given more importance than the performance of the religious duties instead of the rights being kept as a very subordinate adjunct and appurtenance of the duties and religious offices, and caste status are looked upon more as intended for the means of livelihood and for the enjoyment of worldly power and material possessions than as things bestowed upon one for helping all humanity in its evolutionary progress towards the common goal.

I respectfully agree with my Lord that the law as at present settled by the decisions of the Privy Council in that unless the usages in connexion with religious institutions and offices are manifestly immoral or opposed to public policy or opposed to the intentions of the founders of a religious trust or manifestly injurious to the trust the Courts are not entitled to go back for the law to the purer, more liberal and more ancient shastraic fountain heads. The question therefore, narrows itself to this : Whether the usage relied on by the respondents is manifestly injurious (both in its material and moral aspects) to the religious institution, and whether it could have been in conformity with the intention of the founder of the trust. It is on this question that I feel that there is real and substantial difference of opinion between myself and the learned Judges who have considered this question in this Court since 1910. My angle of vision in respect of these questions might have been affected by my long-standing interest and sensitiveness in the cause of Hindu religious and social reform on shastraic lines. I find however that after making sincere attempts to allow as much discount as possible to the above factor, my view of the seriousness of the evils of usage in question has not been materially affected. While the incumbent of a religious office must be allowed to employ a temporary deputy when a temporary disqualification or inability occurs, such as birth and death pollutions absence from home owing to urgent private affairs, etc., I am clear in my mind that a usage permitting a permanently disqualified claimant to receive emoluments of a religious office and to appoint his or her own deputy to do the duties is of such a seriously mischievous character that it ought not to be recognized. I regret I am unable to agree with Seshagiri Aiyar, J., that the performance of the duties through the deputy of a female disqualified heir is not less beneficial to the religious institution than the performance of the next qualified male heir. It is notorions that the deputy is usually chosen on the principle of a Dutch auction. The man who agrees to allow the widow to retain the largest portion of the emoluments of the office and to receive the least as his own remuneration is given the place of deputy. Thus when the usually small remuneration in rice and cash attached to the Archaka office does not go to the deputy who does the duties, the deputy cannot be expected to perform the duties at all satisfactorily. I do not see why a religious office should be considered less important than any other kind of office. To allow even the office of a peon to be held by a permanently disqualified man because he undertakes to appoint a deputy out of the remuneration of the office is, in my opinion, entirely mischievous and it ought not to be allowed even if it is sanctioned by usage.

In the result, my answer to the question referred to is that so long as a Hindu widow is held incompetent by reason of her sex from doing the duty of a priestly office, she is also incompetent to inherit the service and emoluments of the office.

Spencer, J.—Without laying down any rule as to particular institutions in which there may be a special custom that females cannot succeed to the office and emoluments the trend of decisions in this Court has certainly been to treat females as competent to succeed to the Archakasship of Hindu temples in this Presidency: see *Subraya Kakramaya* v. *Subraya Padayya* (17), *Tangirala Chiranjivie* v. *Raja Manikya Rao* (6), *Ramasundaram Pillai* v. *Savundaratha Ammal* (2), *Rajeswari Ammal* v. *Subramania Archakar* (3) and Second Appeal No, 2078 of 1915. The judgment of Sadasiva Aiyar, J., in *Sundarambal Ammal* v. *Yogavanagurukkal* (1) was an exception to the course of decided cases and was not adopted by Tyabji, J., who sat with him. I do not think it contains reasons of such weight as to justify a departure from the principle of stare decisis. I would

(17) [1910] 7 I. C. 715.

answer the question referred to us in the negative.

S.N./R.K. *Answered in the negative.*

** A. I. R. 1919 Madras 607

AYLING AND COUTTS TROTTER, JJ.

Seena Vana Ramiah Aiyar and *another*—Defendants—Appellants.

v.

(S. R. M. A. G.) Gopala Aiyar and *others*—Plaintiffs—Respondents.

Second Appeal No. 856 of 1917, Decided on 16th April 1918, against decree of Dist. Judge Tinnevelly, in A. S. No. 418 of 1916.

** **Civil P. C. (1908), O. 38, Rr. 1 and 2—Defendant arrested before judgment—Deposit of money under R. 2—Deposit is earmarked for suit and is subject to plaintiff's lien in case he succeeds—Insolvency of defendant will not convert deposit into property of creditors—Plaintiff can appropriate that amount to exclusion of Receiver—Security for appearance is not to the credit of suit—Insolvency.**

Money paid into Court by a defendant arrested before judgment under the provisions of O. 38, R. 2, sufficient to answer the plaintiff's claim is earmarked for the suit and is subject to the lien of the plaintiff in the event of his success. [P 609 C 2]

Therefore, the insolvency of the defendant before a decree is passed in the suit will not convert the deposit into the property of his creditors generally or give them any special charge upon it, and the plaintiff is entitled to appropriate the amount towards his decree to the exclusion of the Official Receiver and the creditors of the defendant. [P 608 C 2]

There are two courses open under O. 38, R. 2, One is that the defendant may give security for his appearance. Such security will be merely conditional for his appearance in Court and cannot be said to be to the credit of the suit. It is a specific security. The alternative is that he may deposit money or other property sufficient to meet the claim. That is not security for his appearance and the payment is ear-marked for the suit. [P 609 C 2]

K. R. Guruswamy Aiyar and *A. Subbarama Aiyar*—for Appellants.

A. Ramachandra Aiyar for *S. Viswanatha Aiyar* and *K. S. Ramabadhra Aiyar*—for Respondents.

Judgment.—Defendants 4 and 5 in this case, who are the appellants, brought a suit, Original Suit No. 305 of 1913 in the District Munsif's Court of Ambasamudram against defendant 2. Defendant 2 was brought under the machinery of O. 38, Civil P. C., because an application was taken against him for his arrest before judgment on the ground that he was absconding from the local limits of the Court, and thereupon in accordance with the procedure set out in O. 38, Rr. 1 and 2, he was brought before the Court to show cause why he should not furnish security for his appearance; and he proceeded under R. 2 to deposit a sum of money—in this case Rs. 1,200—which was adjudged sufficient to meet the plaintiffs' claim, that is to say, the claim of defendants 4 and 5 in this suit. The dates are important. The arrest was on 15th July 1913 and the payment into Court was on 21st July following. Defendants 4 and 5 obtained a decree for the full amount claimed on 18th August 1914, and meanwhile on 29th June 1914, defendant 2 had filed his petition in insolvency. He was not adjudicated on that petition until 17th February 1915, but by relation back, his insolvency will date from the petition on which he was adjudicated and accordingly the insolvency will date back to June 1914.

The question in this case is whether the money paid into Court in accordance with the provisions of O. 38, R. 2, belongs to defendants 4 and 5 as the successful plaintiffs in the suit. If it does not belong to them, rival claims may arise as between the Official Assignee as Receiver of the estate of defendant 2 and the plaintiffs in this suit, who are prior decree-holders. But, if the true position be that the money in Court belongs to defendants 4 and 5, the question of priority as between other parties to the suit will not arise. There is a good deal of authority on the question, though not any direct decision, as to whether this precise section is to be interpreted as giving a lien to the plaintiff in a suit in the circumstance of money being deposited to secure the defendant from arrest. There are decisions of this and other High Courts in regard to the corresponding sections of the Indian Code and also decisions of the English Courts relating to kindred situations. It is clear that attachment before judgment of property under O. 38, R. 5, does not pass any title to the person at whose instance it is attached: but its effect merely is to prevent alienations on the part of the person whose property is attached. It restricts the hands of the owner of the property, but does not make him cease to be the owner nor does it confer any specific lien on the person who seeks the attachment. This has been

laid down in numerous cases both in England and in this country, and Lord Hobhouse observed in *Moti Lal* v. *Karabuldin* (1) that even attachment in furtherance of execution gives no title. This has been reaffirmed by this Court on a specific reference to O. 38, R. 5, which relates to attachment of property before judgment in order to prevent the disposal of the property by the defendant, in *Errikulappa Chetty* v. *Official Assignee, Madras* (2), a decision of the Chief Justice and Seshagiri Aiyar, J. The learned Judges point out that what one may call a condition of the application on which the money was secured to safeguard the plaintiff's interest is the abstaining of the defendant from making away with his property and so long as the property is not taken out of the jurisdiction of the Court or alienated and the defendant is ready to produce his property to the Court, then the condition is not broken and as soon as ever the property was produced to the Court by the defendant on decree being obtained by the plaintiff, the object for which the money was deposited was gone and it could only be claimed by the person who deposited it.

That is tantamount to saying that in contemplation of law it has been his property the whole time, only subject to certain control and retention by the Court. Similar principles have been applied to money deposited in Court under a garnishee order, *Jitmand Ramanand* v. *Ramchand Nandram* (3). That is one class of cases, but you get a totally different class of cases where money is not deposited in Court in order to secure something being done by the person who deposited it, such as abstaining from going away or removing his property from the jurisdiction of the Court, but where money is paid to the credit of the suit or earmarked for the suit. The Courts have always held that, when that is done, the money belongs to the plaintiff in the event of his success and that it cannot pass to the general creditors of the person who pays it in or to any person who claims under him. That distinction has been very clearly laid down by the English Courts in the case of *Pollard, In re*; *Pollard, Ex parte* (4). In that case some moneys in a bank belonging to an alleged defaulting executor and trustee were sequestrated by letters of sequestration taken out in the Chancery Division which, for ordinary practical purposes, may be described as a proceeding in the nature of attachment. The defaulting trustee was adjudicated a bankrupt and it was held that the sequestrated fund in the hands of the bank did not pass to the plaintiff in an action by the cestui que trustent who it was said, had been defrauded, but passed to the Official Receiver as part of the estate of the bankrupt. And Romer, L. J., in his judgment at p. 48, explains why it was so and points out very clearly the distinction between the two classes of cases. He says:

"he (i. e., the plaintiff) might have obtained a special charge by obtaining some special order having that effect. I think therefore that the only question is whether the payment of the money into Court, under the circumstances of the present case, did give the appellants, who are no doubt in the position of creditors of the bankrupt a special right to or charge upon the money so paid in. In my opinion for the reasons which I will shortly state, the order for payment into Court did not convert the money into the property of the creditors or give them any special charge upon it. The order was to pay the money not to the general credit of the action, but to the special account of the sequestrators. That left the money as part of the debtor's property received by the sequestrators as sequestrators. Had the order gone on to say that, after payment of the cost of the sequestraters. the balance should be paid over to the general credit of the action, the result would have been different; but that was not done."

Similarly in *Bird* v. *Barstow* (5), a woman got leave to defend an action under O. 14 (summary judgment) on terms that she brought into Court £500. She paid the £500 and lost the case. Then she tried to raise a point that she being a married woman, an inquiry would have to be held to see whether it was money belonging to her separate estate which, in the ordinary course of events, would be the only fund against which the execution could proceed. The Court of appeal, consisting of Lord Esher, M. R., Fry, L. J., and Lopes, L. J., refused to go into that inquiry on the short ground put by Lord Esher that

"the meaning of such an order, in my opinion, is to give security to the plaintiff that, if he succeeds in the action, he shall obtain the fruits of success."

(1) [1898] 25 Cal. 179=24 I. A. 170 (P. C.)
(2) [1916] 39 Mad. 903=32 I. C. 190.
(3) [1905] 29 Bom. 405.
(4) [1903] 2 K. B. 41=72 L. J. K. B. 509.
(5) [1892] 1 Q. B. 94=61 L. J. Q. B. 1.

And in other cases too, it has universally been held in England that where as a condition of granting leave to defend the suit, money is paid into Court, that money is the property, subject to proving his claim, of the plaintiff and that it cannot be attached by the creditors or assignee in bankruptcy of the person who paid it in. And that has been followed in this country in the Madras Courts in two different sets of cases. In one case it has been decided that where money has been deposited under O. 41, R. 5, as a condition of leave to appeal, it is earmarked to the appeal. In that case, which is reported as *Subramania Chettiar* v. *Rajeswara Sethupathi* (6), immovable property, not money had been given as security by the judgment-debtor as a condition of his appeal and it was held that the successful decree-holder could realize the decree without bringing a separate suit for the purpose of realizing the security, and of course the necessary implication is that the property was earmarked to the successful litigant and could be taken possession of by him without further proceedings of any kind. The learned Judges say at p. 874: [of 1917 *M. W. N.*

"The effect of immovable property being given as security is something more than attachment, because it makes the property applicable solely in discharge of the judgment debt and not liable to rateable distribution among other judgment-creditors."

Similarly a Bench of this Court in *Gopalaiyar* v. *Thiruvengadam Pillai* (7) held following the English cases, that where money was brought into Court by the defendant as a condition of being allowed to defend under O. 37, Civil P. C. (summary proceeding in this country on negotiable instruments) the amount paid into Court must be regarded as earmarked to the action of the plaintiff and in the event of success, the judgment amount must be regarded as being charged upon it. These are principles which seem to us to be clear and the question is on which side of the line it is that cases coming under O. 38, R. 2, fall. O 38, R. 1, no doubt says that a defendant when arrested is to be brought before the Court to show cause why he should not furnish security for his appearance and the argument, as we understand it, is that, that being the nature of the inquiry, the section which tells us what the Court can do must have regard solely to the matter of furnishing security for his appearance. If that were so, the action would fall within the principle of the decisions under O. 38, R. 5, that the mere furnishing of security or payment of money into Court as security for the appearance of the defendant does not create a lien or earmark it for the purpose of the action. But what happens when the defendant does appear under a warrant is this, that the Court may make alternative orders:

"The Court shall order him either to deposit in Court money or other property sufficient to answer the claim against him, or to furnish security for his appearanee at any time when called upon while the suit is pending."

It seems to us that there are two alternative courses open. One is the defendant may give security for his appearance. Such security will be merely conditional for his appearance in Court and could not be said to be to the credit of the suit or earmarked to the general purposes of the suit. It is a specific security. The alternative is that he may deposit money or other property sufficient to answer the claim. We think that is not security for his appearance, but is an alternative by which liberty is given to him to pay into Court sufficient money to meet the suit, and we think that that payment would be earmarked to the suit and would be subject to the lien of the plaintiff in the event of his success. As was pointed out during the argument, the words are "to deposit into Court money . . . . or to furnish security . . .", not "to furnish other security" which one would expect if the deposit mentioned in the first part of the rule is merely an alternative way of furnishing the security mentioned in the second part. We think that the first alternative described by the rule is undoubtedly the one pursued in this case, that is the money was paid into Court to the general credit of the action and as such charged with the lien on the plaintiff obtaining a decree in his favour, and we think that neither the assignee of the bankrupt's estate nor the general body of creditors nor any specific creditor has a claim which can prevail over the title of the plaintiff. The result is the appeal is allowed and the suit dismissed with costs throughout. The Official Receiver (out

(6) [1918] 41 Mad. 327=43 I. C. 157.
(7) [1917] 38 I. C. 481.

of the estate) and the plaintiffs will pay the costs.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 610

SADASIVA AIYAR AND NAPIER, JJ.

Arunachalam Pillai—Petitioner.

v.

Ponnuswami Pillai—Opposite Party.

Criminal Misc. Petn. Nos. 83 and 399 of 1918, Decided on 20th August 1918.

(a) Criminal P. C. (1898), Ss. 144 and 195—Disobedience of order under S. 144—Sanction for prosecution granted by District Magistrate in appeal — Order of District Magistrate is judicial and appealable to Sessions Judge.

An order passed by a Magistrate under S. 144, Criminal P. C., is a judical order and the authority issuing the order cannot be separated from the authority granting sanction for prosecution for disobedience of it.

Where therefore a Magistrate grants sanction for prosecution for disobedience of an order issued by him under S. 144 he acts as a "Court" within the meaning of S. 195, sub-S. 7 of the Code.

The summonses and orders referred to in the group of offences mentioned in Cl. (a), sub-S. 1, S. 195, when issued by a Magistrate or Judge, are issued judicially; and where sanction is given to prosecute for disobedience of such summonses or orders, such sanction is issued by the same authority, namely, by the Court : 2 *Weir* 155, *Expl.*

The word "Court" in sub S. 7, S. 195, is not confined to Cls. (b) and (c) of sub S. 1 of the section. Sub-S. 7 is enacted for the purpose of explaining what is subordination within the meaning of sub-S. 6, where the authority giving or refusing is a Court, and does not purport to confine its operation to Cls. (b) and (c), sub-S. 1.

Where therefore sanction is given with reference to an offence against a Court, the appeal is governed by sub-S. 7.

A Sub-Magistrate having refused to accord sanction for prosecution of the petitioner for disobedience of his order passed under S. 144, Criminal P. C., the opposite party appealed to the District Magistrate, who granted the sanction applied for. Against this latter order the petitioner appealed to the Sessions Judge, who refused to interfere with the District Magistrate's order on the ground that it was passed administratively :

Held : that the order of the District Magistrate was a judicial order, against which an appeal lay to the Sessions Judge. [P 611 C 1, 2]

(b) Criminal P. C. (1898), S. 439—Administrative orders

The High Court has no appellate or revisional authority over administrative orders of a District Magistrate. [P 610 C 2 ; P 611 C 1]

(c) Criminal P. C., S 195 (6)—Public servant is not as such subordinate to High Court.

A public servant *qua* public servant is not subordinate to the authority of the High Court as required by S. 195 (6), Criminal P. C. [P 611 C 1]

C. Rajagopala Aiyangar — for Petitioner.

R. V. Seshagiri Row—for Opposite Party.

Napier, J.—These are two petitions, one to revise an order of the District Magistrate of Trichinopoly of 12th January 1918, the other to revise the order of the Sessions Judge of Trichinopoly of 1st March 1918. The order of the District Magistrate was made on appeal from an order of the Stationary Sub-Magistrate of Trichinopoly refusing to sanction the prosecution of the present petitioner and another for an offence under S. 188, I. P. C. The petitions were the result of an order of the Stationary Sub-Magistrate passed on 8th May 1917 under S. 144, Criminal P. C., restraining this petitioner and others from taking the pidari deity in procession through a lane claimed to be the private property of the present counter-petitioners. This order was alleged to have been violated and hence the petition for sanction. The Stationary Sub-Magistrate declined to grant the sanction on two grounds : one, that the order should not have been passed and that therefore disobedience cannot be considered to be an offence ; the other, that the petition for sanction was the outcome of previously existing spite. The present counter-petitioner appealed to the District Magistrate of Trichinopoly, who decided that the order having been passed rightly or wrongly, disobedience of it was an offence and granted the sanction. This is one of the orders appealed against. The petitioner appealed from that decision to the Sessions Judge, who passed the following order :

"The order appears to have been made by the District Magistrate as an administrative officer, and I think therefore that no appeal lies to this Court. Petition is dismissed."

This is the other order appealed against. The petitioner before us first argued that the order of the District Magistrate granting sanction against him was passed by him as a public servant, that no appeal lay to the Sessions Judge and that, therefore he was entitled to come to the High Court. On this petition it is, in our opinion, enough to say that if the order was passed by the District Magistrate administratively, the High Court

has no appellate or revisional power. We asked the learned vakil to invite our attention to any provision either in the Government of India Act or the Letters Patent or in the Criminal Procedure Code which makes a public servant *qua* snch servant and not *qua* Court subordinate to the authority of the High Court as required by S. 195, sub-S. 6, and he was unable to show us any. We therefore dismiss this petition.

On the second petition by way of what is, for convenience, called an appeal from the order of the Sessions Judge, the petitioner took up the opposite position, namely : that the order was one of a Court and that therefore the Sessions Judge was in error in declining to exercise his jurisdiction. We have therefore to decide whether the (appeal) provisions in S. 195, sub-S. (7), Criminal P. C., apply to this order. We are clear that the Stationary Sub-Magistrate, in passing this order refusing sanctioa, was acting judicially, for the original order which, it was alleged, was disobeyed was an order passed under S. 144, Criminal P. C. These orders have always been treated as judicial orders and we cannot separate the authority issuing the order from the authority granting sanction for disobedience of it.

But the more difficult question is whether, on the language of S. 195, Criminal P. C., even though the order was passed by a Court, the "appeal" lies to another Court. S. 195, sub-S. (1), deals with three clasees of offences. The first group are Ss. 172 to 188, I. P. C., which are classed in Ch. 10 of the Code under the heading "of contempts of the lawful authority of public servants;" the second group refers to S. 193 and others, which are classed in the Code under the heading "of false evidence and offences against public justice"; and the third group contains the sections in Ch. 18 of the Code and classed "of offences relating to documents andto trade and property marks." With regard to the first group S. 195, Criminal P. C., provides that no Court shall take cognizance of any such offence except with the previous sanction, or on the complaint, of the public servant or of some public servant to whom he is subordinate. With regard to the second group, the provision is that no Court shall take cognizance of any such offence when such offence is committed in or in relation to any proceeding in any Court except with the previous sanction, or on the complaint or such Court, etc. With reference to the third group it is provided that no Court shall take cognizance of any such offence when such offence has been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding except with the previous sanction, or on the complaint, of such Court, etc. With reference to the second and third groups, the section provides that the term "Court" means civil, Revenue or criminal Court, but not a Registrar. The appeal in all cases is provided for by sub-S. 6:

"Any sanction given or refused may be revoked or granted by any authority to which the authority giving or refusing it is subordinate."

Then sub-S. 7 provides:

"For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie."

The question is whether the word "Court" in sub-S. 7 refers to Court mentioned in sub-S. (1), Cls. (b) and (c), only, or whether it applies also to order made by a public servant as a Court under sub-S. (1), Cl. (a). The Sessions Judge took the former view, following the decision of this Court reported as *Sankaram Aiyar* v. *Sakkarappa Mudaliar* (1). That decision is however no authority for his view, as the High Court held that the order was not one of a Court. It is of course, clear that the offences grouped in Cl. (a) include disobedience of orders of Courts, such as contempts of summonses issued by Courts (S. 172, I. P. C.,) refusal to produce documents before Courts (S. 175), refusal to take an oath or affirmation before a Court (S. 178), giving false information to Court (S. 181), obstructing sale of property offered for sale by the lawful authority of the Court (S. 184), and disobeying a direction to abstain from a certain act promulgated by a Court under S. 188, which is the present case. There can be no doubt that the various summonses and orders referred to in those sections when issued by a Magistrate or a Judge are issued judicially, and, as pointed out above, it surely must follow from that that the sanction to prosecute for disobedience of such summons or

(1) 2 Weir 155.

order must be issued by the same authority, namely, the Court.

But this still leaves the other question open, namely, whether sub-S 7 applies to such sanction. I am of opinion that the word "Court" in sub-S. 7 is not confined to Cls. (b) and (c). The legislature must have been aware that offences against the authority of the Courts were covered by Ch. 10, I. P. C., and there is of course, no reason why any difference should be made with regard to appeals between offences against the lawful authority of Courts and offences against public justice in relation to proceedings in Courts. The word "public servant" was obviously used in Cl. (a) because it is used in the Penal Code throughout the provisions in Ch. 10 and "public servant" is defined in S. 21 of the Code as including Judges and Magistrates. Sub-S. 7 is, I think, enacted for the purpose of explaining what is subordination within the meaning of sub-S. 6, where the authority giving or refusing sanction is a Court, and does not purport to confine its operation to Cls. (b) and (c), sub-S. (1), nor do I think that the legislature had that intention. It seems to me that the word "Court" was used in Cls. (b) and (c) because it was intended to limit the operation of those clauses to proceedings in relation to Courts, thereby constituting a narrower class than is dealt with in Cl. (a), and I see no reason why, because a narrower class of cases confined to Courts only is provided for in those two clauses, the word "Court" in sub S. 7 should be confined to those two groups and not read as applicable to the wider group in Cl. (a), which applies to both Courts and other public servants, both of whom are clearly covered by the word "authority" in sub S. 6. In the result I hold that where the sanction is given with reference to an offence against a Court, the appeal is governed by sub-S. 7. The order of the Sessions Judge is set aside and he is directed to take the petition on his file and dispose of it according to law.

Sadasiva Aiyar, J.—I agree entirely. It is not essential for the decision of this case to express an opinion on the question whether the particular order of the Sub-Magistrate mentioned in Criminal Revision Case No. 136 of 1903 reported as *Sankaram Aiyar* v. *Sakkarappa Mudaliar* (1) was rightly held by this Court on the facts of that case to have been passed by that public servant, not as a criminal Court but as a public servant who was not a Court It is however necessary to guard myself from subscribing to the opinion suggested by a sentence in that decision, that opinion being that a Sub-Magistrate would act as a Court only when he grants sanction for offences mentioned in S. 195, Cls. (b) and (c), that he could never act as a Court when he grants sanction for any of the offences mentioned in Cl. (a) and that therefore sub-S. (7) could never apply to a sanction given by a Sub-Magistrate for such an offence.

S.N./R.K. *Order of Sessions Judge set aside.*

A. I. R. 1919 Madras 612

SPENCER AND KRISHNAN, JJ.

Subba Rao and *others*—Defendants—Appellants.

v.

P. Swamia Pillai and *others*—Plaintiffs—Respondents.

Second Appeal No. 137 of 1916, Decided on 17th September 1917, against decree of Dist. Judge, Trichinopoly, in A. S. No. 47 of 1915.

Hindu Law — Debts — Father — Decree against—It can be executed in absence of proof of immorality or illegality of debt against whole estate—General immorality is not sufficient

An execution creditor is entitled to sell the whole of the estate of a joint Hindu family consisting of a father and his sons and governed by the Mitakshara law in execution of a decree obtained against the father alone, unless it is shown that the debt for which the decree was obtained was incurred for illegal or immoral purposes. [P 614 C 1]

Where joint family property including the shares of two undivided sons was attached and sold in execution of a decree obtained against the father on a pro-note executed by him, and the sons preferred a claim for the release of their shares which was dismissed and subsequently brought a suit for a declaration that their share of the property could not be attached and sold in execution of the decree:

Held: that in the absence of proof that the debt in respect of which the decree was obtained was (i) incurred for illegal or immoral purposes or (ii) borrowed by the father solely to enable him to sell the whole property including the sons' shares, the decree-holder was entitled in execution to proceed against the whole of the property including the shares of the sons. [P 614 C 1, 2]

Per *Krishnan, J.*—It is only when it is doubtful what was attached and sold in Court-auction, as for example, when the property attached and sold was "the right, title and interest of the judgmenet-debtor" that the intention of the attaching creditor becomes important. [P 613 C 2]

If the father's debt in execution of which the shares of the sons are also attached was contracted merely for the purpose of enabling the father to sell the whole property including his sons' shares and if the father suffered a decree to be passed in furtherance of that purpose, the decree-holder cannot be permitted to sell the shares of the sons. [P 614 C 1]

Evidence to show that the father led an immoral life will not be sufficient to exclude the father's right to sell the joint property. There must be evidence to show that the particular debt in question was contracted for an immoral purpose. [P 614 C 2]

T. R. Venkatarama Sastriar—for Appellants.

P. S. Vaidyanatha Aiyar—for Respondents.

Spencer, J.—I am unable to follow the District Judge when he proceeds upon the assumption that defendant 1, in executing his small cause decree, attached only the father's interest in the property. If this were so, the plaintiffs had no cause of action to put in a claim petition for the release of their three-fourths share, and when that failed, to institute the present suit to establish their title against the execution creditor. The District Judge failed to see that his assumption destroyed the very foundation of the plaintiff's claim and that their suit must consequently fail. There is no doubt however that both parties considered that the entire estate had been attached. In his written statement defendant 1 asserted the liability of the sons to pay the debts of their father, if not tainted with illegality, and immorality. No doubt he at first maintained that the property was the father's self-acquisition, but the fact that he also pleaded the sons' liability to pay their father's debts showed that he did not abandon his claim against the entire property, if it turned out to be ancestral. At the trial defendant 1 failed in his attempt to prove that the property was the self-acquisition of defendant 2; the plaintiffs also on their part failed to prove that the debt was incurred for an immoral purpose, as they had only general evidence of their father's immoral conduct. But this failure of the plaintiffs to establish their contention that the debt was an immoral one must be regarded as fatal to their whole suit. As observed by the Privy Council in *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (1)

(1) A. I. R. 1916 P. C. 220=44 Cal. 524=44 I. A. 1=39 I. C. 252 (P.C.).

"in every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone."

Defendant 1 obtained the decree in Small Cause No. 326 of 1912, upon two promissory notes executed in his favour by defendant 2 for what became due from him for the rent of certain lands that he took on lease from defendant 1. This fact is asserted in defendant 1's written statement in this suit: it appears also in defendant 2's written statement in the small cause suit (Ex. 1) and has not been controverted by the plaintiffs. Thus there was in existence in this case an antecedent debt, to discharge which the ancestral property of the family could be validly alienated by the father. We allow the second appeal and restore the decree of the District Munsif dismissing the suit. Respondents 1 to 3 will bear their own and appellants, costs in this and in the lower appellate Court.

Krishnan, J. — The plaintiffs-appellants are the sons of defendant 2 against whom defendant 1 had obtained a decree on two promissory notes executed by him. In execution of that decree defendant 1 had attached the plaint property describing it as defendant 2's own property. The sons filed a claim petition to have their share released, but it was dismissed. Thereupon they filed the present suit for a declaration that defendant 1 was not entitled to execute the decree against their share in the property and for an injunction. The question whether the property was self-acquired or ancestral has been settled, it being found that it is the ancestral property of the family. On this finding the District Judge decreed the plaintiffs' suit holding

"that defendant 1 showed no intention to proceed against it as ancestral property in which he held the sons' share also liable for their father's debt."

His judgment cannot be supported. It is only when it is doubtful what was attached and sold in Court auction as, for example, when the property attached and sold was described as "the right, title and interest of the judgment debtor" that the inteneion of the attaching decree-holder becomes important. Here the whole property has been attached including the shares of the plaintiffs, and that is the footing on which they themselves filed the claim petition and have now brought this suit. If plaintiffs' shares had not

been attached, there would be no cause of action for the claim petition or for this suit, both of which refer only to their shares. Before the plaintiffs' shares can be released from attachment, what has to be decided is whether those shares are not liable to be sold for the decree-debt. The description of the property attached as the debtor's own is immaterial in this connexion. It is settled law that an execution creditor is entitled to sell the whole of the estate of the joint Hindu family, consisting of a father and his sons and governed by the Mitakshara law, in execution of a decree obtained against the father alone, unless it is shown that the debt for which the decree was obtained was incurred for illegal or immoral purposes. It is sufficient to refer to the latest statement of this law by the Privy Council in the case of *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (1). Their Lordships say,

"The property in question was joint property governed by the Mitakshara law. By that law a judgment against the father of the family cannot be executed against the whole of the Mitakshara property if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone."

The recent ruling of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (2), to which our attention has been drawn, that the pious obligation of the son to pay his father's debt arises only after the death of the father, does not affect this question, as the father has power to sell joint property of his son and himself for an antecedent debt of his to pay off that debt, when the debt was not incurred for an illegal or immoral purpose and the Court can in execution of a decree for that debt exercise the same power and direct the sale of such joint property. No doubt if the father had borrowed the original promissory note debts merely for the purpose of enabling him to sell the whole property including his sons' shares and allowed the decree to be passed in furtherance of that purpose, the case may be one where there is only a colourable and not a "real dissociation in fact" between the debts and the final sale In such a case the power to sell will not arise, under the Privy Council ruling above quoted. But such a position does not arise on the facts here, as it is not alleged that defendant 2 had any such purpose.

It follows therefore that as in the present case the plaintiffs did not give any evidence to show that the debts in question were incurred by defendant 2 for any illegal or immoral purpose, their suit must fail. They complain before us that they had evidence to show that their father led an immoral life and that the Munsif shut out such evidence; but such evidence is quite insufficient, in the absence of evidence that the particular debt was incurred for an immoral purpose, to exclude the father's right to sell the joint property. See *Sri Narain* v. *Raghubans Rai* (3). The exclusion of evidence by the Munsif has therefore led to no prejudice to the plaintiffs and is therefore no ground for second appeal. It was also urged that they had evidence to prove that they lived separately from their father and had nothing to do with the promissory notes. That evidence was equally immaterial, as they did not allege any division from the father. I agree therefore that the decree of the District Judge must be reversed and that of the Munsif be restored with costs, here and in the Court below, of the appellants.

S N./R.K. *Appeal allowed.*

(2) A. I. R. 1917 P. C. 61=39 All. 437=44 I. A. 126=39 I. C 280(P. C.).

(3) [1912] 17 I. C. 729 (P. C.).

A. I. R. 1919 Madras 614

OLDFIELD AND PHILLIPS, JJ.

Puthiya Pandikasaliyal Abdulla Koya —Defendant—Appellant.

v.

Mavileri Eacharan Nair and *others*—Plaintiffs—Respondents.

Second Appeal No. 1927 of 1914, Decided on 19th December 1917, against decree of Tempy. Sub-Judge, Tellicherry, in A. S. No. 142 of 1913.

(a) Malabar Law —Tarwad—Management delegated to another can be resumed.

It is open to the Karnavan of a Malabar Tarwad, who has delegated his duties to another, to resume the management at any time. [P 615 C 1]

(b) Malabar Law.—Taward—Improvident leases by Karnavan—He can be moved.

If a Karnavan habitually grants improvident leases and thereby renders himself unable to fulfil his obligations towards the other members of the Taward, this would be a ground for removing him from Karnavastanam, but a particular lease cannot be declared to be invalid as against the lessee merely because it is not proved to be beneficial to the Tarwad. [P 615 C 1]

(c) Malabar Law.—Tarwad—Grant of Melcharth before expiry of kanom term does not bind successors.

The grant of a Melcharth by a Karnavan before the expiry of the previous Kanom does not render it ab initio void, but it will not bind the grantor's successors: 16 *I. C.* 391; *A.I.R.* 1915 *Mad.* 307 and *A.I.R.* 1915 *Mad.* 650, *Dist.* [P 615 C 2]

Govinda Marar—for Appellant.

C. Madhavan Nair—for Respondents.

Judgment.—In this case defendant 1, as karnavan of the tarwad granted a melcharth to defendant 4, whereby he empowered him to recover two items of property held under two leases, the terms of one of which had expired and the term of the other would expire in two years. This Melcharth has been held by the lower Courts to be invalid apparently on two grounds that (1) that defendant 2, was the de facto karnavan, and (2) that the lease was not beneficial to the Tarwad. As regards the first point it is not disputed that defendant 1, was actually karnavan and consequently although he may have allowed defendant 2, to discharge the duties of karnavan it was open to him to resume the management at any time. On the second point the learned vakil for the appellant argues that a karnavan has absolute powers as regards leases and leases granted by him cannot be questioned on the ground that they are not beneficial to the tarwad. The karnavan by the grant of a lease does not alienate tarwad property and although the income of the tarwad may be diminished by the grant of improvident leases that is mainly a matter which concerns the karnavan alone for it reduces income out of which he has to meet liabilities. No doubt if a karnavan habitually grants improvident leases and thereby renders himself unable to fulfil his obligations towards the other members of the tarwad this would be a ground for romoving him from karnavastanam, but we do not think that a particular lease can be declared to be invalid as against the lessee merely because it is not proved to be beneficial to the tarwad. To fetter a karnavan's discretion in this way would be to render his whole management of the property liable to criticism and reversal at any moment.

It is then argued for the respondent that the grant of this lease two years before the expiry of the term under which the land was held is ipso facto invalid and reliance is placed on *Cheria Chirikandan* v. *Krishnan Nambiyar* (1) and *Raman Nambiyar* v. *Raman Nambiyar* (2) and *Moidin Kutti* v. *Kunhi Koyan* (3). These cases are however only authority for holding that a melcharth granted by a karnavan before the expiry of the previous term will not bind his successor and not that such melcharths are necessarliy invalid ab initio. In this view we think that the decision of the lower Courts is wrong and in allowance of the second appeal we dismiss the plaintiff's suit with costs throughout. (This second appeal coming on for hearing on 19th December 1917 in pursuance of the order of this Court dated 21st November 1916, the Court delivered the following)

Judgment —The guardian of respondents 17 and 19 has now been made a party. Mr. Madhavan Nair on his behalf has nothing new to argue. We therefore for the reasons stated by us on 24th October 1916 allow the second appeal and dismiss the plaintiff's suit with costs throughout.

S.N./R.K. *Appeal allowed.*

(1) [1912] 16 I. C. 391.
(2) A.I.R. 1915 Mad. 307=25 I. C. 578.
(3) A.I.R. 1915 Mad. 650—27 I. C. 1007.

A. I. R. 1919 Madras 615

OLDFIELD AND SESHAGIRI AIYAR, JJ.

Athermankutti — Defendant — Appellant.

v.

Chandroth Moideenkutty—Plaintiff—Respondent.

Appeal No. 204 of 1918, Decided on 10th March 1919, against decree of Dist. Judge, of North Malabar in Appeal Suit No. 281 of 1916

Oaths Act (10 of 1873), Ss. 9, 10 and 12—Challenge to take oath—Oath not taken on appointed day on account of challenger's failure to pay charges—Oath taken on subsequent day—Challenger is not bound by oath.

The plaintiff challenged the defendant to take a particular oath on a specified day and the challenge was accepted including a term that, if plaintiff failed to pay the cost of taking the oath and the defendant did not take it, that should be treated as equivalent to his taking it. On the day fixed the plaintiff made default and defendant did not take the oath, but took it on a later day. The plaintiff objected and applied for a trial on the merits, but the trial Court made a decree in defendant's favour.

Held: that the plaintiff was not bound by the oath and that his default in his part of the agreement was not a foundation on which the law

could allow any decree to be founded, and that it was for the defendant to show that his deviation from his agreement was immaterial and that the date specified in it was not of its essence.

[P 616 C 1, 2]

B. Pocker—for Appellant.

C. Madhavan Nair—for Respondent.

Judgment.—The plaintiff respondent in this case challenged the defendant-appellant under S. 9, Oaths Act, to take a particular oath on a specified day and the challenge was accepted, including a term that, if owing to plaintiff's failure to pay the cost of taking the oath, defendant did not take it, that should be treated as equivalent to his taking it. On the day fixed, as plaintiff did not pay, defendant did not take the oath. He, however in spite of plaintiff's opposition and application for a trial on the merits took it on a later day; and the District Munsif passed a decree in his favour. The lower appellate Court in the order appealed against held that plaintiff's consent was only to be bound by the oath as originally agreed on, that he withdrew his consent on that agreement proving abortive and that he was entitled to a remand for a trial on the merits. It has been argued that this withdrawal was not open to plaintiff and did not, in fact, take place. But we deal with this part of the dispute on the shorter ground that the plaintiff's default in his part of the agreement was not a foundation on which the law could allow any decree to be founded. S. 11, Oaths Act, says that the evidence given in pursuance of the challenge shall be conclusive proof of the matter stated. S. 12 says that a refusal to make the oath shall be recorded; and it has been held, for instance, in *Moyan* v. *Pathukutti* (1) that such refusal is a relevant fact in a trial on the merits. But there is no provision, under which any legal effect follows on any other incident than the making of the oath or on any act or omission by the party, who gives the challenge.

In these circumstances the agreement before us, by which a legal result was to follow on the default of the challenger, plaintiff, was to that extent an attempt to introduce a method of decision which the law does not authorize and which can have no legal consequences. That part of the agreement, therefore must be treated as inoperative and all argument founded on it must be rejected. Defendant has then asked us to deal with the remainder of the agreement, which provides for the taking of the oath by him on a specified day and to hold that the oath he took on a later day is equally conclusive. Assuming that this part of the agreement is separable, we cannot construe it in the manner suggested. It is for defendant to show that his deviation from the terms of the agreement is immaterial and that the date specified in it is not of its essence. We see no reason for accepting and much for rejecting this view. It, moreover is unsupported, so far as we have been shown, by authority. In the circumstances this contention also fails. We must, therefore confirm the lower appellate Court's decision, with, however the observation that at the renewed hearing it will be open to the District Munsif to consider the evidence as to plaintiff's conduct and his responsibility for defendant's failure to take the oath on the date originally arranged and to give it what weight it may deserve. The appeal against order is dismissed. In the circumstances there will be no order as to costs.

S.N./R.K. *Appeal dismissed.*

(1) [1908] 31 Mad. 1.

A. I. R. 1919 Madras 616

WALLIS, C. J. AND SPENCER, J.

(*P. L. P. L.*) *Palaniappa Chettiar* and *others*—Defendants—Appellants.

v.

Pana Lal Seena Shanmugam Chettiar and *others*—Plaintiffs—Respondents.

Original Side Appeal No. 61 of 1915, Decided on 17th April 1918, from judgment of Kumaraswami Sastri, J., D/- 26th July 1915.

Negotiable Instruments Act (1881), Ss. 26, 27 and 28—"Agent" in Ss. 27 and 28 means agent of person capable of contracting within meaning of S. 26—Person drawing bill or making note as trustees of temple is not agent—He is personally liable.

The terms "agent" in Ss. 27 and 28 means the agent of a person capable of contracting within the meaning of S. 26, and when the agent is not liable the principal is. [P 617 C 2]

A person drawing a bill or making a note as trustee of a temple or charity is not acting on behalf of such a principal and cannot claim the benefit of the section and is therefore personally liable on the bill: 17 *M. L. J.* 615; 8 *I. C.* 843; 26 *I. C.* 356 and 38 *I. C.* 172, *Foll*; 28 *I C.* 93; 43 *I. C.* 760 and 30 *I. C.* 574, *Dist.* [P 618 C 1]

Per *Wallis, C. J.*—When the agent of a Chetty firm in executing a negotiable instrument prefixes the firm's vilasam, it indicates that he is acting only as an agent. But when a man signs as hukdar (trustee) prefixing the charity vilasam, there is, on the face of the document, no

clear indication that he contracts for anyone but himself. [P 618 C 2]

Per *Spencer, J.*—Where a trustee, executor or church warden signs a promissory note on behalf of an inanimate object, such as a trust, temple, etc., there is a very strong presumption that he intends to incur an individual responsibility because he does not represent any other person in law. [P 619 C 2]

T. Narasimha Aiyangar—for Appellants.

S. Srinivasa Aiyangar and *K. Bhashyam Aiyangar*—for Respondents.

Wallis, C. J.—This is an appeal from a decree of Kumaraswami Sastri, J., in a suit brought by plaintiff on a promissory note executed by defendant 1 describing himself as "P. R. P. L. S. Hukdar." The plaint sought to make the defendant 1 personally liable on the note. Defendant 1 pleaded that the suit was bad for non joinder of the other members of the family who, as he alleged, were also hukdars of the charity, that it was without consideration and that he was not personally liable. He died after the settlement of issues, and the plaintiff then brought on the record not only his legal representatives but also the other members of the family to meet the objection of non joinder, and additional issues were settled as to their liability.

The learned Judge found on issue 1 that the promissory note was not without consideration or intended to be inoperative, and we see no reason to differ from that finding. The subsequent correspondence clearly shows the note was not intended to be inoperative. As regards consideration, the note appears to have been given in consideration of the plaintiff's relinquishment of his claim to a certain village in favour of the family charity. The village was not one of those expressly dedicated to charity by the family. The plaintiff's father had claimed it, and the plaintiff himself had been enforcing his claim to it with some success in the years preceding the execution of the promissory note. The appeal of defendants 3 and 5 to 7 therefore fails and is dismissed with costs of the plaintiff. The learned Judge has given to plaintiff a decree against the charity properties in the hands of defendants 2 to 15, and the plaintiff in his memorandum of objections claimed that defendant 1 was personally liable on the suit note and that he was entitled to a decree against his sons and grandson. He asked in the plaint for a personal decree against defendant 1 and at the hearing of the appeal his vakil stated that, if this were granted him, he did not want a decree against the charity properties. Defendant 3 and the representatives of the deceased defendant 1 contended that the charity properties alone were liable, and that, if this were not so, the other members of the family who had been joined as defendants were equally liable with them. The family charity was constituted in 1887 pursuant to Ex. K, a letter addressed to the P. L. R. M. firm at Madras, in which it was stated that the family had set apart the three villages named and Rs. 50,000 for charity, and the P. L. R. M. firm were directed to credit Rs. 50,000 separately under the style of P. R. P. L. S. for the charity and carry on dealings separately for the choultry under that style. The letter went on to say that only P. L. Palaniappa, defendant 1, was to supervise the chatram and building and that the P. L. R. M. firm were to honour the hundis drawn by the said person for the said matters and debit the account and to correspond with him.

Defendant 1 was accordingly provided with a book of blank hundis like a cheque book, on one of which he executed the suit hundi on 31st July 1906,

"In consideration of his abandoning his claim to the Seersenthamangalam village in favour of the Chatram pay to Murayur P. L. S. S's. (the plaintiff's) order Rs. 17,000 with Nadappu interest from this date and debit it in P. R. P. L. S. account entering the payment."

The words "P.R.P.L.S. Hukdar" were printed at the place for signature which defendant 1 completed by signing his name Palaniappa Chetty. The instrument satisfies the definition of a bill of exchange in S. 5, and of a cheque in S. 6, Negotiable Instruments Act, and the first question is whether the learned Judge was right in holding that defendant 1, the drawer, was not personally liable. Under Ss. 26 and 27 the drawer binds himself by drawing the bill himself or by his agent, and under S. 28 an agent who signs a bill without indicating therein that he acts as an agent or that he does not intend to incur personal responsibility is liable personally. "Agent", however in these sections means the agent of a person capable of contracting within the meaning of S. 26; and

when the agent is not liable, the principal is. A person drawing a bill or making a note as trustee of a temple charity is not acting on behalf of such a principal and cannot claim the benefit of the section.

Accordingly such trustees have been held personally liable by Subramania Aiyar, J., in *Pasupatia Pillai* v. *Sundarappier* (1); by Krishnaswami Aiyar, J., in *Aiyathurai Aiyar* v. *Dharmasiva Iyer* (2); and in *Kasivasi Somasundara Thambiran* v. *Venkatanarayana Pillai* (3); to which I was a party with Seshagiri Aiyar, J., and in *Swaminatha Aiyar* v. *Srinivasa Aiyar* (4), where the personal liability of the temple trustee on the promissory note was not questioned. The decision of Sadasiva Aiyar, J., in *Sundaresa Gurukkal* v. *Sambasiva Aiyar* (5), which the learned Judge has followed, is opposed to these rulings and is not, in my opinion, supported by *Koneti Naicker* v. *Jatu Gopala Aiyar* (6) or by *Chapman* v. *Smethurst* (7), on which it was based, as in those cases the question was whether the agent or the principal was personally liable on the bill. *Sundaresa Gurukkal* v. *Sambasiva Aiyar* (5) was no doubt referred to with approval by Kumaraswami Sastri, J., sitting with Sadasiva Aiyar, J., in *Ammalu Ammal* v. *Namagiri Ammal* (8) where *In re Robinson's Settlement, Gant* v. *Hobbs* (9) and *Padma Krishna Chettiar* v. *Nagamani Ammal* (10) were referred to as supporting it. That case however, like the case from which it differed, was not a case of a negotiable instrument but of a covenant in a deed, as to which other considerations are applicable. Moreover the observations in *Ammalu Ammal* v. *Namagiri Ammal* (8) were obiter the only question there being the right of recourse against the deceased's estate on a promissory note executed by his executrix as to which the executrix's personal liability was not questioned. We have also been referred to *Padma Krishna Chettiar* v. *Nagamani Ammal* (10). That was a case in which the estate of a minor was held liable on a promissory note executed by his mother who was also his guardian but did not describe herself as such. The correctness of the decision in so far as it holds the minor's estate directly liable has been questioned by Sadasiva Aiyar, J., in *Ammalu Ammal* v. *Namagiri Ammal* (8). It does not as I understand it decide that the mother was not personally liable. The view I have taken is entirely in accordance with the English decisions. In Byles on Bills, Edn. 16, p. 86, the learned author says:

"If persons who fill official situations as churchwardens overseers surveyors, commissioners managers of joint stock banks, agents and secretaries to companies give bills or notes on which they describe themselves in their official capacity they are nevertheless personally liable" citing *Rew* v. *Pette* (11) the case of churchwardens, and other cases. Here defendant 1 described himself as "P. R. P. L. S. hukdar." P. R. P. L. was the vilasam of the whole family. "S" admittedly signifies Chuthram so that he described himself as Hukdar of the P. R. P. L. Chathram, a description which would not affect his personal liability on the note. A further contention has however been raised that the use of the vilasam P. R. P. L. S. sufficiently indicated that he was acting as an agent within the meaning of S. 28 for the whole family who are hereditary hukdars including himself. This would merely render the other members of the family liable as well as himself. I do not however think that any clear indication can be gathered from this signature of an intention to make anyone liable but himself. When the agent of a Chetty firm in executing a negotiable instrument prefixes that firm's vilasam, this is a well-understood indication that he is acting only as an agent and has been so recognized by the Court. But when a man signs as hukdar prefixing the charity vilasam it appears to me that on the face of the document there is no clear indication that he contracts for anyone but himself. If it were otherwise it would be necessary to find whether the other Hukdars had authorised him to draw hundis on their behalf. There is not even on the facts of the case any reason to find that he intended to draw the hundi on behalf of anyone else.

(1) [1907] 17 M. L. J. 615.
(2) [1910] 35 Mad. 588=8 I. C. 843.
(3) [1915] 26 I. C. 356.
(4) [1917] 38 I. C. 172.
(5) [1915] 28 I. C. 93.
(6) [1913] 38 Mad. 482=21 I. C. 417.
(7) [1909] 1 K. B. 927=78 L. J. K. B. 654.
(8) [1918] 43 I. C. 760.
(9) [1912] 1 Ch. 717=81 L. J. Ch. 393.
(10) [1915] 39 Mad. 915=30 I. C. 574.
(11) [1834] 1 Ad. & E. 196.

He was supervising the chathram and in charge of its funds and it was prima facie for him to arrange for payment of the money which the chathram had to pay to secure its title to the village. The plaintiff does not desire to have recourse to the trust property and there is no need to consider whether it would properly be made liable in the present suit. The memorandum must be allowed and the decree varied by releasing the charity properties and making defendants 3 to 10 liable to the extent of the joint family properties in their hands with costs of the plaintiff, respondent 1. Time for tender and execution of sale deed is extended by three months from this date.

Spencer, J.— I entirely agree. I have no doubt that defendant 1 made himself personally liable under the hundi (Ex. A) and that the decree must be amended by releasing the charity properties and making the joint family assets in the hands of defendants 3 to 10 liable. To the authorities, *Pasupatia Pillai* v. *Sundarappier* (1), *Aiyathurai Aiyar* v. *Dharmasiva Iyer* (2) and *Koneti Naicker* v. *Jatu Gopala Aiyar* (6), I would add that of *Sri Yinugantti China Venkatarayanim* v. *Katagiri Venkata Narasimharayanim* (12). I do not think that *Sundaresa Gurukal* v. *Sambasiva Aiyar* (5) was correctly decided. The learned Judge who decided it in quoting *Koneti Naicker* v. *Jatu Gopala Aiyar* (6) may have been misled by the clerical error consisting in the accidental omission of the "not" between the words "intention" and "to incur personal responsibility" in the judgment of Oldfield, J., as reported both in the Law Journal and in the authorized reports.

I am prepared to follow *Padma Krishna Chettiar* v. *Nagamani Ammal* (10), which does not appear to me to be inconsistent with *Sanka Krishnamurthi* v. *Bank of Burma* (13), as it decided upon principles of Hindu law that a mother could make her minor son's estate liable for a debt incurred for purposes binding upon him but that there could be no personal decree against the defendant (who in that case was the minor). I think that cases of guardians and managers of joint Hindu families signing promissory notes on behalf of minors should be distinguished from cases of agents trustees and executors who sign on behalf of principals, trusts or estates of deceased persons. The observations of the Judicial Committee in *Konwar Doorganath Roy* v. *Ram Chunder Sen* (14), to the effect that the manager of a debutter estate had an analogous right to that of the manager of an infant heir was not made with reference to a negotiable instrument.

The signature of the guardian of a minor or of the manager of an infant's estate to a contract is a substitute for the signature of the ward or infant, who is incapable of contracting, and it has the effect of making the minor's estate liable when the contract is made for necessary purposes, but the minor cannot be made personally liable thereby. See *Sanka Krishnamurthi* v. *Bank of Burma* (13). I do not understand *Padma Krishna Chettiar* v. *Nagamani Ammal* (10) as going beyond this. The case of agents' signing negotiable instruments is especially provided for in S. 28, Negotiable Instruments Act. Cases of trustees executors churchwardens etc., who sign promissory notes on behalf of inanimate objects such as trusts, temples estates of deceased persons and parish vestries, etc., fall into a different class. In such cases there is a very strong presumption that the trustee executor or churchwarden intended to incur an individual responsibility because he does not represent any other person in law. An incorporated company is however both in England and in India a distinct persona and therefore the case of a director of a company signing a promissory note in the name of the company is on a different footing again. So we find S. 72, Companies Act, raising a presumption that a person acting under the authority of a company and signing a promissory note in the name of the company means to make the company liable. In the present case not only is there no indication in the hundi that Palaniappa Chettiar (defendant 1) did not intend to incur personal responsibility but the fact that he signed as hukdar of the chathram makes it clear that he must be liable for the chathram debt as the chuthram itself has no personal liability. Defendant 1's legal representatives are also liable to the extent of

(12) [1913] 21 I. C. 650.
(13) [1911] 35 Mad. 692=11 I. C. 79=14 I. C. 889.
(14) [1876-77] 2 Cal. 241=4 I. A. 52 (P. C.).

the family properties in their possession.

S.N. R.K. *Decree varied.*

A. I. R. 1919 Madras 620

SADASIVA AIYAR AND NAPIER, JJ.

Gaddam Penchulu Reddi, In re—Petitioner.

Criminal Misc. Petn. No. 219 of 1918, Decided on 30th August 1918, against order of Sess. Judge, Nellore, in Cri. Misc. Petn. No. 2 of 1918.

Criminal P. C. (1898), S. 195 (1), (a), (6) and (7)—Information given to District Magistrate of person being in possession of fire-arms without license—Issue of search warrant is judicial act—Information found to be false — Sanction for prosecution granted—Order is appealable to Sessions Judge — Arms Act (1878), S. 25—Penal Code, S. 182.

A Magistrate directing the issue of a warrant to search premises, on information received that the owner or occupant thereof is in possession of fire-arms without a license, acts as a Court and not merely as a public servant, whether he purports to act under the Criminal Procedure Code or under S. 25, Arms Act. Where a District Magistrate accords sanction for the prosecution of an informant on the ground that his information proved to be false, he acts judicially and his order is appealable to the Sessions Judge under S. 195 (7): 2 *Weir* 155, *Diss. from.*

[P 622 C 1]

Per *Sadasiva Aiyar, J.* — Every Magistrate acting judicially is a criminal Court. A Magistrate to whom as a criminal Court, a report is made in order that he might take action as a criminal Court, receives that report as a Court. The terms "Court" and "Magistrate", wherever used in the Criminal Procedure Code, are generally used as convertible terms.

[P 622 C 2, P 623 C 1]

K. Krishnaswami Aiyangar—for Petitioner.

Public Prosecutor—for the Crown.

Napier, J.—This is an application for revocation of sanction to prosecute the petitioner for an offence under S. 182, I. P. C, in that he gave false information to a public servant. The petitioner wrote to the District Magistrate, informing him that one Soora Chinna Venkata Reddi had in his custody without license 3 pieces of arms and submitted to the District Magistrate that the possession of such weapons 'by such a person in our village will be dangerous to our lives and that they are without any license." The house of Venkata Reddi was searched and no arms were discovered. Venkata Reddi then put in a petition to the District Magistrate under S 195, Criminal P. C., asking for sanction for the prosecution of the person who gave the information for an offence under S. 182, I. P. C. The District Magistrate granted the sanction. The petitioner then appealed to the Sessions Judge, who dismissed his petition holding that the order was passed by the District Magistrate not as a Court but as an executive officer and that therefore no appeal lay to his Court. He expressly followed a decision of this Court in *Sankaram Aiyar* v. *Sakkarappa Mudaliar* (1). In that case a report had been made by a Village Munsif under S. 45, Criminal P. C., to the nearest Magistrate of the occurrence in the village of a death under suspicious circumstances or of the commission of an offence of murder. The High Court held that a report made under this section was not made to a Court and that therefore the Sessions Judge had no jurisdiction to entertain an appeal from a sanction granted by a Magistrate for the offence of giving false information to a public servant. With great deference to the learned Judges, I think that this view is incorrect, and if the information in this case had been given under that section, we might have thought it necessary to refer the matter to a Full Bench. But as I think the information is given under a special Act, we feel at liberty to dispose of it.

It is argued that the information constituted a complaint under the Code. But I do not think that it can be so treated. Under S. 28, Arms Act 11 of 1878, every person aware of the commission of an offence shall, in the absence of reasonable excuse, give information of the same to the nearest police officer or Magistrate. I have no doubt that the intention of the informant was to act under this section, especially in view of the language of his prayer which states that "the possession is without any license," this being an offence punishable under S. 19, Cl. (f) of the said Act. The informant did not go to the Magistrate to make the complaint, and he was not examined on oath as he would have been if it had been a complaint. It appears that the Magistrate directed the issue of a warrant for the search of the house and the police procured the warrant from the nearest Magistrate. I am not clear whether the Magistrate in directing the issue of a warrant purported to act specifically under the Criminal Procedure Code with reference to an offence which had been brought to his notice or purported to act under S. 25,

(1) 2 Weir 155.

Arms Act. If he was acting under the Criminal Procedure Code, it would be very difficult to argue that the information on which a Court issues a warrant is not information given to the Court, and it would not matter that the action was taken under S. 190, sub-S. (1), Cl. (c), Criminal P. C., and not on complaint. But if he did not think at that stage that it was necessary to take cognizance of an offence, but only acted under S. 25, Arms Act, the question is more difficult, for if such action is not by a Court, it would necessarily follow, as held by the Sessions Judge, that the information was given to an executive officer and not to a Court.

Section 25 provides that where a Magistrate has reason to believe that any person has in his possession any arms for an unlawful purpose, or that such person cannot be left in the possession of any such arms without danger to the public peace, such Magistrate, having first recorded the grounds of his belief, may cause a search to be made, and may seize and detain the arms, although covered by a license, in safe custody for such time as he thinks necessary. The information in this case was to the effect that the possession of these arms is dangerous to the lives of the persons in the village, and it may very likely be that the Magistrate was proceeding under S. 25, Act 11 of 1878, as a preliminary to any further proceedings which might be necessary for an offence under the Act. Assuming that he did so, I am still of opinion that he was acting as a Court. It is true that the section does not say he shall issue a warrant. But I know of no procedure by which the police have a power of search except under the Code, and it would seem to follow that except by a warrant the Magistrate could not authorize the police to make a search. It would seem to follow therefore that the Magistrate in exercising his powers under this section must have recourse to the powers under Ch. 7 (B), Criminal P. C., of issuing search warrants, subject of course, to the special procedure contained in S. 25, Arms Act, and such warrants are, of course, under the language of the section, issued by a Court.

There is another reason why I think the Magistrate is acting as a Court, and that is the use of the words "having first recorded the grounds of his belief." If the Magistrate is not a Court when proceeding under S. 25, the provision can have no value whatsover. These words are always inserted where the legislature intends to provide that a Court shall put on record the information on which it is acting for the benefit of any superior Court having jurisdiction to review its action. I am fortified in this view by the opinion expressed by Brett, J., in *Clarke* v. *Brojendra Kishore Roy* (2). In that case a District Magistrate, having received information of a formidable riot in which firearms were used, came to the spot and being informed that the firearms were being kept in certain houses, searched the houses. It was held by the majority of the Bench that his action was justified neither by the Criminal Procedure Code nor the Arms Act. On appeal to the Privy Council, *Clarke* v. *Brojendra Kishore Roy* (3), the first view was negatived, but the latter view was upheld on the ground that he had not recorded his reasons as required by S. 25, Arms Act. Neither the Privy Council nor the majority of the Bench expressed any opinion on the question whether action under S. 25 was the action of a Court, but the dissenting Judge states his opinion on that point definitely. He considers the matter on p. 476 of (*I. L. R.* 36 *Cal.*) and says as follows:

"The distinction between a judicial and an executive act in India is not very clearly drawn, as many acts which are purely administrative are generally described as executive. The main distinction between the two appears to be that judicial acts are those acts done or orders passed in the exercise of the judicial discretion or power with which an officer is vested under the law, while executive acts are of a ministerial character either carrying judicial orders into effect or discharging duties not of a judicial nature. In the case of *Hope* v. *Evered* (4), to which we have been referred, it has been clearly laid down that the issue of a search-warrant is a judicial act and in the case of *Mahomed Jackarah* and *Co.* v. *Ahmed Mahomed* (5), and in case of *Lakhmidas Naranji, In re* (6), a similar view has been taken by the High Courts in India."

I agree with the learned Judge that it is often difficult to say what acts of a Magistrate are administrative and what are judicial. But I think that where,

(2) [1909] 36 Cal. 433=2 I. C. 436.
(3) [1912] 39 Cal. 953=16 I. C. 501=39 I. A. 163 (P.C.).
(4) [1886] 17 Q. B. D. 338.
(5) 1888] 15 Cal. 109.
(6) [1903] 5 Bom. L. R. 980.

as in the case of a search or the issue of a search-warrant, the action of a Magistrate under a special Act is analogous to his action as a Court under the Code, the better view would be to hold that he was acting as a Court. We have already decided in Criminal Miscellaneous Petition No. 83 of 1918, *Arunachalam Pillai* v. *Ponnuswami Pillai* (7), that sanction by a Court under S. 195, sub-S. 1 (*a*), is appealable under sub-S. 7. It follows therefore that the view of the Sessions Judge is incorrect and that he had jurisdiction to entertain the appeal. The petition is allowed and the case will be remitted to the Sessions Judge. who will take it on his file and dispose of it according to law in the light of the above observations.

Sadasiva Aiyar, J.—I agree with the order proposed by my learned brother and I further agree generally and in substance with the reasons given by him. I wish, however, to add some words of my own. The powers given by S. 195 (6), Criminal P. C., of the superior "authority" to revoke or grant a sanction given by a subordinate "authority" is a specific statutory power. There is no express procedure laid down for the party to follow who wishes to move the superior authority to interfere with the proceedings of the subordinate authority. It seems to be usual to call the application to the superior authoity a petition of "appeal," though I am doubtful whether it could be called an "appeal." The mere fact that, under Cl. 7, the superior authority is (where the subordinate authority is a Court) the Court to which in most cases, though not in all, see sub-Cl. (*c*) appeals "ordinarily lie" is not a complete justification for the use of the word "appeal." However, the description of such an application as an appeal is convenient and I only wish to guard myself against the use of that term tending to mislead the mind in certain contingencies.

With the greatest respect to the decision in Criminal Revision Case No. 136 of 1903 *Sankaram Aiyar* v. *Sakkarappa Mudaliar* (3), feel constrained to dissent from that decision. In that case a Village Munsif sent a false report to the Sub-Magistrate accusing a man of murder. It is clear that he did so in order that the Sub-Magistrate might, as a Criminal Court, take cognizance of the alleged offence. The Sub-Magistrate accorded sanction to prosecute the Village Munsif for an offence under Ss. 177 and 182, I. P. C. The Sub-divisional Magistrate revoked the sanction. The Sessions Judge "restored" the Sub-Magistrate's order. According to S. 195 (6), Criminal P. C., it is not strictly, a restoration of the Magistrate's order but the fresh granting of the sanction by the Sessions Judge himself. Tne Sessions Judge in that case treated himself as an appellate authority instead of an authority who was given a special statutory power and, as I have said above, was misled by the use of the term "appeal" to indicate an application made to a higher authority under Cl. (6). Then, on revision to the High Court, the learned Judges (Benson and Bashyam Aiyangar, JJ.) held (*a*) that the sanction to prosecute was granted by the Sub-Magistrate of Turaiyur in his capacity as a public servant and not in his capacity as a Court; (*b*) that he would have acted in his capacity as a Court only if the offence for the prosecution of which sanction was applied for was one of those mentioned in Cls. (*b*) and (*c*), S. 195 (1), and not if it fell under S 195 (1) (*a*); and (*c*) that the Sud-divisional Magistrate did not act as a Court but only as an executive officer and the superior authority over the Sub-Magistrate in revoking the sanction granted by the Sub-Magistrate and (*d*) that the Sessions Judge had therefore no jurisdiction to interfere under sub-Ss. 6 and 7, S. 195.

It seems to me that every Magistrate acting judicially is a criminal Court. A Magistrate to whom, as a criminal Court, a report is made in order that he might take action as a criminal Court receives that report as a Court. The presiding officer of the Court is, no donbt, almost always a "public servant"; also S. 195, Cl. (*a*) and is also an "authority" Cl. (6). When he grants a sanction in respect of an offence falling under Ss. 177 and 182, I. P. C., which are two of the offences mentioned in S. 195, Cl. (1) (*a*), Criminal P. C., he clearly grants the sanction as a Magistrate, that is as a Court, and Cl. (7), in my opinion directly applies. In the case of *Clarke* v. *Brojendra Kishore Roy* (2) their Lordships of the Privy Council decided that a Magistrate making a search, even in the absence

(7) A. I. R. 1919 Mad. 610=48 I. C. 878.

of a complaint and on his own knowledge that an offence had been committed, is acting as a criminal Court At p. 966 of (*I. L. R. 39 Cal.*) they say :

"It would seem that the trial Judge and both the learned Judges who formed the majority of the Court of appeal were misled by the use of the word 'Court' in S. 96. For the sake of brevity the Code uses the terms 'Court' and 'Magistrate' generally, if not always, as convertible terms. S. 6 headed 'Classes of Criminal Courts' enacts that : 'Besides the High Courts and the Courts constituted under any law under this Code for the time being in force there shall be five classes of criminal Courts in British India, namely (1) Courts of Session, (2) Presidency Magistrate, (3) Magistrates of the First Class, (4) Magistrates of the Second Ciass, and (5) Magistrates of the Third Class."

Then their Lordships say that a search made by a Magistrate is a proceeding conducted by him when "acting in the discharge of his judicial functions." I think that this dictum of their Lordships of the Privy Council must be held as overruling the opinion expressed in Criminal Revision Case No. 136 of 1903, *Sankaram Aiyar* v. *Sakkarappa Mudaliar* (3), that a Sub-Magistrate, to whom a report is made as such Magistrate and who grants sanction to prosecute, is not acting as a Court but as a public servant other than a Court.

S.N./R.K. *Case remitted.*

A. I. R. 1919 Madras 623

ABDUR RAHIM AND OLDFIELD, JJ.

Komandur Srinivasa Seshacharlu and *others*—Plaintiffs—Appellants.

v.

Komandur Seshamma and *others*—Defendants—Respondents.

Appeal Suit No. 321 of 1916, Decided on 2nd November 1917, against decree of Dist. Judge, Nellore, in O. S. No. 43 of 1914.

Will—Construction—General principles of English wills are applicable to Hindu wills—No express words of gift but language justifying implication of gift—Court should have regard to dominating intention of testator and effectuate intention by ascertaining it from entire scheme of will.

The general principles of construction governing English wills are applicable also to Hindu wills, e. g., where there are no express words of gift but the gift can be implied from the language used in will, the Court should have regard to the dominating intention of the testator and effectuate that intention by ascertaining it from the entire scheme of the will : *Scale* v. *Rawlins*, (1892) *A. C.* 342, *Expl.*

There is no positive presumption of Hindu law that a gift by a person to his daughter is of an absolute estate.

A Hindu testator devised his property to his two daughters, *S* and *A*. *A* had issue at time of the death of the testator while *S* had none. The will recited that as *A* was attending to the testator's comforts and had male offspring who would perform karmams (ceremonies after death) to him, he gave her two out of three shares and he gave *S*, who had no issue, the remaining one share. The will further recited that any person adopted by *S*, should not get her share but that if any male child was born to her he should, like the children of *A*, enjoy his mother's share from generation to generation,

Held : that there was no gift of an absolute estate to *A* and that though there were no express words of gift to her children, they took the reversion after *A*'s death. [P 624 C 2]

A. Krishnaswami Aiyar, *K. Bhashyam* and *K. Krishnaswami Aiyar*—for Appellants.

K. V. Krishnaswami Aiyar for *S. Varadachariar*—for Respondents.

Judgment.—The point involved in this appeal relates to the construction of a will executed by a Hindu. The document is marked as Ex A in the case. The construction of the document is by no means free from difficulty. But once the rules of construction applicable to such cases are borne in mind, we think that we have enough in this will from which we can gather the intention of the testator in the events that have happened. He had two daughters one called Seshamma and the other Andalammal, the younger daughter. Seshamma had no child, but Andalammal had two sons. The question we have to consider is, whether there was any gift to Andalammal's children or whether the gift was to Andalammal of an absolute estate or of a daughter's estate according to the Hindu law. The will starts with saying that the property should be divided into shares : one share should be given to Seshamma and the other two to Andalammal, it having been already recited that the testator's two daughters were alive as his heirs and that, of these daughters, Andalammal had male offspring. The testator says :

"Therefore the remaining half should be divided from the said Varada Reddi and, as out of my abovesaid two daughters, Andalammal has been attending to all my comforts and as her male santhathi (translated as offspring) are entitled to perform karmams to me, she should enjoy two-thirds, two of the three shares, and Seshamma should enjoy the third share."

Then the testator provides that his daughters should divide and enjoy in three shares in the abovesaid manner above 60 ankanams of site.

After her death (meaning the death of his sister-in-law *B*. Seshamma in whose favour he

was making the bequest, my daughters should enjoy the said land in the proportion of the above three shares."

Now we come to the more important clause in the will :

"In enjoying in the above manner as my elder daughter Seshamma has no male issue, she should be enjoying the third share that comes to her without contracting debts and after her death the said third share should go to my second daughter Andalammal and to her santhathi (offspring). But if she adopts a son, this property should not go to the adopted son. If a male issue is hereafter born to my daughter that is, Seshamma, that grandson should, like the santhathi (offspring) of my younger daughter enjoy her (elder daughter's) third share, having power of gift and sale from son to grandson and so on from generation to generation."

There is only one other sentence to which reference need be made, where the testator provides that the younger daughter alone shall have the right of collecting the said debts and of causing the said karmams or obsequies to be performed. The learned District Judge has held that though it was the intention of the testator to make a gift to the children of Andalammal, he omitted to do so and therefore the Court cannot carry out what might have been the intention of the testator but which he failed to carry out in the will. If the District Judge is right in his reading of the will, no doubt the decree passed by him would be correct. It may at once be said that there is no gift to the children in express and clear terms. The learned pleader for the appellant, Mr. A. Krishnaswami Aiyar, however argues that taking the whole will into consideration, three things are clear : (1) that it was the intention of the testator to make a gift to the children of Andalammal ; (2) that that intention can be gathered as a matter of construction, especially from the words "should, like the santhathi of my younger daughter, enjoy her third share, having powers of gift and sale from son to grandson and so on from generation to generation" and (3) at any rate that this is a case of an implied grant. Nothing can be clearer from the reading of the will than that the testator was extremely anxious that his property should go to his daughters and their natural children. This is to be gathered especially from the fact that in the contingency of Seshamma not bearing a son, the property should not go to any adopted son of hers. It is not suggested that he had any other relatives or kinsmen besides those mentioned in the will on whom he would like the property to devolve. He starts by saying that he is making provision in respect of all his property moveable and immovable. The District Judge however thinks that what the testator intended was to make a gift to his two daughters of estates corresponding to a Hindu daughter's estate and that he assumed that Andalammal who was the younger daughter would survive Seshamma and himself. That being so the contingency that actually happened namely, the death of Andalammal before the death of the testator, was not within his contemplation and he failed to provide for it. All this depends upon what construction is to be placed upon the will.

The learned District Judge does not take all the provisions together in order to arrive at the mind of the testator. He first of all takes into consideration the words in the earlier part of the will that is to say, where the testator mentions the disposition into shares, one-third in favour of Seshamma and two-thirds in favour of Andalammal, and infers that they are given estates such as a Hindu daughter would take by inheritance under the general Hindu law. Proceeding upon that basis he construes the other clauses of the will, and that is exactly the nature of the argument which has been addressed to us by the learned vakil for the respondents. Now take the case of Seshamma. The testator in the earlier part of the will contents himself merely with saying that she is to take one-third of the properties, but he goes on afterwards to lay down what is to happen in case Seshamma should die without issue and in case she was to have an issue or she was to adopt a son. All these provisions clearly indicate that so far as Seshamma was concerned, she was intended to take only a life-estate and if she left no issue, her share was to go over to Andalammal and to her children. If she were to have male issue, the son or sons were to take directly under the will on the death of Seshamma. If that was the testator's intention with regard to Seshamma's male issue, it seems to us to be quite clear that similar was his intention with respect to Andalammal's sons. He gives two-thirds to Andalammal as her sons are entitled to perform his karmams. The scheme of the will was not to give anything less to Andalammal and her children than what

was given to Seshamma and her sons, but to treat the former on the same footing as the latter. Then we have this clause:

"If a male issue is hereafter born to my elder daughter, the grandson should, like the santhathi of my younger daughter, enjoy her third share . . . . ."

"Should like the santhathi of my younger" can have no other meaning than that it wasthe intention of the testator that they should take the property given to Andalammal after her death No doubt this is a case of inartistic careless drafting but we do not see what other meaning can be given to these words than what we have stated. The learned pleader for the respondents suggests to us that by these words all that the testator meant to convey was that he expected that his younger daughter's children would, in the ordinary course of Hindu law, enjoy the property which he was giving to that daughter. But that is not a possible construction, having regard to the fact that the gift over after the life-estate of Seshamma is to her male issue and so it can hardly be contended that in her case the testator did not dispose of the reversion. The reversion in both the cases was intended to be placed on the same footing that is to say, in the case of each daughter, it is to go to her children. Numerous cases have been cited to us, but so far as the construction of this document is concerned, little help is to be derived from the provisions of other wills. But there are certain general rules of construction which are applicable to this case. They are clearly laid down in the well-known judgment of the Right Hon'ble Pemberton Leigh in *Towns* v. *Wentwarth* (1), extracts from which have been quoted in more than one case as laying down the proper rules for the construction of wills like this, which do not contain express words of gift but where the gift is to be implied no doubt from the language used, but having regard to the dominating intention of the testator to be ascertained from the entire scheme of the will. In *Sweeting* v. *Prideaux* (2), Hall V. C., upheld a gift which could only be implied from the general tenor of the entire will. He cites with approval the proposition laid down by Knight Bruce, L. J. in the caseof *Key* v. *Key* (3), in these words:

"In common with all men I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter, casesin which it is impossible for a reasonable be ing, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly."

Then he quotes the passage above alluded to from the Right Hon'ble Pemberton Leigh's judgment:

"and on the other hand, if the will shows that the testator must necessariiy have intended an interest to be given which there are no words in the will expressly to devise, the Court is to supply the defect by implication, and that to mould the language of the testator so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has on the whole Will sufficiently declared."

These rules of construction relating to wills have not, so far as we are aware, ever been doubted either in England or here. It will not serve any useful purpose to go through the different cases to see how far the Courts have gone to effectuate the intention of the testator in particular cases provided that intention is to be gathered from the entire will, although the gift is expressed in defective or elliptical form of language. But one of the strongest cases seems to us to be *Redfern, In re. Redfern* v. *Bryning* (4). There Bacon, V. C., relied mainly on the scheme of the will as showing that the testator intended to make an equal division of all his estate among his children and though there was an omission with respect to one of the children, he felt himself justified in supplying that omission, being clear as to the intention of the testator. He says:

"I think upon a reasonable construction of the words which the testator has used, the words which are suggested by the statement of claim ought to be read as if they were inserted in the will."

On behalf of the respondents we have been referred to the case of *Scale* v. *Rawlins* (5). But all that is laid down there is that the Court is not at liberty to speculate upon the intention of the testator if there is no language in the will by which that intention is expressed. It does not in any way throw doubt upon the other rule to which we have referred. Mr. K. V. Krishnaswami Aiyar has

(1) [1858] 11 Moore P. C. 526=6 W. R. 397.
(2) [1876] 2 Ch. D. 413= 45 L. J. Ch. 378
(3) [1853] 4 De G. M. & G. 73=1 Eq. Rep. 82,
(4) [1877] 6 Ch. D. 133=47 L. J. Ch. 17.
(5) [1892] A. C. 342=61 L. J. Ch. 421.

asked us to say that the general principles of construction such as we have mentioned are not applicable to Hindu wills. The argument is that under the Hindu law or under the rules of construction of Hindu wills, a presumption against partial intestacy has no room and therefore the English law has gone much further than we should be justified in going towards carrying out the intention of the testator. But we do not find that this is borne out by authority. On the other hand there are a number of cases which have laid down that the rule in question applies to Hindu wills as well: *Ellokassee Dossee* v. *Durponarain Bysack* (6), *Cheda Lal* v. *Gobind Ram* (7) and *Seshayya* v. *Narasamma* (8). The learned pleader for the respondents also enunciated a proposition that in cases of bequest to a Hindu daughter she takes an absolute estate. There again he is unsupported by any authority. On the other hand, the decided cases and certainly the later decisions lay down the contrary proposition. No doubt there are some recent decisions which say that there is no presumption that the gift to a Hindu daughter is only of a life-estate or of an estate which the daughter takes under the Hindu law of intestate succession. But there is no authority for saying that there is any positive presumption that such a gift is of an absolute estate. We may also mention that it was attempted to be argued that the mention of the "offspring" of Andalammal was only by way of limitation, indicative of a gift of inheritance. But that does not seem to us to be the proper construction having regard to the entire scheme of the will. By santhathi, the testator apparently meant her children or perhaps her sons, because in the will sometimes the word santhathi "is used by itself and sometimes the phrase" the male "santhathi" is used.

No such question was raised at the trial and there can be no doubt that what the testator meant was the children of Andalammal as the direct objects of bequest. We allow the appeal and reverse the judgment of the District Judge. There will be a declaration that the plaintiffs are entitled to 2/3rds of the properties claimed in the plaint and Seshammal to 1/3rd for her life. There will be a preliminary decree for partition and there will be an inquiry into the mesne profits to which the plaintiffs are entitled as claimed in the plaint. The appellants are entitled to their costs from the respondents here and in the Court below. Out of the costs payable by the respondents, the court-fees payable by the appellants will be realized.

S.N./R.K. *Appeal allowed.*

(6) [1880] 5 Cal. 59.
(7) [1908] 30 All. 455.
(8) [1899] 22 Mad. 357.

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* A. I. R. 1919 Madras 626

Full Bench.

ABDUR RAHIM, OLDFIELD AND SESHAGIRI AIYAR, JJ.

T. Manavikraman Tirumalpad—Appellant.

v.

Collector of Nilgiris—Respondent.

Letters Patent Appeal No. 96 of 1917, Decided on 3rd April 1918, against decisions of Ayling and Sadasiva Aiyar, JJ., D/- 4th May 1917, in Appeal No. 245 of 1917.

***(a) Land Acquisition Act (1894), S. 54, —Decision of High Court in appeal under S. 54, is not judgment within Letters Patent (Madras), Cl. 15.**

The decision of the High Court in appeal under S. 54, Land Acquisition Act, is not a "judgment" within the meaning of Cl. 15, Letters Patent: 40 *Cal.* 21 (*P. C.*) and 20 *I. C* 763 (P. C.) *Foll.* [P 627 C 2]

(b) Civil P. C. (1908), S. 98—S. 98 applies to appeals under Land Acquisition Act, (1894).

Section. 98, Civil P. C., applies to appeals under the Land Acquisition Act. [P 628 C 2]

(c) Civil P. C. (1908), S. 98 — Principles governing question as to right of Letter Paten tappeal or Privy Council appeal has no appli cation to S. 98.

The principle governing the question as to the right of appeal to the Privy Council or to the High Court under Cl. 15, Letters Patent, has no application to S. 98, Civil P. C. [P 628 C 2]

(d) Civil P. C. (1908), S. 98—Land Acquisition appeal—Judges composing Bench differing as to amount of additional compensation—Procedure prescribed in S. 98 should be followed.

Where, in an appeal under the Land Acquisition Act, the Judges composing the Bench differ as to the amount of additional compensation which should be awarded, the procedure prescribed in S. 98, Civil P. C., should be followed and the award of the lower Court should be confirmed. [P 628 C 1,2]

In an appeal from an award by the District Court under S. 54, Land Acquisition Act, one of the Judges composing the Bench held that an additional sum of Rs. 7,000 should be award, while the other held that the amount awarded should be enhanced by Rs. 56,000. The Bench then agreed that the order of the Court should be that Rs. 8,050 should be added to the award

passed by the District Judge. The claimant appealed under S. 15, Letters Patent.

Held: (1) that the order of the High Court should be deemed to be a confirmation of the order of the District Court under S. 98. Civil P. C.; (2) that no appeal lay, under Cl. 15, Letters Patent, against such order. [P 628 C 2; P 629 C 1]

(e) Land Acquisition Act (1894), S. 54—R. 2 (2-a) of appellate side rules applies to appeals under S. 54.

The words "decree or order of a Civil Court" in Cl. (*a*), sub-R. 2, of R. 2 of the Appellate Side Rules do not preclude the application of this rule to cases of appeals under S. 54. [P 629 C 1

Per *Seshagiri Aiyar, J. (dubitante)*.—Cl. 36 Letters Patent, is applicable to mofussil appeals as well as appeals from the original Side of the High Court. The Letters Patent should however be only invoked in cases which are not covered by the Civil P. C. [P 630 C 2]

T. R. Ramachandra Aiyar—for Appellant.

V. Ramesam—for Respondent.

Abdur Rahim, J.—Under S. 54, Land Acquisition Act, an appeal from the award of the District Court of Coimbatore was heard by a Bench consisting of Ayling and Sadasiva Aiyar, JJ. Both the learned Judges differed, generally speaking, from the Land Acquisition Judge and among themselves on some questions relating to the principle on which the value of the property was to be assessed. The total amount claimed by the owner was 8 lakhs. The Land Acquisition Judge confirming the valuation of the Collector made an award of one lakh and seventy-two thousand rupees in round figures. Ayling, J., on the basis on which he proceeded held that the amount of the award should be enhanced by Rs. 7,000 and Sadasiva Aiyar, J. on the method of valuation adopted by him was for awarding on the whole an additional sum of about Rs. 56,000. We understand that a question was then raised before the learned Judges as to what should be the order of the High Court under such circumstances. The learned Judges thereupon agreed upon the order in the appeal being that the decree of the District Judge should be modified by adding Rs. 8,050 to the award. In other words they thought that that was the least amount to which the appellant was entitled, as that was the additional amount, which Ayling, J., wanted to award, and according to Sadasiva Aiyar, J., the appellant was entitled to something more and not less.

The appeal before us is filed under Cl. 17, Letters Patent, and the preliminary objection taken is that no such appeal is allowed by the law. That depends upon whether the decision of the High Court in appeal under S. 54, Land Acquisition Act, can be said to be a "judgment" within the meaning of Cl. 15, Letters Patent. It seems to me that the matter is not involved in any doubt in view of the Privy Council in *Rangoon Botatoung Co.* v. *Collector of Rangoon* (1) and the judgment of the Bombay High Court in *Special Officer, Salsette Building Sites* v. *Dosabhai* (2), confirmed as it was by the Privy Council as reported in *Special Officer, Salsette Building Sites* v. *Dosabhai* (3). In the first case, their Lordships described an award made under the Land Acquisition Act as "the determination of arbitrators as to the value of land" taken for public purposes and upon that ground they refused to accept the argument that once the claimant is admitted to the High Court as appellant under S. 54 of the Act, he has all the rights of an ordinary suitor including the right to carry the award up to the Board as if it were a decree of the High Court made in the exercise of its ordinary civil jurisdiction. It will be seen from the report of the argument of Buckmaster, K. C., the present Lord Chancellor, that almost his whole argument against the maintainability of the appeal was based on the use of the word "award" in the Act. His contention was that the legislature wanted the determination of the Land Acquisition Tribunal to be distinguished from an "order" or "decree" of an ordinary civil Court.

In the case in the Bombay High Court, the learned Judges had to consider whether Cl. 39, Letters Patent, of the Bombay High Court, which is in the same language as Cl. 39, Letters Patent of the Madras High Court, allowed an appeal to the Privy Council, for no arguments were or could have been based in the *Rangoon Co.*'s case (1) on any such clause, as the Chief Court of Lower Burma was not constituted under the Letters Patent. The Letters Patent allow an appeal from a "final judgment" "decree" or "order" of the High Court. Batchelor and Heaton JJ., interpret-

(1) [1913] 40 Cal. 21=39 I. A. 197=16 I. C. 188 (P. C.)
(2) [1912] 37 Bom. 506=17 I. C. 952.
(3) [1913] 20 I. C. 763 (P. C.).

ing the ruling of the Privy Council in the *Rangoon Co.'s* case (1) as laying down that an award in a land acquisition case is more in the nature of an award of an arbitrator than a "judgment", "decree" or "order" of a civil Court, held that the parties have no further or other right of appeal than that expressly given by the legislature. On the matter being taken to the Privy Council they refused to grant leave to appeal, and if the arguments at the Bar, and the observations of the learned Lords of the Privy Council are correctly reported in *Special Officer, Salsette Building Sites* v. *Dasabhai* (3), it would appear that the Judicial Committee refused to regard the decision of the Bombay High Court in an appeal under S. 54 Land Acquisition Act, as a "judgment", "decree" or "order" of a High Court within the meaning of Cl. 39, Letters Patent. The attempt therefore of Mr. T. R. Ramchandra Aiyar to distinguish the ruling of the Privy Council in *Rangoon Botatoung Co.* v. *Collector of Rangoon* (1), on the ground that the appeal to the Privy Council was from the decision of a Judge of the Rangoon Chief Court acting as the Land Acquisition Judge and not of the Chief Court as an Appellate Tribunal hearing an appeal under S. 54, must fail. It is not suggested that the word 'judgment', in Cl. 15, Letters Patent, is used in a different or wider sense than in Cl. 39. As for *Secry. of State* v. *Chelikani Rama Rao* (4), which was also referred to at the Bar, I do not think that there is anything in the judgment of the Privy Council in that case which can be said to have modified the law enunciated in *Rangoon Botatoung Co.* v. *Collector of Rangoon* (1).

We have then been asked to consider whether S. 98, Civil P. C., applies to this case. In my opinion it does. S. 54, Land Acquisition Act, says that the appeal to the High Court shall be subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees; and it seems to me that S. 98 is one of the provisions of the Code which is so made applicable, for apart from it there is no procedure prescribed by which the order to be passed in the cases of difference of opinion contemplated there could be ascertained. No doubt, in sub-S. 2 of that section the words "decree" and "judgment" are used, but these are ordinary terms used in Part 7 of the Code dealing with appeals from original decrees, as also elsewhere throughout the Code. But sub-Ss. 1 and 2, S. 98 do not confer any right of appeal; they only lay down how an appeal heard by a Bench of two or more Judges is to be disposed of in certain contingencies.

The principle governing the question as to the right of appeal to the Privy Council or to the High Court under Cl. 15, Letters Patent, has no application to S. 98. The provisions of the Civil Procedure Code relating to appeals from original decrees as laying down the procedure for the hearing and disposal of such appeals are made applicable to appeals under S. 54, Land Acquisition Act, by express reference. The application of those provisions cannot therefore be excluded because of the use of the words "judgment" and "decree" in the sections, orders and rules bearing on the subject. Sub-S. 2, S. 98 provides that

> "where there is no such majority which concurs in a judgment varying or reversing the decree appealed from such decree shall be confirmed",

and this in terms applies to what has happened in this case. I should say therefore that the result of the hearing before Ayling and Sadasiva Aiyar, JJ., must be taken to be that that the award of the District Judge was confirmed. But Mr. Ramesam appearing for the Government, the respondent in the appeal, is content to accept the award proposed by Ayling, J., and which to that extent was accepted by Sadasiva Aiyar, J. It thus becomes unnecessary to decide whether the order of the Court consisting of Ayling and Sadasiva Aiyar, JJ., was a proper order. We have in this connexion been referred to a decision of the Calcutta High Court in *Krishnen Doyal Gir* v. *Irshad Ali Khan* (5), but I do not think that the circumstances of that case afford a very close parallel to the present case. If necessary the Calcutta ruling could be distinguished on the ground that the learned Judges who heard the appeal in this case differ from each other and from the Land Acquisition Judge on matters relating to the principle of valuation and not merely on a question of figures, and I should be inclined to think

(4) A. I. R. 1916 P. C. 21=39 Mad. 617=35 I. C. 902=43 I. A. 197 (P. C.).

(5) [1915] 31 I. C. 965.

that the order of the High Court was not in accordance with sub-S. 2, S. 98.

I may also mention that Mr. Ramchandra Aiyar drew our attention to R. 2, of the Appellate Side Rules, under which the Bench composed of Ayling and Sadasiva Aiyar, JJ., was constituted and under which other Benches are ordinarily constituted for the hearing of appeals under S. 54, Land Acquisition Act. The rules provide for a Bench of two Judges who are ordinarily to hear and determine appeals from the "decree or order of a civil Court", and Mr. Ramchandra Aiyar's argument was that, if we hold that the decision of the High Court in an appeal under S. 54 is not a decree or order of a civil Court, we must also hold that Ayling and Sadasiva Aiyar, JJ., had no jurisdiction to hear the appeal at all. I am not prepared to hold that there is force in this contention, though the argument is not without an appearance of plausibility. The rules are framed under the powers vested in the High Court not merely by the Charter Act and the Letters Patent, but also by the Civil Procedure Code, and as the provisions of the Civil Procedure Code relating to appeals from original decrees are expressly made applicable to appeals to the High Court from the award of a Land Acquisition Judge, I should think that the words "decree or order of a civil Court" in Cl. (a), sub-R. 2, R. 2 of the Appellate Side Rules, do not preclude the application of this rule to cases of appeals under S. 54, Land Acquisition Act. The District Judge, against whose award the appeal was heard, tried the case as the tribunal designated as "the principal civil Court of original jurisdiction" and, in my opinion, it would not be unduly straining the language of R. 2 (Appellate Side Rules) to say that the award of such a Court "is a decree or order of a civil Court" for purposes of the procedure to be followed in the hearing and disposal of an appeal from an award of that Court as prescribed by the provisions of the Code of Civil Procedure which are expressly referred to in S. 54. I hold that the preliminary objection is valid and the appeal must be dismissed with costs.

Oldfield, J.—I agree.

Seshagiri Aiyar, J.—In my opinion the preliminary objection is well founded. The decision against which the Letters Patent appeal has been preferred is practically the result of a compromise. Ayling, J., was for giving Rs. 7,000 more to the claimant than was awarded by the District Judge. Sadasiva Aiyar, J., was prepared to increase it by over Rs. 50,000. Neither of them was for confirming the award of the District Judge. Both of them were for varying it, one learned Judge to a small extent, the other to a larger extent. In the result, the Court's order was that the award should be increased by Rs. 7,000 plus the usual 15 per cent. To such a state of affairs, the language of S. 98, Civil P. C., seems inapplicable. Cl. (1) contemplates the concurrence of the Judges or a majority, There is neither in this case. Cl. (2) provides for confirmation of the lower Court's decision when the Judges are not agreed. That has not been done in this case. The proviso, as is very often the case in Indian enactments, introduces an exception to the rule requiring the confirmation, and only applies where the Judges differ on a question of law. Ex facie therefore the conclusion come to by the learned Judges in this case does not appear to be within the letter of the section, although if the District Judge's judgment were confirmed, the section would have been satisfied.

Mr. T. R. Ramachandra Aiyar contended that the conclusion is in accordance with the view taken by a Bench of three Judges in *Krishen Doyal Gir* v. *Irshad Ali Khan* (5). Mookerjee, J., alone deals with the present question. In substance what the learned Judge says amounts to dividing the judgment of a lower Court into compartments and to appropriating the differing Judge's views pro rata to such of them as are concurred in, and to others which are not approved of. Such a procedure is hardly compatible with the avowed policy of the legislature. In effect, the view leads to countenancing the splitting of a single judgment into a number of judgments. If this process is logically applied whenever there is a concurrence with the decision of a Court below on one of the issues, to that extent there must be a confirmation leaving the other issues on which there is a difference of opinion to be adjusted otherwise. If there is a judgment relating to a number of items of land or accounts, the final result as to each of the items will have to be settled

in the same way. By parity of reasoning when there is a judgment for Rs. 10,000, the decision must, for purposes of S. 98, be regarded as having been given in respect of each rupee or groups of tens or hundreds of rupees. With all respect I am unable to uphold such a piecemeal apportionment of a single decree. I am not losing sight of the fact that there were practically distinct subject-matters in the suit from which the appeal was heard in the Calcutta case. Nonetheless the logical application of the principle of that decision to cases of money claims shows that the section was not intended to be construed as suggested. Chatterjee, J., in the original judgment from which there was the Letters Patent appeal, says that Cl. (1), S. 98 justifies the procedure adopted by him. That clause speaks of the appeal in its entirety, and of its confirmation or variation as a whole. I am unable to construe the clause as reading "the appeal or such portion of it as is concurred in by the Judges" shall be decided in accordance with the opinion of such Judges. In the present case there is greater difficulty than was present in the Calcutta case. The conclusion to increase the award by Rs. 7,000 was not based on any point on which the learned Judges agreed. Ayling and Sadasiva Aiyar, JJ., proceeded to award compensation on different principles. Both of them to a certain extent disagreed with the Court below and with each other. To such a decision I find it difficult to apply the language of S. 98 of the Code. The result is that there is no judgment which attracts the provision of S. 15, Letters Patent, and consequently no appeal lies under it.

Mr. Ramachandra Aiyar next suggested that the final decision may be regarded as that of Ayling, J., the senior Judge, so as to invite S. 36, Letters Patent. There are two difficulties in the way. In the first place, the recorded note speaks of the final award as that of the Court of the two Judges. In the second place, it seems clear, as contended by the learned Government Pleader, that it is not a case to which any section of the Letters Patent can apply. Before dealing with the larger question whether an award in a Land Acquisition case is a judgment, I shall consider the shorter point whether S. 36, Letters Patent applies. S. 44 says:

"The provisions are subject to the legislative powers of the Governor-General in Council."

The Code of Civil Procedure enacted by this authority makes provision for cases of difference of opinion by S. 98. But that provision is defective and has not taken into account differences like the present case. Therefore it is open to argument that the Letters Patent must at least be taken to be supplementary of the Code. Although I was at first inclined to the view that S. 36 of the Letters Patent should be confined to appeals from the original side, as such a provision exists, as pointed out by Oldfield, J., in the course of the argument, in the Allahabad Letters Patent appeal which did not contemplate an original civil jurisdiction, I have come to the conclusion that the section is applicable to mofussil appeals as well. In practice this conclusion may lead to difficulties. Whether S. 98 of the Code or S. 36, Letters Patent, applies to a given case may not easily be determined. One rule may be acted upon, namely that the Letters Patent should be invoked only in cases which are not covered by the Code.

As regards decided cases in *Narayanaswami Reddi* v. *Osuru Reddi* (7) a Full Bench of this Court held that S. 36, Letters Patent, cannot apply to mofussil appeals. *Karri Venkanna Patrudu, In re* (8) takes a different view, although it should be noted that the Full Bench case was not quoted before the learned Judges. *Roop Laul* v. *Lakshmi Doss* (9) lays down the converse of the proposition enunciated in *Narayanaswami Reddi* v. *Osuru Reddi* (7). In *Surajmal* v. *Horniman* (10), reported since we heard the arguments in this case, Sir Basil Scott, C. J., refers to Ss. 4 and 129, Civil P. C., as pointing to the conclusion that S. 36, Letters Patent is also applicable to appeals from the original side. This does not affect the question whether that section, subject to any law that may be passed by the Governor-General in Council, is not intended to provide for differences of opinion in mofussil appeals. Chatterjee, J., says in *Krishen Doyal Gir* v. *Irshed Ali Khan* (5) that S. 36, Letters Patent, is applicable whenever S. 98 of the Code is not applicable. That

(7) [1902] 25 Mad. 548.
(8) [1916] 32 I. C. 330.
(9) [1906] 29 Mad. 1.
(10) [1918] 47 I. C. 449.

seems to be the better view. I have therefore come to the conclusion, though not without hesitation, that S. 36, Letters Patent applies to this case, if otherwise the decision is within its terms.

The last question is whether the pronouncement of the two learned Judges in this case amounts to a judgment within the meaning of Ss. 15 and 36, Letters Patent. If the matter were res integra, I would have agreed with Mr. Ramachandra Aiyar on this point. There is great force in the learned vakil's contention that a conclusion come to by the Tribunals exercising jurisdiction under the Land Acquisition Act is not an award like that given by an arbitrator or by an umpire. In the Land Acquisition Act 1 of 1894 first of all there is a proposal by the acquiring officer in which he fixes the amount of compensation which he is prepared to give to the claimant. If the claimant accepts the proposal, there is a concluded bargain. If the claimant disputes the correctness of the acquiring officer's valuation he is entitled to ask that the question be referred for the decision of a civil Court. The Judge of the civil Court exercises all the functions and privileges of a Judge who is hearing a contested case. The Government on the one hand, and the claimant on the other, adduce evidence of their respective contentions. The Judge gives his decision on weighing the evidence placed before him. There is no provision in the Act by which finality is given to the decision thus arrived at. It is open to appeal under S. 54 of the Act. Moreover the question may arise, and very often does arise, as to whether *A* or *B* is entitled to the compensation which may be fixed by the acquiring officer or by the Court. Thus there will be a tripartite contest. The Tribunal will have to decide first between the contesting claims of the rival claimants and then to fix the amount by valuation.

Further there may be cases in which the mode of apportioning the compensation between rival claimants, as in the case of a landlord and tenant, will have to be inquired into by the Tribunals. There will thus be difficult questions relating to title, questions relating to mode of apportionment, questions relating to the mode of valuation, cropping up in the course of a land acquisition case. The Judge who determines these questions is not acting as an arbitrator, in the proper significance of that term. Therefore there is considerable force in the contention of the learned vakil for the appellant for the decision arrived at under these circumstances is a judgment in its most accepted sense. But speculation is not possible on a question of this kind. The Judicial Committee of the Privy Council have said the last, if not the final, word on the subject. In *Rangoon Botataung Co.* v. *Collector of Rangoon* (1) they first propounded the view that the conclusion come to by the appellate Court under S. 54, Land Acquisition Act is not a judgment, but partakes the character of an award. In a later case in *Special Officer, Salsette Building Sites* v. *Dasabhai* (3) there are observations of the members constituting the Board which undoubtedly point to the conclusion that in the opinion of their Lordships the decision on appeal is a land acquisition case is not a judgment. It is true, as Mr. Ramachandra Aiyar argued, that the report of the observations is not authentic in the sense that they appear in a publication sanctioned by the Judicial Committee. But there is no reason for supposing that these observations were invented. Moreover, if we bear in mind that the application for special leave was made to the Judicial Committee after the refusal of the learned Judges who heard the case to grant a certificate under the Code of Civil Procedure: vide *Special Officer, Salsette Building Sites* v. *Dosabhai* (2), there can be no doubt that the Judicial Committee did intend to lay down the proposition contended for by the learned Government Pleader.

Lastly we have the latest Privy Council decision in *Secy. of State* v. *Chelikani Rama Row* (4). That was a case under the Forest Act: it was there pointed out that, when under a local or special enactment an appeal is preferred to a District Court, the provisions of the Code relating to appeals and to further appeals therefrom ordinarily govern such an appeal, but that appeals in land acquisition cases stand on a different footing. The inference is irresistible that the Judicial Committee have definitely come to the conclusion that no appeal lies to them from a judgment of the High Court in a land acquisition proceeding. It may be that His Majesty the King's unlimited

prerogative of hearing appeals from any judicial proceedings may induce the Judicial Committee to grant special leave in this case. But we are not concerned with that question. It seems to me that the conclusion is forced on us that the decision in the present case is not a judgment within the meaning of that expression in Cl. 15 or Cl. 36, Letters Patent.

The preliminary objection must prevail and the appeal should be rejected with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 632

WALLIS, C. J. AND NAPIER, J.

Origanti Venkatarathnam — Defendant—Appellant.

v.

K. Desikachari and *another*—Respondents.

Original Side Appeal No. 1 of 1918, Decided on 21st November 1918, from the judgment of Coutts-Trotter, J.

Madras High Court Original Side Rules, R. 119—Disobedience of order of Official Referee—Court has power to commit for contempt.

A Judge presiding on the original side of the Madras High Court has power under R. 119 to commit a person for contempt for disobeying the order of the Official Referee to produce certain documents alleged to be in his possession, 10 *B. H. C. R.* 4, *Foll.* [P 632 C 2]

T. Narasimha Iyengar—for Appellant.

V. V. Srinivasa Aiyangar, *Venkatasubba Row* and *Radhakrishnayya*—for Respondents.

Judgment.—This is an appeal from an order of Coutts Trotter, J., directing defendant 3 to be committed for contempt for disobeying four orders of the Official Referee to produce certain documents alleged to be in his possession. The account-books in question were admitted by defendant 3 in his affidavit of documents to be then in his possession. He was in charge of the Bezwada branch of the suit business, and the accounts which were the accounts of the branch were kept there. They had been sent to Madras, for the purpose of an arbitration in the present suit and then taken back to Bezwada, and the correspondence shows that they were again sent to Madras in connexion with the arbitration in February 1913. The arbitration fell through, as appears from a summons taken out on 3rd March 1917 relating to the further prosecution of the suit. There is evidence that the books in question were sent back to Bezwada on 6th March, where it appears they were wanted for the purpose of making up accounts with the Bombay branch of the business. Ex. 35 dated 20th May 1917, clearly establishes in our opinion that the missing books were then at Bezwada, as it would have been impossible to make up the accounts for the successive years 1911, 1912, 1913 and 1914 without them, and cannot accept defendant 3's story that these accounts were written up in Bezwada from materials obtained from the books in Madras Defendant 3 was in possession of the books in May and should have produced them with the rest of the books produced by him at the beginning of August. He has neither produced them nor given any satisfactory account of what has become of them, and we are unable to interfere with the finding of Coutts Trotter, J., that he has been guilty of wilful disobedience to the order of the Official Referee, and has rendered himself liable to commitment for contempt under R. 119, Original Side Rules. The fact that the order for production was made by the Official Referee to whom the case had been referred makes no difference. *Dhurandhardas Sakharam* v. *Bhau Govind* (1). The order, as drawn up, contains this :

"Until such time as he shall comply in all respects with the said orders of the Official Referee and purge himself of the said contempt."

It is not clear whether at the date of the application for committal the missing books were in his possession or that of defendant 1 who has now fallen out with him, and in these circumstances we modify the order by substituting for the words "until such time as he shall" the words :

"for a term of three months from the date of his arrest unless he shall at any time before the expiration of the said term."

a from of order approved in *Fernandez, Ex parte* (2) and by Mathew, J., in *Davies, In re* (3). Otherwise the appeal is dismissed with costs of plaintiff. Memo of objections dismissed with costs payable by plaintiff.

S.N./R.K. *Order accordingly.*

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(1) 10 B. H. C. R. 4.
(2) [1861] 10 C. B. (n. s.) 3.
(3) [1888] 21 Q. B. D. 236.

A. I. R. 1919 Madras 633

KUMARASWAMI SASTRI, J.

Kripasindhu Naiko and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 773 and 774 of 1917, and Criminal Revn. Petn. Nos. 620 and 621 of 1917, Decided on 2nd July 1918, against judgment of Dist. Magistrate, in Criminal Appeals Nos. 16 and 17 of 1917.

(a) Criminal P. C. (1898), S. 110—Limitations on issue of notice is stay of accused within jurisdiction.

The issue of notice under S. 110 is not a formal matter and the section limits the power to issue the notice to the Magistrate in whose jurisdiction the accused is. [P 634 C 1]

(b) Criminal P. C. (1898), Ss. 110 and 530—Issue of notice by Magistrate without jurisdiction is not validated by fact that it was drawn up by orders from District Magistrate—Defect is question of jurisdiction and falls under S. 530.

The issue of a notice under S. 110 is a judicial act to be exercised after due consideration of the materials placed before the Magistrate, and not merely an executive order to be passed as a matter of course on a complaint by the police. The issue of a notice by a Magistrate without jurisdiction cannot be justified on the ground that it was drawn up under orders from the District Magistrate. [P 634 C 1]

A defect in the issue of the notice is not a mere irregularity, but the question is one of jurisdiction and falls under S. 530: 44 *I. C.* 122, *Diss. from.* [P 634 C 2]

(c) Criminal P. C. (1898), S. 110—Joint trial of two persons under S. 110 (f) is illegal.

It is not legal to try two persons jointly charged under S. 110 (*f*). [P 635 C 1,2]

The test to be applied in cases where a plea of misjoinder is raised is whether there has been habitual association between the persons charged in respect of the misconduct alleged in the complaint. [P 635 C 1]

(d) Criminal P. C. (1898), S. 110—Undivided members of family are not liable for misconduct of particular members.

The fact that persons are members of an undivided family would not by itself render each member liable for the misconduct of any other member, and where they are living separately, there is not even the presumption that one member knew and assented to the misdeeds of the other. [P 635 C 1]

Evidence of general repute does not mean hearsay evidence. [P 635 C 2]

(e) Criminal P. C. (1898), S. 110—Evidence of repute is not hearsay—Belief of persons that particular person has certain characteristic because there are rumours to that effect—No reasons shown for impression—Such belief is inadmissible.

The belief of a class of persons, that a particular individual has done particular acts or has characteristics of a certain kind because there are rumours to that effect in a particular place, is not admissible as evidence of repute where no facts are mentioned to indicate that there were sufficient reasons for the impression. [P 635 C 2]

(f) Criminal P. C. (1898), Ss. 110 and 439—Essentials of notice—Defect not objected to—Accused not prejudiced by defect—High Court should not quash proceedings in revision.

A notice under S. 110 must contain something more than a reproduction of the clauses of the section. There should be sufficient indication of the time and place of the acts charged and sufficient details to enable the accused to know what fact he is to meet, but it is not necessary to give a list of witnessee. [P 636 C 1]

Where however the defect has not been objected to in the trial Court, the High Court ought not to quash the proceedings in revision in the absence of any proof that the accused was prejudiced by the defect. [P 636 C 1]

(g) Criminal P. C. (1898), S. 110—Landlord keeping tenants of bad character is no ground for requiring security.

The facts that a landlord has tenants of bad character under him and lends them money when they are in difficulty or mediates between his tenants who are accused of theft and their victims, are not grounds for requiring security from the landlord under S. 110 [P 640 C 2]

(h) Criminal P.C. (1898), S. 110—Inference drawn by forest officers as to persons who committed forest offences are not evidence of repute.

Inference drawn by forest officials as to persons who committed forest offences are not evidence of repute. The Court should test the source of the information that led the official to infer that the accused had anything to do with the offences. [P 640 C 2]

K. V. L. Narasimham, P. Narayanamurthi and *K. Srinivasa Iyengar*—for Petitioner.

C. Narasimmachari—for the Crown.

Judgment.—These petitions are filed against the order of the Subdivisional Magistrate of Chatrapur which was confirmed on appeal, directing the petitioners to furnish security for good behaviour under S. 110, Criminal P. C. The petitioners are brothers. One of them is the karji of panchabuhuti and the other is the sirdar of gondhadhars. The notice issued to them by the Divisional Magistrate sets out that the charge sheet submitted by the Sub-Inspector of Police made it appear to the Magistrate that they were habitually protecting thieves, habitually committing or attempting to commit or abetting the commitment of offences involving a breach of the peace, and were so dangerous and desperate as to render their being at large without security hazardous to the community. The Subdivisional Magistrate directed them to execute a bond for Rs. 500 with two sureties of Rs. 100 each for the period of

one year. Various legal objections to the validity of the order are raised and I shall deal with them before going into the evidence.

The first objection raised is that the Subdivisional Magistrate had no jurisdiction to issue notice or try the case, as the accused persons did not reside within his jurisdiction. It appears from the record that the police sent the charge sheet to the District Magistrate, who did not issue any notice under the Criminal Procedure Code, but sent the charge-sheet on for disposal first to the Special Agent and then to the Subdivisional Magistrate of Chatrapur. It is contended that the Magistrate issuing the notice under S. 110, Criminal P. C., should be the Magistrate within whose jurisdiction, the persons against whom the notice is issued reside and that as the accused admittedly reside outside his jurisdiction, the proceedings taken by him are invalid. As it is clear from the records, and not disputed by the Public Prosecutor, that the accused are residing within the jurisdiction of the Deputy Magistrate of Gumsur, it is clear that the Subdivisional Magistrate of Chatrapur had no jurisdiction to issue the notice. It was no doubt open to the District Magistrate to have issued the notice under S. 110 when he received the charge-sheet, as his jurisdiction extends over the whole district and he would be a Magistrate within whose jurisdiction the accused lived, but he did not do so. The issue of notice is not a formal matter and it is clear that S. 113 limits the powers to issue the notice to the Magistrate in whose jurisdiction the accused are. The issue of a notice under S. 110 being a judicial act to be exercised after a due consideration of the materials placed before the Magistrate and not merely an executive order to be passed as a matter of course on the complaint by the police, the legislature evidently restricted the jurisdiction to issue the notice to the Magistrate in whose local limits the persons complained against were living or were making themselves a danger to he public peace, as he would presumably have a knowledge of the local conditions and would be the fittest person to judge whether any action was necessary. It is to be noted that under S. 107, Cl. 2, Criminal P. C., the notice is to be issued by the Magistrate within the local limits of whose jurisdiction the person informed against is residing or the place where breach of the peace is apprehended is situate, while in S. 110 the acts complained of must be done by a person within the limits of his jurisdiction. The question is concluded by the recent decision of Abdur Rahim and Napier, JJ., in *Nagireddy Kondareddy, In re* (1). In dealing with a similar objection taken under S. 107, Criminal P. C., where the District Magistrate sent on the records to the Divisional Magistrate without issuing a notice, the learned Judges observe that the District Magistrate cannot be said to have taken proceedings under the section until he issues notice to the person charged to show cause why he should not be proceeded against, that the Magistrate who issues the notice must be deemed to be the person who initiates proceedings and that the District Magistrate to whom the police reported certain facts, and who passed the matter on to the Head quarter's Deputy Magistrate. cannot be said to have initiated proceedings and transferred it to the Head quarters Deputy Magistrate for disposal.

They also held that S. 528 did not empower the District Magistrate to transfer the case to a Magistrate who had no local jurisdiction over the matter by reason of S. 107, Cl. 2. A similar view is taken in *Nirbicar Chandra Mukherji* v. *Emperor* (2), where it was held that the fact that the District Magistrate directed a Subordinate Magistrate to draw up proceedings against a person not resident in the jurisdiction of the Subordinate Magistrate would not give the latter Magistrate jurisdiction, as the provisions of S. 107 were imperative. *Surjya Kanta Roy Chowdhry* v. *Emperor* (3) and *King-Emperor* v. *Munna* (4), referred to with approval in *Nagireddy Kondareddy, In re* (1) are also in point. It is argued that the drawing up of proceedings by the Deputy Magistrate is only an irregularity. The question is one of jurisdiction and more appropriately falls under S. 530, Criminal P. C. It was treated as fatal to the validity of the proceedings in all the cases above referred to. My attention has been called to *Ohiduddin Chou-*

(1) [1917] 41 Mad. 246=41 I. C. 990.
(2) [1909] 1 I. C. 78.
(3) [1904] 31 Cal. 350.
(4) [1902] 24 All. 151.

dhury v. *Emperor* (5), where it was held that the procedure of the District Magistrate was only an irregularity, but I am bound by the decision of the Madras High Court which is supported by authority. No reasons are given in the above case for taking a contrary view and the decisions of the Calcutta High Court are not even referred to. I am of opinion that the Sub-divisional Magistrate of Chatrapur had no jurisdiction to issue the notice and try the case and that the proceedings are void.

The next objection relates to the joint trial of accused 1 and 2. They are brothers who have undivided properties, but they live separately. Accused 1 is the village Karji of Panchabubhuti and lives at Panchabubhuti. Accused 2 is a Sirdar and lives at Gondhadhars. The two villages are about 10 miles distant from each other. It is contended that evidence against accused 1 has been used as evidence against accused 2 and vice versa and that the parties have been greatly prejudiced thereby. The test to be applied in all such cases where a plea of misjoinder is raised is whether there has been habitual association between the persons charged in respect of the misconduct alleged in the complaint. The fact that persons are members of an undivided family would not by itself render each member liable for the misconduct of any other member, and where they are living separately there is not even the presumption that one member knew and assented to the misdeeds of the other. In the present case there is no evidenoe of any association of the two accused in any particular act, and even if the evidence against one is true it is quite consistent with the ignorance of the other accused as to the wrongful acts alleged. There can belittle doubt that one accused has been prejudiced by evidence against the other being used as evidence against him, and I am of opinion that both the lower Courts were wrong in not examining the evidence against each of the accused with a view of determining whether security should be demanded against him or not. I might in this connexion refer to *Hari Telang* v. *Queen-Empress* (6), where it was held that it was not legal to try jointly two persons charged under S. 110, Cl (f).

Objection has also been taken to the admission of a large body of irrelevant evidence in the belief that it was admissible as evidence of repute. Evidence has been let in to the effect that *A* heard from *B* that the latter suspected one of the accused of misconduct. It seems to be clear that such evidence is not evidence of repute and is clearly inadmissible. Evidence of general repute under S. 117, Cl. (3), does not, for the purpose of inquiry into conduct of persons under Ch. 8 mean hearsay and repute has been clearly pointed out in *Rai Isri Pershad* v. *Queen-Empress* (7). The following observations are in point:

"It is hardly necessary to say that evidence of rumour is mere hearsay evidence and hearsay evidence of a particular fact. Evidence of repute is a totally different thing. A man's general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen and if it is proved that a man who lives in a particular place is looked upon by his fellow townsmen, whether they happen to know him or not, as a man of good repute, that is strong evidence that he is a man of that character. On the other hand if the state of things is that the body of his fellow townsmen who know him look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad charaeter; but to say that because there are rumours in a particular place among a certain class of people that a man has done particular acts or has characteristics of a certain kind these rumours are in themselves evidence under this section, is to say what the law does not justify us in saying."

The case was considered in *Chintamon Singh* v. *Emperor* (8) where all that was held was that when an offence, e. g. dacoity, was committed in another village, evidence of repute given by persons residing in that village was also admissible. In *Alep Pramanik* v. *King-Emperor* (9) it was held that persons ought not to be bound down under S. 110, Criminal P. C., upon the mere statement of witnesses that they suspect or are under the impression that the persons proceeded against are thieves or dacoits, where no fact is mentioned to indicate that there was sufficient reason for their suspicion or impression. The next objection is that the notice to the accused to show cause is vague and insufficient. The notice issued by the Divisional Magistrate runs as follows:

(5) [1918] 44 I. C. 122.
(6) [1900] 27 Cal. 781.
(7) [1896] 23 Cal. 621.
(8) [1908] 35 Cal. 243.
(9) [1907] 11 C. W. N. 413.

"Whereas it has been made to appear to me by the charge sheet submitted against you by the Sub-Inspector of Police, Bugada station, under S. 110 (e) and (f), Criminal P. C., that you are habitually protecting thieves, habitually committing or attempting to commit or abetting the commitment of offences involving a breach of the peace, and are so dangerous and desperate as to render your being at large without security hazardous to the community, you are hereby required to show cause why you should not be required to execute a bond for Rs. 500 with two sureties of Rs. 100 each to be of good behaviour for a period of two years."

I am of opinion that notices under S. 110 must contain something more than a reproduction of the clauses of the section. There should be sufficient indication of the time and place of the acts charged and sufficient details which would enable the accused to know what facts he is to meet, though, as pointed out in *Chintamon Singh* v. *Emperor* (8), it is not necessary to give a list of the witnesses. In *Nagireddy Kondareddy, In re* (1) it was held that a general notice which did not state when the threats complained of were uttered or who the persons threatened were or when the apprehension of a breach of the peace arose was vague and bad in law and that the proceedings were liable to be quashed on that ground. I am however of opinion that when a party does not during the trial seek for information and does not complain in the lower Court or show that he has been substantially prejudiced, the High Court in revision ought not to quash the proceedings in the absence of any proof of prejudice. In the present case I am unable to find anything to show that the accused were unable to cross-examine the prosecution witnesses effectively or cite their own evidence in consequence of the vagueness of the charge.

Turning to the merits I think the order ought not to have been made, as the evidence which is relevant is totally insufficient to bring the accused under S. 110. Accused 1 is the Karji of Panchabhubhuti and accused 2 is the Sirdar of Gondhadhars. They own extensive properties and have several Panos in their service like other landlords in the district. So far as accused 2 is concerned, the Governor-General in Council presented him with the certificate Ex. 2 in recognition of his help in preventing riots in 1889 and his good services in watching the frontier in 1894. He was also given a gun in 1905 and Coronation Medal in 1912 by the Government. He was also appointed Member of the Taluk Board. There is a large body of evidence of respectable Government officials and also of non-officials which, in my opinion, certainly outweighs the unreliable and interested evidence of the prosecution witnesses. Mr. Green, the Deputy Magistrate of Gumsur since 1913, within whose jurisdiction the accused live and who had ample opportunities of knowing their character, states that he never received petitions to the effect that the accused were receiving stolen property or were dangerous to the public and that he never came across any such complaints in the records prior to his time. He states that in his opinion the two accused are of good conduct.

It is to be regretted that all kinds of insinuations were allowed to be made by the police against Mr. Green, the more so as there is nothing, so far as I can see, to warrant the belief that Mr. Green who is a responsible Government servant of long standing acted improperly. The Subdivisional Magistrate has fallen into a strange error when he states that P. W. 10 complained against accused 1 and 40 persons having cut his crop and Mr. Green took the case on his file and dismissed it as false. P. W. 10 states in his evidence that he complained to the Superintendent of Police who referred him to a Magistrate and that he never filed any complaint before the Deputy Magistrate, Mr. Green. Far from dismissing any case brought by P. W. 10, Mr. Green dismissed a case filed against P. W. 10. Mr. Narayanamurthy, D. W. 1, who is a pleader and who was chairman for 15 years, states that accused 2 was a Member of the Taluk Board, that he has known accused 1 and 2 for 10 or 12 years and that they are reported to be good men. There is no cross-examination of this witness as to the unreliability of the source of his information. The District Magistrate discredits him because, in his opinion, he made contradictory statements as to his having been retained as a pleader by the accused. He states that he was never retained as a pleader by the accused and immediately afterwards states that he was not engaged as their pleader in a case.

What the witness evidently meant is that he had no general retainer as vakil to appear in all their cases, but was only

engaged on a special occasion by them and there is no contradiction if the well-known distinction between a pleader having a general retainer to appear for a party and his being engaged only in a special case is kept in view. D. W. 2 was the Sub-Assistant Surgeon of Russalkonda for eight years prior to 1912. He states that he has only heard good reports of their character. As the prosecution has let in evidence of acts said to have been committed seven or eight years ago, his evidence is certainly relevant. D. W. 3 was the Stationary Sub-Magistrate of Russalkonda in 1910 and Tahsildar of Gumsur Taluk in 1913. He states he does not remember having heard any bad reports about accused 2. D. W. 5 is a land-holder and merchant who has 1,500 or 1,600 bharnams of land and who was a Taluk Board and Union Member. He speaks to the good character of the accused and says he has known them for 25 years and never heard that the accused caused thefts to be committed or harboured thieves or received stolen property. His purchasing skins from Panos as a skin merchant is no ground for discrediting his evidence nor is his having testified to accused 1's character on a previous occasion.

There is nothing in his cross-examination to suggest he does not own 1,500 or 1,600 bharnams of land. D. W. 6 is the trustee of a temple and owns 180 bharnams of land paying a kist of 80 or 90 rupees. He speaks to the conduct of the accused and says that they are known to be respectable persons in the mittah. D. W. 7 also speaks to their good character. D. W. 8, who says he is a schoolmaster and owns 150 bharnams of land states that accused have good character and are not known to be receivers of stolen property or abettors of thefts or harbourers of thieves. D. W. 9 is a karnam and he speaks to the character of the accused. D. W. 10, who is an inamdar and owns 700 bharnams of land, states that he has known the accused for 15 or 16 years and that their character has been good and that he never heard any reports against them. D. W. 11, who lives near the accused's village, states that accused get an income of Rs. 25,000 from their lands, that they are respectable and charitable persons. D. W. 12, who owns about 450 bharnams of land, states that he knows the accused well and that they bear a good character. D. W. 14, who is a retired Deputy Collector and who was in Gumsur Division in several capacities for several years till April 1913 states that he knows the accused well and that he never heard anyone say that they received stolen properties harboured thieves, or forcibly carried away properties. He says that accused 2's conduct was excellent. This witness had ample opportunities of knowing their character and his evidence shows that at any rate till 1913 they bore a very good character. D. W. 15 is the Sub-Assistant Director of Survey, who was in charge of Gumsur Division in 1909 and 1915.

He says he heard nothing against their character and that he knows that their character is good from conversations he had with them and the raiyats. D. W. 16 was a Revenue Inspector of Gumsur for three years (1906-10). He says that their character is good and that he never heard complaints about their having received stolen property or harboured thieves or taken forcible possession of property. D. W. 17 who was a Deputy Ranger for 1913 and 1915, also speaks for their good character. D. W. 18 who owns 300 bharnams of land says he has known accused since their infancy and that they have always borne a good character and that he never heard anything against them. D. W. 19, who was Deputy Collector in Gumsur in 1902, 1905 to 1908, 1911 and 1912, states that he knows accused 1 and 2, that their conduct was good, that accused 2 was Member of the Taluk Board and that he never head that they harboured thieves or received stolen property. D. Ws. 22 and 23, who own lands in the neighbourhood, also speak to their good character. D. W. 24, who was Tahsildar of Gumsur from 1911 to 1914, states that their character was good and that he heard nothing against them. As accused 1 was his subordinate he had special means of knowing his character. D. W. 25, who is a retired Tahsildar and at present manager under the Maharaja of Bobbili, states that he was Sub-Magistrate of Gumsur from 1910 to 1912 that he knew accused 2 and that he heard nothing against his character. D. W. 26 is a retired Deputy Tahsildar, who says he knows accused 1 and 2 from 1888 and he never heard anything against them. D. W. 27 is the Revenue Inspector who

has been there for about three years and he states he heard nothing against the accused. D. W. 28, who was a Revenue Inspector, says that during his stay in the division the character of accused 1 and 2 was good and that he heard nothing against them. I am unable to agree with the Divisional Magistrate who dismissed the defence evidence summarily as being of a negative and intangible character and not of persons living on the spot.

It is difficult to believe that if the accused were notoriously bad persons or were guilty of even a fraction of the acts attributed to them, Deputy Collectors, Tahsildars, Sub-Magistrates, Revenue Inspectors and persons owning lands in the vicinity would not have heard of it. Nor am I able to appreciate the remarks of the District Magistrate that the evidence of Mr. Green's subordinate has to be discounted, as I see nothing which casts any doubt on the bona fides of Mr. Green. The evidence of the prosecution witnesses is vague and indefinite as to time and some acts complained of take us back to several years. It also appears to me that men who bore a good character till a few years ago would not suddenly have degenerated into thieves and dangerous persons. The evidence of the defence official witnesses cannot be therefore rejected so summarily as the District Magistrate has done.

Before discussing the prosecution evidence, it is necessary to bear in mind the circumstances under which the present complaint was laid by the Sub-Inspector who, as found by the Divisional Magistrate, has identified himself with the faction opposed to the accused in the dispute about Gochabadi land. Accused 1 has taken a lease of the village from some of the junior members and had also purchased some shares and was in possession for a long time. The Sirdar of Koradabadi tendered pattas to tenants alleging that he was entitled to 1/5th share. The disputes culminated in 1897 by the High Court deciding that the Koradabadi Sirdar could not tender pattas: see *Raghu Gowdo* v. *Gowdo Chandro Naiko* (10) Exs. 32 and 33 series are the documents under which accused 1 got possession. The Koradabadi Sirdar having failed in the High Court did not file a regular suit, but tried to get possession through the Mahapatros who had lent moneys to Gochabadi Mokassadar. The lessors of accused 1 at one stage supported him but afterwards took sides with the Sirdar and the Mahapatros. Proceedings were taken by accused 1 under S. 145 on 13th April 1914 and order (Ex. 44) was passed in favour of accused 1 and his possession was confirmed. No suit was filed to contest this. The Koradabadi Sirdar then wanted to prevent accused 1 reaping paddy and filed a criminal complaint of theft of paddy which was dismissed. Disputes continued. Accused 1 again applied under S. 145 in April 1916 and the order Ex. P. 3 was passed directing that accused 1 should not be disturbed as regards 4/5ths of the estate and the counter-petitioner as regards 1/5th. The order as regards 1/5th was ultimately upset by the High Court. Taking advantage of the order of Mr. Arudt, the Special Assistant Agent, the Koradabadi Sirdar attempted to enter on the lands and cut the crops, but the tenants who raised the crops objected that it was they that should harvest and not the landlord who had at best only a claim to the Rajabhagam after tenants harvested. Accused 1 filed a suit on 23rd November and got a temporary injunction Ex. P-4. The Koradabadi zamindar was in the meanwhile harvesting the crops and it was alleged that though the order of the civil Court was shown to the police they declined to interfere. The evidence of the constable, P. W. 22, supports this. Mr. Green then passed an order, dated 27th November 1916, directing the police to obey the order of the civil Court. The Magistrate finds, and there can be little doubt from the evidence, that throughout these proceedings the Sub-Inspector of Police, who is responsible for the initiation of the proceedings under S. 110 against the accused and who is a relation of the Mahapatros, was an active partisan of the opposite party. It was after the order of Mr. Green and when the Mahapatros and the Sirdar were defeated in their attempts to get possession that proceedings were initiated under S. 110 against the accused. Under these circumstances the evidence of the Sub-Inspector and the police witnesses has to be received with considerable caution.

As already pointed out, the charges against the accused are (1) habitually protecting thieves (2) habitually com-

(10) [1897] 7 M. L. J. 243.

mitting or attempting to commit or abetting the commission of offences involving a breach of the peace (3) being dangerous and desperate. The second charge relates to cutting crops and taking forcible possession of lands. The chief items are Gochabadi lands, Panokyari lands and lands in Singapur. As regards Gochabadi lands. I have already given a history of the dispute. The case against accused 1 that he was present and came to the land with a number of persons is clearly disproved, as accused 1 was on that date at Berhampore. The Subdivisional Magistrate observes in this part of the case :

" My opinion of this affair, as far as it relates to accused 1, is that he did send his men to Gochabadi to make a show of force but that he did not intend to use force. His idea was obviously to hold up proceedings in Gochabadi while he took steps in civil Courts. I cannot acquit accused 1 of all blame in this matter, even though the ultimate responsibility for it rests on other shoulders."

It appears from the evidence that the lands were shared on the Rajabhagam system and if this is so, the raiyats were justified in objecting to the landlord cutting the crops even assuming that the Sirdar was entitled to 1/5th of the lands. The order of Mr. Arudt was admittedly set aside by the High Court. Accused 1 would well have been within his legal rights if he took steps to prevent the opposite side from unlawfully entering on land in his possession, especially as Mr. Arudt's order referred to a fifth ununspecified share. It is difficult to see how on the findings of the Magistrate the case is one for security under S. 110.

As regards the Panokyari lands the contesting parties were P. W. 19 and one Govinda Naiko. Lakkow Prodhano purchased the lands in 1910 under Ex. 3 and leased them to Govinda Naiko by the deed Ex. 5-a. In 1913 the brother of P. W. 13 got a sale-deed from the same vendor, Ex. 5-b. The dispute between the rival claimants is pending in second appeals in the High Court. Exs. 5-a and 6 are leases in favour of Govinda Naiko. Prima facie title is in Govindo Naiko and the Magistrate states that Exs. 4, 5, 6 and 7 show that Govindo Naiko has a title. The learned Magistrate was wrong in stating that accused 1 admitted bringing his men to cut the crop. His vakil denies it and I have not been referred to any part of the record supporting the Magistrate's statement. It is clear that accused 1 had no interest in the land. As remarked by the Magistrate, P. W. 19 is a bitter enemy of accused 1 and it is difficult to see how his statement can be accepted. No report was sent to the police and it is extremely unlikely that P. W. 19 or the enemies of accused 1 would not have filed complaints, if as a matter of fact accused 1 went to the land with several men and carried away the crops. The paddy was not taken to accused's house but was in Govinda Naiko's house at Khyronadi. Ex. 22 shows that the accused were discharged in the theft case and Ex. 23 that the District Magistrate upheld the order of discharge. I find it difficult to see how the accused can be ordered to furnish security on so flimsy materials.

As regards the Singapur lands the Magistrate has fallen into the error already pointed out by me that Mr. Green took the complaint of P. W. 10 on his file and threw it out. It appears from the evidence that Mr. Green threw out the complaint against P. W. 10. The evidence of P. W. 10 is worthless, especially as he wants to make out that the complaint which was thrown out was concocted with the assistance of the Deputy Collector. As regards the dispute between P. W. 9 and D. W. 29 about lands, it is clear from the evidence that D. W. 29 obtained a decree Ex. 24 against P. W. 9. It also appears that he got possession. P. W. 9 says that accused 1 and 2 cut the crops with the help of Panos five years ago. The statement of P. W. 9 that the Deputy Collector (who was not then Mr. Green) asked him to complain against the Haddis and Panos and not against accused 1, is on the face of it absurd. It seems to me impossible to act on evidence of this kind, relating to an occurrence said to have taken place four or five years previously. The evidence of P. W. 11 is equally worthless. He is a servant of the opposite faction. He says he complained to nobody about the alleged conduct of accused 1 and 2 even though, according to him, the Karji sent him to the police station with a false report.

The evidence as to forcible cutting and carrying away of crops is therefore worthless and cannot, in my opinion, be accepted. As regards the complaint about the rescue of prisoners, it is said to have taken place so long ago as 1908.

There is little to connect Sola Pano with the accused. It is difficult to see how the accused can be held to be liable for the acts of the Panos in rescuing a fellow Pano. It not unfrequently happens that amongst the lower classes a fellow caste-man who is arrested is rescued by the other villagers turning up, and it is a large order to hold the landlord liable simply because some of his servants rescued others. It does not appear that any finding was recorded in the trial that accused had any hand in the rescue of Sola Pano. His plea seems to have been that he escaped while the constables escorting him were asleep. P. W. 28, the constable, speaks to the contents of reports and to his evidence in the case. The originals ought to have been produced, if it was intended by the prosecution to rely on them. The second case about a rescue is limited to an attempt in 1915 by accused 1 and the evidence is equally worthless. It is difficult to see why if the evidence of P. W. 22 is true, no steps were taken against accused 1 at the time. The evidence of this witness as to accused 1 turning up at Gochabadi with 300 men is false, as accused 1 is proved to have been at Berhampore on the date and the Magistrate finds that he was not at Gochabadi when the raiyats turned up and refused to allow the Koradabadi servants to cut the crops. P. W. 16 states that he turned up with 12 men to support P. W. 22 and that the Panos of accused 1 ran away but accused 1 remained there. This is improbable. He admits that neither he nor the constable reported that accused 1 attempted to rescue the prisoners.

As regards complaint of theft or the abetment of theft, the evidence of witnesses who say that they heard from *A* that he suspected the Sirdars or that theft was at their instance has, for the reasons already given by me, to be excluded. It is not evidence of repute and if the thefts are sought to be proved, the witnesses who have a direct knowledge of the affair ought to have been called. The Magistrate seems to have thought that because Panos committed theft and some prosecution witnesses state that they are accused Panos, the case against the accused is proved. It is well known that Panos like Marravars, Kallars and other tribes are addicted to theft and lawlessness especially, during the non-cultivating seasons. The District Magistrate in his judgment says that Panos are notoriously addicted to crime. Under these circumstances great caution has to be used in fixing liability on the landlords, especially as almost every landlord in those parts has to employ Pano cultivators. In this connexion I may refer to the observations in *Nilkamal Das* v. *Emperor* (11), where it was held that the facts that a landlord has tenants of bad character under him, that he lends money to tenants of bad character under him when they are in difficulty and that he mediates between his tenants who are accused of theft and their victims, are not grounds for requiring security under S. 110. If these remarks are borne in mind and hearsay evidence excluded, there is very little reliable evidence to show that accused either took part in or abetted thefts. They are rich and influential persons, and it is difficult to believe that they either profited by the small thefts or instigated Panos (who required little inducements to thieve) to commit theft. The fact that in 2 or 3 cases they interested themselves in the case against the Panos, even if true, is quite consistent with a desire to help servants whom they considered wrongly charged. The Magistrate erred in thinking that in spite of acquittals of the persons actually charged with offences the facts relied on by the prosecution in those cases can be relevant evidence against the present accused. I need only refer to the observations in *Nagireddy Kondareddy, In re* (1) already referred to.

As regards forest offences, any inference that particular forest officials may draw as to the persons who committed theft will not be evidence of repute. The Court has to test the sources of the information that led them to infer that the accused had anything to do with the thefts. Statements in Forest Department files will not be evidence by themselves. As other landlords besides the accused have Pano servants, the fact that the Forest Ranger was of opinion that from the nature of the wood stolen, others ought to be behind them would apply generally to landlords, and there is no special reason why the accused should be charged in particular. The forest officials were not likely to be afraid of the village

(11) [1907] 6 C. L. J. 711

Karji (accused 1) and there is no reason why they did not prosecute him. The illicit grazing of the buffalos on one occasion in respect of which compensation was levied by the Forest Department, even if true would not be a ground for requiring security under S. 110; nor would the remarks in a file that some shicaries on one occasion used the gun of accused 2 be sufficient. As regards the evidence of P. Ws. 14 and 15 it is difficult to see how, even if it is true, any case of theft can be made out. Accused 1 told P. W. 14 that his servants brought timber without orders and offered to pay the price, which offer the merchant accepted. P. W. 15 says that stolen timber was found near the village where accused 1 and several others lived. The fact that accused 2 purchased the logs and paid Rs. 75 for them would not show he was the thief.

As regards evidence of repute the prosecution witnesses are not men of any special consequence and the evidence is in my opinion more than counterbalanced by the evidence of officials and respectable residents, which I have already referred to. Several prosecution witnesses are on bad terms with the accused and evidence of the sort they give is easily procurable by the Police Sub-Inspector, P. W. 1, who is on bad terms with the accused and who launched the present prosecution after all attempts to help the Mahapatros and the Sirdar in the land dispute between them and accused had failed. The Magistrate is of opinion that the Sub-Inspector, P. W. 1, is the champion of the faction opposed to the accused, and I have little doubt that the present proceedings were not instituted bona fide by P. W. 1. The case has been very fully argued on both sides, and I have little hesitation in holding that both on the points of law and the questions of fact raised the order requiring security is unsupportable. I set aside the order and direct that the bonds, if executed by accused 1 and 2 be cancelled.

S.N./R.K. *Order set aside.*

1919 M/81 & 82

* * A. I. R. 1919 Madras 641

Full Bench

WALLIS, C. J., AYLING AND SESHA GIRI AIYAR, JJ.

Batchu Ramajogaya—Petitioner.

v.

Vajjula Jagannadham and *another*—Opposite Parties.

Civil Misc. Petn. No. 2743 of 1917, Decided on 14th November 1918.

* * **Hindu Law—Minor—Covenant on behalf of minor entered into by guardian for his benefit—Decree cannot be passed against minor on his estate if no charge is created on estate under that covenant.**

Per *Wallis, C.J.*—A decree cannot be passed against a minor or his estate on a covenant entered into on his behalf by a guardian for his benefit. [P 644 C 1]

Per *Ayling* and *Seshagiri Aiyar, JJ.*—No decree should be passed against a minor or his estate on a contract entered into on his behalf by his guardian under which no charge is created on the estate, excepted in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject. [P 645 C 2]

Per *Seshagiri Aiyar, J.*—What the Judicial Committee intended to lay down in *Waghela Rajsanji* v. *Shekh Masludin*, 11 *Bom.* 551 (*P.C.*); was that an onerous covenant cannot be imposed by the guardian on the person or property of the minor. The bona fieds of the guardian, is not an element for consideration. But where an infant's estate would be liable but for the interposition of the guardian, there is no reason why the fact of the latter undertaking that liability should not bind the estate. The rule laid down in *Waghela Rajsanji* v. *Shek Masludin*, 11 *Bom.* 551 *P.C.*): was not intended to affect the Hindu law liability of the minor. (Authorities reviewed.)

[P 644 C 2; P 645 C 1]

P. Narayanamurthi—for Petitioner.

P. Somasundaram—for Opposite Parties.

Order of reference

Napier, J.—The plaintiff in this suit sues for recovery of moneys due on a mortgage deed executed in his favour by the mother of defendant 1 as his guardian. The lower appellate Court found that the greater part of the money was borrowed for the marriage of defendant 1's sister and that the amount was moderate and spent for legitimate purposes. Both Courts have held that the property could not be mortgaged without the sanction of Government. But the first Court held that defendant 1 was bound to liquidate the debt by any property other than the mortgage property, and decided that the plaintiff was entitled to a decree for Rs. 550 against defendant 1 as head of the Vajjula family and manager of the family property. The decree followed the terms

of the judgment. The sole point taken before us is that this is a personal decree against the minor on an obligation created by his guardian and that no such decree can be given. Reliance is placed on the decision of the Privy Council in *Waghela Rajsanji* v. *Shek Masludin* (1). The covenant in that case, which was contained in a mortgage of a Talukdar's estate by his guardian, is found in the deed set out at pp. 553 and 554. It is as follows:

"If Government should make a claim in any way * * * and if you should have to pay * * * all those moneys and the interest on those moneys we and our heirs are to pay to you * * * you are to recover your money from the said property, etc., and from our persons."

The Bombay High Court gave judgment for a sum of Rs. 12,000 to be recovered from the defendant Rajsanji's property generally as well as from him personally. So far as the personal liability is concerned, the view of their Lordships is stated at page 561:

"Now it was most candidly stated by Mr Mayne, who argued the case on behalf of the respondent, that there is not in Indian Law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English Law. In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances. Their Lordships are not aware of any law in which the guardian has such a power, nor do they see why it should be so in India. They conceive that it would be a very improper thing to allow the guardian to make covenants in the name of his ward, so as to impose a personal liability upon the ward and they hold that in this case the guardian exceeded her powers so far as she purported to bind her ward, and that, so far as this suit is founded on the personal liability of the Talukdar, it must fail."

This decision was considered by this Court in *Tirumalai Muthuveera Paramasiva Venkitasami Naicker* v. *Muthusami Pillai* (2). In that case, the guardian of a minor executed a bond in favour of a certain mortgagee to pay certain expenses which the lower appellate Court found reasonable and with respect to which this Court was not prepared to differ from the lower appellate Court. The High Court was of opinion that the decision in *Waghela Rajsanji* v. *Shekh Masludin* (1) went no further than this, that no decree should be made against the minor personally, but that a decree might be made against his property. It was admitted that if the property had been specifically charged, such a decree could be passed, but it was argued before the Court on the authority of *Indur Chunder Singh* v. *Radhakishore Ghose* (3) that in the absence of such a specific charge no decree could be passed against the estate of the minor.

The Court pointed out that in *Indur Chunder Singh* v. *Radhakishore Ghose* (3) the Judicial Committee were dealing with a document which did not purport to have been executed by a guardian on behalf of the minor, and referred to p. 513 of the report, where the Board pointed out that the plaintiff was asking the minor to fulfil obligations entered into by the lessees in their own name. The judgment also points out that in several cases since the decisions of the Privy Council, this Court has held that the minor's estate could be made liable, the decisions being *Subramania Ayyar* v. *Arumuga Chetty* (4), *Duraisami Reddi* v. *Muthial Reddi* (5), *Sanka Krishnamurthi* v. *Bank of Burma* (6) and *Padma Krishna Chettiar* v. *Nagamani Ammal* (7). In view of this catena of decisions in the Presidency, the Court saw no reason why they should refer the case to the Full Bench. It has now been pressed upon us that the decision in *Tirumalai Muthuveera Paramasiva Venkitasami Naicker* v. *Muthusamy Pillai* (2) does not give full effect to the decision of the Privy Council in *Waghela Rajsanji* v. *Shekh Masludin* (1) in that that suit was dismissed by the Privy Council and no limited form of decree given. It is further contended that although in the case in *Indur Chunder Singh* v. *Radhakishore Ghose* (3) the mortgage did not purport to be executed qua guardian, there are dicta at p. 511 which are inconsistent with the decision in *Tirumalai Muthuveera Paramasiva Venkitasami Naicker* v. *Muthusamy Pillai* (2). The language is as follows:

"The contention that the mother and widow . . . . . had power to bind the minor by contract was abandoned in the Court below and their Lordships are of opinion that such a contention could not be sustained."

I agree that this is definite language. But it is doubtful whether it carries the case any further than the decisions in *Waghela Rajsanji* v. *Shekh Masludin* (1).

(1) [1887] 11 Bom. 551=14 I. A. 89 (P. C.).
(2) [1918] 45 I. C. 949.
(3) [1887] 15 Cal. 667=15 I. A. 90 (P. C.).
(4) [1903] 26 Mad. 230.
(5) [1908] 31 Mad. 458.
(6) [1911] 35 Mad. 692=11 I. C. 79=14 I. C. 389.
(7) [1915] 39 Mad. 915=30 I. C. 574.

Reliance is also placed on the decision of a Bench of this Court in *Swaminatha Aiyar* v. *Srinivasa Aiyar* (8). But that was a case not of a guardian of a minor, but of a trustee with reference to temple property, and the question now before us only arose on the suggested analogy between such a trustee and the guardian of a minor. The last case prior to the decision in *Tirumalai Muthuveera Paramasiva Venkitasami Naicker* v. *Muthusamy Pillai* (2) is that of *Ammalu Ammal* v. *Namagiri Ammal* (9). The question in that case was how far an estate can be made liable where the executor had borrowed money on a promissory note for the purpose of paying a legacy to the testator's daughter. The position then is this: that there are two cases in the Privy Council which go a long way to support the appellant's contention; and there are subsequent decisions of this Court which it is contended are inconsistent with the ratio decidendi in the Privy Council cases. I think it advisable therefore to refer to the Full Bench the question whether any decree, and if so, what decree can be passed against a minor or his estate on a covenant entered into on his behalf by a guardian for his benefit, under which covenant no charge is made on the estate.

Sadasiva Aiyar, J.—I agree.

Opinion.

Wallis, C. J.—The decision of the Privy Council in *Waghela Rajsanji* v. *Shekh Mas'udin* (1), with reference to a personal covenant made on behalf of a Hindu minor by his guardian, that a guardian cannot be allowed to make covenants in the name of the ward so as to impose personal liability upon him, precludes us in my opinion from holding that a guardian has any such power in India. It was however pointed out in *Maharana Shri Ranmalsinghji* v. *Vadilal Vakhatchand* (10) that this ruling does not affect the liability of the minor's estate under S. 68, Contract Act to to persons who have supplied him during minority with necessaries suited to his condition in life. What are necessaries must depend on the facts of each case, and in the case of a Hindu, money advanced for the expenses of a marriage which the minor has to perform or to pay off a debt binding upon him, may be recoverable under this head from his estate. It was held in this case that a guardian has no power to acknowledge debts on behalf of the minor, but this part of the decision was overruled by a Full Bench in *Annapagauda* v. *Sangadigyapa* (11), where Sir Lawrence Jenkins, C. J., pointed out that the fact that a guardian cannot impose a personal liability on his ward by contract does not prevent him from binding the ward by acknowledgments under S. 19, Lim. Act. "for an acknowledgmet under the Act is fundamentally different from a fresh contract, though it may in some respects have similar results."

Further where a guardian himself borrows money for the necessities of the minor in such circumstances as to give him a right to reimbursement from the minor's estate, his creditor may in a proper case be subrogated to his rights, as held in *Sanka Krishnamurthi* v. *Bank of Burma* (6) practically. In all the cases in this Court which are referred to in the order of reference or were cited before us, it will be found that the minor's estate could have been made liable under one of the first two heads independently of any contract by the guardian on his behalf. No practical inconvenience therefore would result from giving full effect to their Lordships' express decision but even if it were otherwise, we should be bound to follow it. That this rule is well settled appears to me to be assumed by the Privy Council in *Indur Chunder Singh* v. *Radhakishore Ghose* (5). I do not read the recent judgment in *Imambandi* v. *Sheikh Haji Mutsaddi* (12) as holding that a Mohamedan guardian can bind a minor's estate by contract, except in the sense that the minor's estate will be liable for necessaries supplied by his agency, and that he can sell the minor's property in proper cases. The question under consideration in that case was the right of a de facto guardian to alienate the minor's property.

It was also argued that the decision in *Waghela Rajsanji* v. *Shekh Masludin* (1) only established the illegality of covenants imposing personal liability on the ward in the sense of making him liable to arrest after attaining maiority in execution of a decree obtained against him on such covenants. This contention is clearly untenable. The High Court had

(8) [1917] 38 I. C. 172.
(9) [1914] 43 I. C. 760.
(10) [1896] 20 Bom. 61.
(11) [1902] 26 Bom. 221.
(12) A. I. R. 1918 P. C. 11=45 I. A. 73 (P. C.)

Passed a decree against the appellant who was sued after attaining majority on a covenant made during his minority by his guardian, for Rs. 12 000 with interest to be recovered from the defendant's property generally as well as from him personally. The contention raised on appeal was that the covenant was not binding on him at all, and their Lordships upheld this contention and dismissed the suit altogether. Further the term personally liable is well understood in English law, and has reference to the old classification of actions into personal, real and mixed.

"Actions may be personal, as contra distinguished from real and mixed; the first being actions against the person only for damages, the second for recovery of real estate, the third for both, *Attorney-General* v. *Lord Churchill* (13)".

A man who was liable in the old personal actions of debt covenant, trespass, ect., was said to be personally liable and is still so described after the abolition of these old forms of action and of the liability to to arrest in execution. I think the answer should be that a decree cannot be passed against a minor or his estate on a covenant entered into on his behalf by a guardian for his benefit.

Ayling, J.—I would prefer to frame our answer as suggested by my learned brother Seshagiri Aiyar, J., in his judgment about to be delivered.

Seshagiri Aiyar, J.—It was tacitly agreed that the decision in *Indar Chunder Singh* v. *Radhakishore Ghose* (3), to which reference is made in the order of the Division Bench, has no bearing on the question we have to decide. That was a case of personal and onerous executory contract by the widows in management, which was held not to bind the minor heir. The question before us is, what is the principle laid down in *Waghela Rajsanji* v. *Shekh Masludin* (1), and what are its limits. There are some accepted propositions: (a) A guardian can for a proper purpose by apt words create a charge over the property under his management so as to bind the minor. See *Dowse* v. *Gorton* (14); (b) If the guardian acts for the benefit of the minor and borrows and if the creditor obtains a decree for the loan against the guardian, the latter can sue the minor for reimbursement: This is based on the principle of subrogation and may shortly be styled the theory of indirect recourse. *Strickland* v. *Symons* (15), *Johnson, In re*; *Shearman* v. *Robinson* (16), *Farhall* v. *Farhall*; *London and County Bank, Ex parte* (17) and *Sanka Krishnamurthi* v. *Bank of Burma* (6); (c) For necessaries the debts contracted by the minor himself or by his guardian would bind the estate: S. 68, Contract Act and *Maharana Shri Ranmalsinghji* v. *Vadilal Vakhatchand* (10); (d) If the guardian in management gives a bond in renewal of a debt binding on the minor, the estate could be proceeded against, as the act of the guardian may be regarded as keeping alive by acknowledgment a pre-existing liability: per Jenkins, C. J., in *Annapagauda* v. *Sangadigyapa* (11).

It is possible that the cases which are said in the order of reference to conflict with *Waghela Rajsanji* v. *Shekh Masludin* (1) may be brought under one or the other of the above categories. That is the view taken by my Lord and that is certainly one way of reconciling the Privy Council decision with the mass of cases which have been decided since that ruling. However I shall shortly point out that the decisions in Madras and in the other presidencies can be based on a broader ground. I do not wish to take a narrow view of *Waghela Rajsanji* v. *Shekh Masludin* (1). Woodroffe, J., in *Mir Sarwarjan* v. *Fakharuddin Mahomed Chowdhury* (18) states that what the Judicial Committee intended to lay down was that an onerous covenant cannot be imposed by the guardian upon the person or property of the minor. That is also my view. Although this decision was overruled by the Judicial Committee in *Mir Sarwarjan* v. *Fakharuddin Mahomed* (19) on another point, I do not think this view of the law was taken exception to in the argument before or in the judgment of the Privy Council. The various English decisions dealing with trustees and executors to which our attention was drawn in the course of the argument lay down that a trustee or executor has no power to bind the beneficiary by personal contracts. *Johnson In re*; *Shearman* v. *Robinson* (16) and *Evans. In re*; *Evans* v. *Evans* (20). I do

(13) [1841] 8 M. & W. 171=10 L. J. Ex. 31.
(14) [1891] A. C. 190=60 L. J. Ch. 745.
(15) [1884] 26 Ch. D. 245.
(16) [1880] 15 Ch. D. 548.
(17) [1871] 7 Ch. 123.
(18) [1907] 34 Cal. 163.
(19) [1912] 39 Cal. 232=39 I. A. 1(P. C.).
(20) [1887] 34 Ch. D. 597.

not think the bona fides of the guardian is an element for consideration. But where an infant's estate would be liable but for the interposition of the guardian, I fail to see why the latter undertaking that liability should not bind the estate. After examining *Waghela Rajsanji* v. *Shekh Masludin* (1) once again, I do not think their Lordships intended to lay down that under no circumstances can a minor be held liable for the acts of his guardian. Almost all the High Courts have, since *Waghela Rajsanji* v. *Shekh Masluddin* (1), held that the liability of the minor under the Hindu law is not affected by the fact that the guardian has incurred that obligation. *Nathuram* v. *Shoma Chhagan* (21), *Maharana Shri Ranmalsinghji* v. *Vadilal Vakhatchand* (10), *Siva Narayan Ghosh* v. *Kamakhya Ghose* (22), *Sundararaja Ayyangar* v. *Pattanathusami* (23), *Sinaya Pillai* v. *Munisami Ayyan* (24), *Subramania Ayyar* v. *Arumuga Chetty* (4), *Srimath Daivasikamani Pandara Sannidhi* v. *Noor Mahomed Routhan* (25), *Duraisami Reddi* v. *Muthial Reddi* (5), *Padma Krishna Chettiar* v. *Nagamani Ammal* (7) and *Tirumalai Muthuveera Paramasiva Venkitasami Naicker* v. *Muthusami Pillai* (2) have all taken this view. Sargent, C. J., Telang, J., Mookerjee, J., and Muthuswami Aiyar, J., are among the Judges who have enunciated this view.

If we examine some of the Privy Council decisions before, contemporaneous with, and after *Waghela Rajsanji* v. *Shekh Masludin* (1), it will be seen that the Judicial Committee did not intend to lay down that under no circumstances can the guardian bind the estate of the ward, except it be by creating a charge. In *Hunocmanpersaud Panday* v. *Mt. Babooee Munraj Koonweree* (26) the well-known case of Hanuman Prasad, their Lordships speak of a guardian borrowing on behalf of a minor and charging his estate in the same sentence. In *Watson & Co.* v. *Sham Lal Mitter* (27), which is contemporaneous with *Waghela Rajsanji* v. *Shekh Masludin* (1) an agreement by a guardian to pay enhanced rent was held binding on the minor. In *Imambandi* v. *Sheikh Haji Mutsaddi* (12) the Right Honourable Mr. Ameer Ali lays down that a Mahomedan guardian can bind a minor's estate by contracts entered into for the latter's benefit. So the rule of law in *Waghela Rajsanji* v. *Shekh Masludin* (1) is subject to exceptions. Strong reliance was placed on the observation of Lord Hobhouse at p. 561:

> "Now it was most candidly stated by Mr. Mayne, who argued the case on behalf of the respondent, that there is not in Indian law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English law."

I do not think that it was intended to lay down by this statement that no rule to the contrary under the Hindu law would be countenanced. The term Indian law was meant to apply to the Statute law of the land and not to Hindu or Mahomadan law. I am therefore of opinion that the rule laid down in *Waghela Rajsanji* v. *Shekh Masladin* (1) was not intended to affect the Hindu law liability of the minor. In this view, the decisions which are mentioned in the order of reference are not inconsistent with *Waghela Rajsanji* v. *Shekh Masludin* (1).

I would therefore answer the question under reference by saying that no decree should be passed against a minor or his estate on a contract entered into on his behalf by a guardian, under which covenant no charge is created on the estate except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject. Although the answer given by the learned Chief Justice read with his opinion would cover my opinion also, I respectfully think that in order that doubts may not be entertained as to our meaning, the answer should be in the form I have suggested.

S.N./R.K. *Answer accordingly.*

(21) [1890] 14 Bom. 562.
(22) A. I. R. 1914 Cal. 500=23 I. C. 877.
(23) [1894] 17 Mad. 306.
(24) [1899] 22 Mad. 289.
(25) [1908] 31 Mad. 47.
(26) [1864-57] 6 M. I. A. 393=18 W. R. 81n
(27) [1888] 15 Cal. 8=14 I. A. 178. (P. C.)

A. I. R. 1919 Madras 646

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Ripon Press and *Sugar Mill Co. Ld., Bellary*—Defendants—Appellants.

v.

Nama Venkatarama Chetty—Plaintiff—Respondent.

Appeal No. 371 of 1917, Decided on 29th July 1918, against decree of Dist. Judge, Bellary, in Original Suit No. 12 of 1917.

(a) Limitation Act (1908), Art. 116—Suit for dividend is governed by Art. 116.

A suit by a shareholder for the recovery of dividend against a registered company is governed by Art. 116. [P 646 C 2; P 647 C 1]

(b) Limitation Act (1908), Art. 116—Word "registered" in Art. 116 must be read as defined in General Clauses Act (1897), S. 3 Cl. (45).

The word "registered" in Art. 116, Sch 1, Limitation Act must be read as defined in S. 3, Cl. (45), General Clauses Act, and the term "registered" in the latter Act includes documents registered under any special law such as the Companies Act or the Copyright Act as well as registration under the Registration Act. [P 646 C 2]

C. Sambasiva Row—for Appellants.

H. Bala Krishna Row—for Respondent.

Judgment.—This appeal raised an interesting question on the law of limitation as to which, so far as we are aware, there is as yet no authority in India, namely as to the period of limitation for a suit by a shareholder against a registered company to recover dividends. In England, it is well settled that a dividend is a speciality debt for which a period of 20 years is allowed by 3 and 4 William IV, Ch. 22, S. 3. This was first pointed out by Christian, L. J., in *Smith* v. *Cork & Bandon Ry Co.* (1), which has been followed in later cases and in England in *Artisans' Land & Mortgage Corporation, In re* (2).

In India we have to look to the provisions of our Limitation Act. The right to receive a dividend which has been duly declared is one of the rights of every shareholder by virtue of the contract which he is deemed to have entered into with all the members of the Company under S. 39, Companies Act, 1882. The terms of that contract are to be found in the memorandum of association and in the special articles of association, if any, and if there are no special articles of association, and in so far as they are not inconsistent with them, then in table A which is appended to the Act, prima facie, the provisions of Arts. 72 to 76 in table A, which deal with the declaration and payment of dividends, are applicable and form the contract under which the dividends are payable. Now the memorandum of association is required by law to be registered, and the articles in table A, in so far as they are applicable, are by S. 38, Companies Act, to be deemed to be the regulations of the Company, in the same manner and to the same extent as if they had been inserted in the articles of association, so that by virtue of S. 38 the debt here must be deemed to have arisen from a memorandum and articles of association duly registered under the Companies Act. Now, Art. 115 Lim.Act is:

"for compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.',

There is no special article for the recovery of dividends, and therefore Art. 115 will apply, unless Art. 116 is applicable. Art. 116 is "for compensation for the breach of a contract in writing registered," and it is now settled that that means for breach of any contract in writing registered. "Registered" in the Limitation Act must be read as defined in the General Clauses Act of 1897. S. 3, Cl. 45, of that Act says, "registered" used with reference to a document, shall mean' " registered in British India under the law for the time being in force for the registration of documents."

It has been contended for the appellant that the law for the time being in force for the registration of documents must mean the Indian Registration Act for the time being. That however appears to us to be unduly restricting the meaning of that clause. The Companies Act provides for the registration of the Memorandum and the Articles of Association, which are documents, and there may be other Statutes such as the Copyright Acts, which provide for the registration of other documents. There is, we think, no reason why the term "registered" within the meaning of the General Clauses Act should not include documents registered under any special law of that kind as well as registration under the Registration Act. We are therefore of opinion that the present suit is for compensation for the breach of a contract in writing registered and that the period of limitation

(1) [1870] Ir. Rep. 5 Eq. 65.
(2) [1904] 1 Ch. D. 796=73 L. J, Ch. 581.

Art. 116 is six years and barred. The other contention the appellant also fail. In the result the appeal fails and is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 647

SESHAGIRI AIYAR AND NAPIER, JJ.

Thiraviyam Pillai and another—Defendants—Appellants,

v.

Lakshmana Pillai —Plaintiff—Respondent.

Second Appeal No. 1269 of 1916, Decided on 19th November 1917, against decree of Sub-Judge, Madura, in A. S. No. 40 of 1915.

(a) Civil P. C. (1908), S. 73—"Assets held by Court"—Money paid under O. 21, R. 55 is asset.

Where money is paid into Court by any one of the modes mentioned in O. 21, R. 55, it is an "asset held by the Court" within the meaning of S 73, 12 *I. C* 911, *not Appr.*; 35 *I. C.* 850, *Dist.* [P 648 C 1]

(b) Civil P. C (1908), O. 21, R. 83—Money paid into Court by virtue of permission should be rateably distributed among all attaching decree-holders.

When permission is granted to a judgment-debtor under O. 21, R. 83, to raise money by private alienation and the money thus raised is paid into Court, it is paid under a pending execution application.

Where property is attached at the instance of several decree-holders, permission should not be granted under O. 21, R. 83, to satisfy only one of the decrees.

Money paid into Court by virtue of a permission granted under R 83 of O. 21, should not be credited to the decree of the person in whose execution application the permission was ordered, but should be rateably distributed among all the attaching decree-holders. [P 648 C 1]

(c) Civil P. C (1908), S 73—Scope.

Semble.—The language of S 73 is wide enough to cover cases where money is in the hands of the Court, however realized. [P 647 C 2]

C. V. Ananthakrishna Aiyar—for Appellants.

T. R Venkatarama Sastriar and *P. S. Narayanaswami Aiyar*—for Respondent.

Judgment.—Plaintiff and defendant 1 obtained decrees against one Thoppiah Pillai. Plaintiff applied for execution and an order was made for the attachment of the judgment-debtor's property. Defendant 1 also applied for execution and the same property was again attached at his instance. When the property was about to be sold, the judgment-debtor applied under O. 21, R. 83, Civil P C., for permission to raise money by private alienation. The District Munsif gave him permission. Why he granted it when there was an attachment at the instance of defendant 1 and why he accepted the payment by the judgment-debtor of moneys which could only have covered the amount due to the plaintiff have not been explained. It seems to us that the permission should not have been accorded, but as the judgment-debtor is not before us, we shall not deal with that question any further. In accordance with the permission, the judgment-debtor executed a mortgage on the property and the mortgagee paid into Court money just enough to cover the plaintiff's decree. The District Munsif divided this amount rateably between the plaintiff and defendant 1. Thereupon this suit was instituted to contest that order. The Courts below have held that the money should entirely be given to the plaintiff, apparently on the ground that it was deposited in Court by virtue of the permission obtained in the proceedings taken by the plaintiff. We are unable to agree with them.

Mr. Venkatarama Sastriar, vakil for the respondent, in his able argument, took us through the various analogous provisions contained in O. 21 and argued that the money paid by the judgment-debtor must be taken to have been earmarked for the benefit of the plaintiff. A significant change has been made in the language of S. 73 of the present Civil P. C. In the old Code, the words were "whenever assets are realized by sale or otherwise in execution of a decree." In the present Code, the words are "where assets are held by a Court." The change was apparently intended to set at rest the question whether the word "realization" should not be restricted to what is paid in by virtue of process taken in execution; but apparently the legislature has not succeeded in the object. There can be no question that the language of the present Code is wide enough to cover cases where moneys are in the hands of the Court by whatever process the same has been realized. It is true that the learned Judges of the Bombay High Court hold that even under the new Code, the money to be held by the Court must have reached its hands in execution: see *Sorabji Coovirji* v. *Kali Raghunath* (1). An observation of Bakewell, J., in *Suikeena Katum Sahiba* v. *Mahomed Abdul*

(1) [1911]36 Bom. 156=12 I. C. 911.

P. R. S. A. LL. B. High Court. (Kashmir)

Aziz (2) lends support to this proposition. It is not necessary to express any opinion on this question, as we are of opinion that when permission is granted under O. 21, R. 83, to raise money by private alienation, the money is paid under a pending execution application. The further point which Mr. Vankatarama Sastriar pressed before us was that the money should be taken to have been paid solely to the credit of his client's decree. The learned vakil asked us to apply the analogy of O. 21, R. 55. In that rule three classes of payments are indicated.

We are prepared to concede that if money is paid outside the Court and the decree holder certifies the payment, it cannot be said that it is an asset held by the Court. It may be that in such a case, as the attachment would cease to subsist, rival decree-holders can have no remedy, but if money is paid into Court by the other modes mentioned in R. 55, we are not satisfied that this money cannot be regarded as an asset held by the Court. If *Sorabji Coovarji* v. *Kala Raghunath* (1) lays down this proposition, we are not prepared to accept it. It must be remembered that an attaching creditor acquires no lien upon the proceeds of the sale because he procured the attachment, and we fail to see why the fact that the attachment is raised in consequence of the payment made into Court should take the money out of the expression "assets held by the Court." As regards *J. C. Galstaun* v. *Woomesh Chandra Bannerjee* (3) that was a decision under O. 21, R. 89. That rule distinctly provides for payment to the decree-holder or to the purchaser: consequently the payment must be taken to be earmarked. The learned vakil for the respondent conceded that where moneys are realized by process of Court solely at the instance of one of the attaching decree-holders he does not obtain, apart from getting his expenses paid, any higher right than the other decree holders who have before payment applied for execution. This being so, we fail to see on what principle the fact that the money was paid into Court by virtue of the permission granted to raise money privately should give a larger right to the person in execution of whose decree permission was so granted. The policy of the legislature seems to be to bring all moneys realized at least in process of execution to the hotchpot to be shared by all the decree holders.

It is analogous to distribution on an insolvency. The language of O. 21, R. 72, shows that even when moneys are not actually paid into Court, as in cases where the decree-holder is given permission to purchase property and the sale proceeds are applied to the satisfaction of his decree, the legislature specifically provided for the money being regared as assets held by the Court. The intention of the Legislature is to afford every creditor equal opportunities of obtaining a rateable advantage in the available assets of the judgment-debtor. Therefore, unless there is something clear in the language of the provisions of the Code to exempt a payment from being applied to the benefit of all the creditors, the Court should incline to the view that moneys in the hands of the Court should be shared by all decree-holders rateably. In this view, we must reverse the decrees of the Courts below and dismiss the plaintiff's suit with costs throughout. The memorandum of objections is dismissed. There will be no order as to costs.

S.N./R.K. *Appeal allowed.*

(2) [1915] 38 Mad 221=29 I. C. 239.
(3) [1916] 44 Cal. 789=35 I. C. 850.

A. I. R 1919 Madras 648

WALLIS, C. J. AND KUMARASWAMI SASTRI, J.

Official Assignee of Madras and *another*—Defendants—Appellants.

v.

Mangayar Karasu Ammal and *another*—Plaintiffs—Respondents.

Appeal No. 103 of 1917, Decided on 9th August 1917, against decree of Dist. Judge, Chingleput, in Appeal Suit No. 531 of 1915.

Presidency Towns Insolvency Act (1909), S. 7—Order under S. 7—Proper remedy indicated.

No suit lies to set aside an order passed under S. 7. The proper remedy for the party aggrieved is to appeal against the order: 44 *I.C.* 847, *Foll.* [P 649 C1]

M. D. Devadoss—for Appellants.

Facts.—The properties of an insolvent having vested in the Official Assignee of Madras respondents applied by a claim for exemption of certain of these properties from being seized by the Official Assignee as the property of the insolvent. The claim having been disallowed, respondents filed the present suit to set aside the order.

Judgment,—The point raised in this appeal was decided by one of us (the Chief Justice) in Original Suit No. 206 of 1911 on the file of the High Court on the Original Side and the decree was affirmed in appeal in *Hajee Abdul Lateef Sahib* v. *Official Assignee of Madras* (1). Following that decision, we allow the appeal and reverse the order and restore the decree of the Munsif with costs throughout.

S.N /R.K. *Appeal allowed.*

(1) [1918] 40 Mad. 1173=44 I. C. 847.

A. I. R. 1919 Madras 649

SADASIVA AIYAR AND SPENCER, JJ.

Konimareddi Subbareddi and *another* —Counter-Petitioners—Appellants.

v.

Kollipara Veerayya Tata—Petitioner —Respondent.

Appeal No. 21 of 1918, Decided on 6th November 1918, from appellate order of Dist. Judge, Guntur, in Appeal Suit No. 204 of 1917.

Civil P. C. (1908), O. 21, R. 43—Per *Sadasiva Aiyar J.*—**Execution proceedings against surety under R. 43 is not maintainable—Surety under S. 145 alone can be proceeded with under R. 43—Civil P. C., S. 145** (*Spencer, J.* contra).

Per *Sadasiva Aiyar, J.*—S. 145 (b) refers to restitution of property "taken in execution," that is, taken possession of by a party in execution in accordance with the terms of the decree or order in his favour, and not to properties taken possession of by the Courtthrough attachment in execution of a decree. A decree-holder cannot execute his decree against a person who has become surety under O. 21 R. 43, in respect of properties taken possession of by the Court Amin. It is only a surety who comes under S. 145 of the Code that can be proceeded against in execution as if he were a party to the decree (*Spencer, J.* contra). [P 649 C 2]

Per *Spencer, J.* — The Court has inherent power to assign a bond executed in its favour for the purpose of a suit being brought to enforce its terms. [P 650 C 1]

The word "restitution" in S. 145 (b) must be read in the wide and general sense of restoration or making good that which is deficient, and a Court can, under that section, proceed in execution against a surety who has failed to perform his conditional undertaking to produce the judgment-debtor's property when called upon to do so. [P 649 C 2]

K. G. Babu Row—for Appellants.

V. Lakshminarayana—for Respondent.

Sadasiva Aiyar, J—The security bond given by the appellants does not fall under any of the Cls. (a), (b) or (c) of S. 145, Civil P. C. It is a special kind of surety bond taken by the Court in accordance with O. 21, R. 43, Civil P. C., as materially altered by this High Court under its rule-making powers and is concerned with the safe custody of "articles which cannot be conveniently removed" from the place of their attachment in execution. It has nothing to do with S. 145, Civil P. C. Cl. (b), S. 145 refers to restitution of property "taken in execution," that is, taken possession of by a party in execution in accordance with the terms of the decree or order in his favour, and not to properties taken possession of by the Court through attachment in execution of a decree.

The decree-holder cannot execute his decree against a surety who becomes one under O. 21, R. 43, in respect of properties taken possession of by the Court Amin. It is only a surety who comes under S. 145 that could be proceeded against in execution as if he was a party to the decree. The Court should, in a case like the present, assign the bond favour of the decree-holder in whose interests (though not for whose direct benefit) the bond was taken. The lower Court's orders permitting the decree-holder to execute his decree against the appellants to the extent of the amount mentioned in the surety bond cannot therefore be upheld and are set aside. In substitution thereof I would direct that the District Munsif's Court do assign the bond in favour of the decree-holder. As the bond is nearly three years old, it is desirable that the assignment should be made soon. The parties will bear their respective costs throughout.

Spencer, J.—As the words "where and in so far as a decree is varied or reversed" occurring in S. 144, Civil P. C., are not repeated in S. 145, I am inclined to read the word "restitution" in S. 145 (b) as not confined to the narrow sense in which it is used in S. 144, namely adjustment of the rights of parties inter se arising out of the variation of a decree in appeal or otherwise, but in the wide and general sense of "restoration" or making good that which is deficient. If that is so, the Court can proceed in execution against the surety who has failed to perform his conditional undertaking to produce the judgment-debtor's property before the Court when called upon to do so. In the Civil Procedure Code there is no provision similar to that in S. 35, Guardians and Wards Act, for the assignment of a secu-

rity bond for the purpose of a suit being brought to enforce its terms.

That course is however one which it must be within the inherent power of the Court in whose favour the bond is written to adopt, and I think it would be convenient to adopt it in the circumstances of the present case. The words "may be executed" in S. 145 seem to indicate that a proceeding in execution is only an alternative remedy and that the other remedy of assignment of the security bond is not excluded.

I therefore agree with the order proposed by my learned brother.

S.N./R.K. *Decree set aside.*

A. I. R. 1919 Madras 650

PHILLIPS AND KUMARASWAMI SASTRI, JJ.

Chinnaswami Reddi—Plaintiff — Appellant.

v.

Krishnaswami Reddi and *others*—Defendants—Respondents.

Second Appeal No. 1470 of 1916, Decided on 31st July 1918, against decree of Dist. Judge, Chingleput, in Appeal Suit No. 304 of 1914.

Contract Act (1872), S. 64—Sale of minor's property by guardian—Consideration applied in purchase of other properties — Sale declared not binding on minor—Vendee is not entitled to properties purchased unless such purchase was in contemplation at time of original sale—Claim by minor barred—Plea of invalidity of sale is still available in suit by vendee for possession — Limitation Act, Art. 44.

Where a sale of a minor's properties by his guardian is declared to be not binding on the minor, the vendee is not entitled to claim other properties which were purchased for the minor with the sale consideration, as a "benefit" which the minor is bound to restore under S. 64 when he elects to avoid the sale, if the latter purchase was not contemplated at the time of the original sale: 28 *I. C.* 714; 22 *Mad.* 289 and 3 *C. L. J.* 260, *Dist.* [P 650 C 2; P 651 C 2]

Per *Kumaraswami Sastri, J.*—Ordinarily, the benefit which a party receives when he sells the property is the price which the vendee pays. Any profits which the vendor might make with the moneys would be too remote in estimating what he has to return, in case he is entitled to avoid the sale and elects to do so. Where however for the protection of a purchaser contracting with a guardian or a qualified owner, a particular dealing with the money was in the direct contemplation of the parties, such as the purchase of other lands with the consideration, and the money is so applied, the benefit which the other party obtains will be the land or other property acquired with the consideration. There must be something more than mere application of the consideration in a particular way in order to entitle the purchaser to claim restoration of the properties acquired with the consideration paid by him. [P 651 C 1, 2]

In a suit by the vendee for possession brought after the expiry of three years after attainment of majority by the ward, the latter is entitled to plead the invalidity of the sale though he could not actually sue to set it aside. [P 652 C 1]

On the expiry of the period specified in Art. 44 the purchaser from the guardian is not of right entitled to the properties in the possession of the ward [P 652 C 1]

The proper decree to pass in such a case is to order possession to be given to the vendee if the consideration is not returned within a specific time. [P 652 C 1]

S. Srinivasa Aiyangar and *A. C. Sampathu Aiyangar*—for Appellant.

G. S. Ramchandra Aiyar—for Respondents.

Phillips, J.—Apart from the fact that the plaintiff has by his action precluded the Court from ordering an exchange between the parties of the lands sold to plaintiff by the mother of defendants 1 and 2, and the lands purchased by her in Sriperembudur, I think that it follows from the finding that the purchase of the lands in Sriperumbudur was not contemplated at the time of the sale to plaintiff, that those lands do not constitute the benefit received by defendants 1 and 2 from plaintiff within the meaning of S. 64, Contract Act. I therefore agree in the order proposed.

Kumaraswami Sastri, J.—The plaintiff is the applicant. He sued for possession of the house site specified in the plaint. The case for the plaintiff is that the mother of defendants 1 and 2 acting as their guardian sold to him certain properties consisting inter alia of the site specified in the plaint for the purpose of purchasing other properties, that the defendants have not put plaintiff in possession of the property claimed by demolishing the building on the site as agreed upon Defendants 1 and 2 contested the suit on the ground that the sale deed executed by their mother is invalid and inoperative and would not bind them and that plaintiff has no right to the relief claimed. The defence of defendants 3 and 4, who claimed an interest in the buildings on the site, is not material for the purpose of this appeal. The District Munsif held that the sale by their mother as their guardian was not binding on defendants 1 and 2 and dismissed the suit on this ground. He was of opinion that the purchase of the lands subsequently purchased was not settled at the time of the

sale by defendants' mother and that it is probable that the plaintiff prevailed upon the defendants' maternal grandfather to enter into the transaction. On appeal, the District Judge held that the sale was not binding on defendants 1 and 2 as it was not necessary or beneficial and dismissed the appeal.

The contention for the appellant is that it was not open to defendants 1 and 2 to keep the lands purchased with the sale-proceeds of the family lands and to repudiate the sale by their mother made with the object of purchasing other lands and that under S. 64, Contract Act, a person who seeks to avoid a voidable transaction should restore any benefit he has received as a condition precedent to such avoidance. It is also argued that the District Judge was wrong in thinking that the recital in the sale deed by defendants' mother to the effect that lands in Sriperumbudur were to be purchased was insufficient as the particular lands actually purchased were not specified. There can be little doubt that, under S. 64, Contract Act, a party seeking to avoid a voidable transaction is bound to restore any benefit he has received from the other party and the question is whether in the present case, lands actually purchased in Sriperumbudur can be said to be the benefit which defendants 1 and 2 received in respect of the sale by their mother as their guardian.

Ordinarily, the benefit which a party receives when he sells the property is the price which the vendee pays. Any profits which the vendor might make with the moneys would be too remote in estimating what he has to return in case he is entitled to avoid the sale and elects to do so. Where however for the protection of a purchaser contracting with a guardian or a qualified owner, a particular dealing with the money was in the direct contemplation of the parties, such as the purchase of other lands with the consideration, and the money is so applied, the benefit which the other party obtains will be the land or other property acquired with the consideration. There must, in my opinion, be something more than a mere application of the consideration in a particular way in order to entitle the purchaser to claim restoration of the properties acquired with the consideration paid by him. S. 35, T. P. Act makes this clear. It requires that the benefit received should be part of the same transaction and should be direct. The authorities cited by the learned Advocate-General do not support the view that the purchaser is entitled to follow up properties purchased with the consideration irrespective of whether there was any arrangement or not.

In *Rabia Bi* v. *Angappan* (1) it was held that the guardian of a Mahomedan minor is not entitled to mortgage her properties for the purpose of acquiring other properties but that if the minor disclaims liability to pay the mortgage monies, she must give up per rights in the property so purchased. She was directed to execute a conveyance of the property to the mortgagee. It was assumed that the benefit was the purchase of other lands and there was no discussion of the question. In *Sinaya Pillai* v. *Munisami Ayyan* (2), *Tejpal* v *Ganga* (3) and *Eastern Mortgage and Agency Co. Ltd.* v. *Rebati Kumar Ray* (4) it was held that any benefit received should be restored. In these cases it was the consideration paid that was to be refunded. There can be little doubt that if the purchase of the lands at Sriperumbudur was for the benefit contemplated by the parties and arose in connexion with the same transaction as the sale of ancestral properties by the minor's mother, the plaintiff would be entitled to a conveyance of the properties so purchased. Otherwise all that he would be entitled to is repayment of the consideration he paid.

The difficulty in the present case is that both the lower Courts do not believe the evidence of the plaintiff and find that the purchase of the lands which were actually purchased was not in the contemplation of the parties at the time of the sale to plaintiff. The District Judge disbelieves the evidence of the plaintiff and his witnesses that there was an understanding at the time of the sale that lands in Sriperumbudur should be purchased with the consideration and believes the evidence of Sami Reddi, the first defence witness, that it was only subsequent to the sale that plaintiff refused to pay the consideration unless lands were purchased and that it was at his pressure and refusal to pay that lands were purchased.

(1) [1915] 28 I. C. 714.
(2) [1899] 22 Mad. 289.
(3) [1903] 25 All. 59.
(4) [1906] 3 C. L. J. 260.

The plaintiff executed an unconditional demand promissory note for the consideration and could have been sued on the note and the fact that there is a recital in the sale deed to plaintiff that it was intended to purchase lands would not entitle plaintiff to withhold payment of the note if the vendor changed her mind, and decided to invest the moneys in any other way. The lands were purchased at Sriperumbudur on 4th March 1908 while the sale to plaintiff was on 22nd August 1907. I do not think we can say that the findings of the lower Courts were based on no evidence, and on those findings it cannot be said that the .purchase of the lands under Ex. C was part of the same transaction as the sale of lands under Ex. B. The plaintiff would therefore be entitled only to the return of the consideration paid by him.

It has been argued that, as the suit by defendant 1 to set aside the sale deed Ex. B and to recover possession of properties other than the plaint properties covered by it was dismissed as barred, the plaintiff is entitled to possession of the suit properties as the right to avoid the contract is at an end owing to the impossibility of placing the parties in status quo ante. I do not think there is anything to prevent the plaintiff from giving back the properties in his possession though the suit of defendant 1 was dismissed as barred. He is the plaintiff and the defendants are, in a suit by him for possession, entitled to plead the invalidity of the sale by their guardian. The fact that they cannot sue to recover an item of property wrongfully alienated by their guardian cannot affect their right to remain in possession of properties not delivered to the possession of the purchaser. There is no authority for the proposition that on the expiry of the period specified in Art. 44, Lim. Act, the purchaser from the guardian is of right entitled to possession of properties in the possession of the ward.

No doubt the right to avoid a contract depends on the power of the Court to put the parties in the same position as they would have been if the transaction had not been entered into, but the plaintiff cannot be heard to say that he will not do something which is within his competence and claim the enforcement of a voidable transaction on the ground that the parties cannot be put in status quo ante because of his unwillingness to do equity. The plaintiff is in possession of other properties conveyed to him; he values the site at Rs. 250 and the value is not disputed in the written statement or in the evidence. I am of opinion that the plaintiff is entitled to a return of Rs. 250 in case the defendants elect to keep the house site claimed. I would set aside the decrees of the lower Courts and direct that, on payment by defendants 1 and 2 of Rs. 250 in three months, the plaintiff's suit be dismissed, each party bearing his own costs, and that in default a decree be passed for possession as prayed with costs throughout.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 652

AYLING AND KRISHNAN, JJ.

Kandana Venkata Varadaraja Sobanadhri Row and *another*—Defendants—Appellants.

v.

Achanta Venkata Subbarayudu —Plaintiff—Respondent.

Second Appeal No. 260 of 1918, Decided on 11th December 1918, against decree of Temporary Sub-Judge, Masulipatam, in Appeal Suit No. 76 of 1917.

(a) Limitation Act (9 of 1908), Art. 61—Agent borrowing unauthorizedly and paying to principal's creditor—Suit for recovery of amount as paid—Limitation commences from date of payment to creditors.

A suit by an agent to recover from his principal money borrowed by the former without the latter's authority or ratification but which he paid to the latter's creditors is governed by Art. 61, the cause of action arising when payment is made to the principal's creditors: 20 *Cal.* 18 and 7 *I. C.* 399, *Foll.*; 29 *All.* 627; *Dist.* [P 653 C 1]

(b) Contract Act (1872), S. 197—Absence of repudiation does not amount to ratification.

A mere failure to repudiate in terms an unauthorized transaction does not amount to ratification. [P 653 C 1]

V. Ramadoss—for Appellants.

T. Prakasam—for Respondent.

Judgment.—The question of authorization is res judicata against plaintiff by reason of the decision in Appeal Suit No. 22 of 1910. The Subordinate Judge holds that there was subsequent ratification, but there is nothing in the facts found by him to justify such a conclusion. All that is shown is that plaintiff in Ex. 1 reported to defendants' father the fact that he had borrowed the money and asked pardon for having done

so without authority and wanted orders to pay it back. No reply appears to have been sent to this, and there is no evidence of defendant's father having done or said anythiug in ratification of plaintiff's action. It cannot be said that he ratified it simply by failing to repudiate it in terms. In the absence of authority or ratification it must be held that plaintiff's cause of action arose when he paid to the creditors of defendants' father the money which he (plaintiff) had borrowed. The article applicable is Art. 61, Lim. Act, and the suit is clearly time barred. This view is in accord with the decisions in *Aghore Nath Mukhopadhya* v. *Grish Chunder Mukaopadhya* (1) and in *Kandaswami Pillai* v. *Avayambal* alias *Thangachi Ammal* (2). On the respondent's side *Girraj Singh* v. *Mul Chand* (3) was relied on: but that case is easily distinguishable.

It is not a case of principal and agent at all, but of one person borrowing money for the benefit of another to whom it was directly paid, and who contracted to repay it himself or indemnify the nominal borrower. We must set aside the decrees of the lower Courts and dismiss the suit with costs throughout.

S.N./R.K. *Appeal allowed.*

(1) [1893] 20 Cal. 18.
(2) [1911] 34 Mad. 167=7 I. C. 399.
(3) [1907] 29 All. 627.

A. I. R. 1919 Madras 653 (1)

PHILLIPS AND NAPIER, JJ.

Mogal Beg and *another*, In re—Accused.

Referred Case No. 55 of 1918, and Criminal Revn. No. 352 of 1918, Decided on 24th September 1918, against orders of Sess. Judge, Guntur, D/- 27th April 1918.

Criminal P C. (1898), S. 439—Order of acquittal can be revised.

The High Court has jurisdiction to interfere in revision even in the case of an order of acquittal, but such interference will only be where serious injustice has been caused by an error of law. [P 653 C 1, 2]

S. Krishnaswami Aiyangar—for Accused.

Public Prosecutor—for the Crown.

Order.—It is argued for accused that this Court has no jurisdiction to entertain an application for revision in the case of an acquittal. It is however clear from the language of S. 439, read with S. 430, Criminal P. C., that this Court has jurisdiction to interfere even in such cases. It has however been consistently laid down by this Court that it will not interfere with cases of acquittal when Government has not appealed, except in extreme cases. This has been held both when a private party has moved the Court and also when a District Magistrate has done so, but the present reference is made by a Sessions Judge who has not the same facilities as a District Magistrate for moving Government to file an appeal. Although the rule of non-interference might be somewhat relaxed in cases referred by a Sessions Judge, yet we think it would be wrong to interfere even in such references unless we are convinced that serious injustice has been caused by error of law. In the present case, although we agree with the Sessions Judge's view of the law, we think the case is one of such a petty nature that we must refuse to interfere with an order of acquittal. Let the papers be returned to the Sessions Judge.

S.N./R.K. *Records returned.*

A. I. R. 1919 Madras 653 (2)

BAKEWELL AND PHILLIPS, JJ.

Kizhekke Manjambrath Avulla — Plaintiff—Appellant.

v.

C. K. P. Kanna Kurup and *others*—Defendants—Respondents.

Second Appeal No. 1671 of 1916, Decided on 12th February 1918, against Decree of Temporary Sub-Judge, Tellicherry, in Appeal Suit No. 95 of 1914.

Civil P. C. (5 of 1908), and O. 2, R. 2 O. 34, R. 1 — Suit for redemption of kanom—First suit against karnavan personally — Subsequent suit against tarwad is barred.

Where a mortgagor brings a suit for redemption against some of the co-owners of the equity of redemption and obtains a decree, a subsequent suit on the mortgage against the other co-owners is barred under O. 2, R. 2. [P 654 C 1]

Plaintiff sued the karnavan of a tarwad in his personal capacity for redemption of a kanom and obtained a decree. He then had knowledge of the tarwad's interest in the kanom. Subsequently he brought another suit for redemption against all the members of the tarwad:

Held: that the subsequent suit was barred by the provisions of O. 2, R. 2 14 *Mad* 284 *Expl.* and *Dist.* [P 654 C 2]

K. P. M. Menon—for Appellant.

C Madhavan Nair—for Respondents.

Bakewell, J.—The question argued before us is, whether the plaintiff is debarred from bringing his suit by reason of the omission of some of the co-owners of the property in his previous suit for

redemption in contravention of the provisions of O 34, R. 1. The plaint states expressly that the previous suit was against defendant 1 in his personal capacity and this also appears from the order dismissing defendant 4 from that suit; there is, accordingly, no question of the members of defendant 1's tarwad other than defendant 4 being bound by the previous decree. The plaint does not allege the plaintiff was ignorant of the claims of those persons to the kanom right, and I think that there was sufficient evidence to support the finding of the learned Subordinate Judge that he had notice of that claim when he brought the previous suit.

It is obvious that if a mortgagor were at liberty to bring separate suits for redemption against several co-mortgagees under the same mortgage, in which separate accounts would have to be taken, there would be an unnecessary multiplicity of proceedings and great confusion might arise: see *Nilakant Banerji* v. *Suresh Chandra Mullick* (1), and such a course is in contravention of O. 2, R 2. The plaintiff's claim is against all the co-owners that they shall jointly deliver up possession of the mortgaged property and is based on the kanom deed, and I think that this constitutes "the whole of the claim" which he was entitled to make in the previous suit within the meaning of O. 2, R. 2, and that this rule prohibits another suit against the other co-owners. For these reasons I would dismiss this appeal with costs.

Phillips, J—The finding of the Subordinate Judge must be accepted that plaintiff had knowledge of the fact that defendant 1's tarwad had kanom right in the property in respect of which defendant 1, the karnavan, executed the Marupat, Ex. B. The case, however, appears to be somewhat similar to the case of *Govinda* v. *Mana Vikraman* (2). It is contended that, in that case, the first suit was for rent while the second suit was on the mortgage, but the second suit also include a claim for the rent decreed in the first suit, and it was held that the claim was neither res judicata nor barred under S. 43, Civil P. Code., corresponding to O. 2, R. 2 of the present Code. That case is, however, distinguishable from the present case, on the ground that in the second suit the basis for the claim for rent was the mortgage, whereas in the first case the claim was based on a lease. In the present case, the second suit is based on the same cause of action as the first. In the first suit plaintiff, knowing that the tarwad had a right in the kanom, sued the karnavan alone in his personal capacity, and omitted to sue in respect of his claim against the tarwad. I, therefore, agree that the present suit is barred O. 2, R, 2.

S.N./R.K. *Appeal dismissed.*

(1) [1886] 12 Cal. 414=12 I. A. 171 (P. C).
(2) [1891] 14 Mad. 284.

A. I. R. 1919 Madras 654

SADASIVA AIYAR AND NAPIER, JJ.

Kamatchinatha Pillai, In re—Accused—Appellant.

Criminal Appeal No. 707 of 1918, and Criminal Revn. No. 703 of 1918 (taken up No 44 of 1918), Decided on 7th January 1919, against the order of Sess. Judge, Ramnad, in Case No. 28 of 1918.

Penal Code (1860), Ss. 468 and 471—Process server filing forged attakshi is guilty under Ss 468 and 471.

Where a process server filed in Court a forged attakshi to explain the delay in returning a process:

Held: that he was guilty of offences under Ss. 468 and 471: 11 *Mad.* 411 and 25 *Cal.* 450, *Foll.* 5 *All.* 221 and 8 *All.* 653, *Doubted.*

[P 655 C 1]

E. R. Osborne—for the Crown.

Judgment.—This is an appeal by a process-server of the Court of the District Munsif of Dindigul, who was convicted of forgery for the purpose of cheating and using as genuine a forged document and sentenced to six months' rigorous imprisonment under Ss. 468 and 471 I. P. C. The document in question is the attakshi Ex. H, purporting to have been signed by the two karnams Sivgurunatha Pillai (P. W. 5) and Anthinarayana Mudali (P. W. 6) certifying that the appellant was ill of fever and cholera in P W. 5's village and between 23rd and 30th November 1917, and that the two karnams had him treated with medicines. The body of the Attakshi is in the appellant's writing. The evidence (including the depositions of P. Ws. 5 and 6) clearly establishes that P. Ws. 5 and 6 did not sign the attakshi Ex. H, that the peon was not in P. W. 5's village between 23rd and 30th November 1917 and that he was not treated with medicines by P. Ws 5 and 6 in that village Seeing that the appellant has not adduced any evidence (except the worth-

less testimony of D. W. 2', a "resigned" Head Constable who says appellant told him one day ten months before the witness gave evidence that appellant was suffering from fever) to establish that he suffered from cholera and fever between 23rd and 30th November 1917, it is a very fair inference that the whole story of his illness for just the one week's time that he overstayed the period allowed to him to return his process is all a myth. There can be no question that the attakshi Ex. H was prepared by the appellant with the false signatures of P. Ws. 5 and 6, in order to defraud the District Munsif into excusing his delay in returning processes and the absence of the appellant from duty between 24th and 30th November 1917. The decisions in *Empress of India* v. *Jiwanand* (1) and *Queen-Empress* v. *Girdhari Lal* (2) and other similar cases, where false entries made to screen the accused from punishment for an offence already committed were held not to be offences, are distinguishable and the soundness of those decisions is also doubtful, there being other decisions tending to support a contrary conclusion: see *Queen-Empress* v. *Sabapati* (3) and *Emperor* v. *Rash Behari Das* (4).

The question whether the false signatures were placed in Ex. H also "dishonestly" need not be considered, as they were clearly placed in Ex. H "fraudulently" according to the rule laid down by the majority of the Full Bench of this Court in *Kotamraju Venkotrayadu* v. *Emperor* (5) and hence Ex. H was a forgery intended to cheat the District Munsif and was used by the appellant as a genuine document. We confirm the conviction and sentence and dismiss the appeal.

S.N./R.K. *Appeal dismissed.*

(1) [1883] 5 All. 221.
(2) [1886] 8 All. 653.
(3) [1888] 11 Mad. 411=1 Weir 549.
(4) [1908] 35 Cal. 450.
(5) [1905] 28 Mad. 90 (F. B.).

A. I. R. 1919 Madras 655

ABDUR RAHIM AND OLDFIELD, JJ.

N. Krishnaswami Aiyangar In re—Accused—Petitioner.

Civil Misc. Petition No. 2959 of 1917, Decided on 14th November 1917.

Government of India Act (1915), S 107—Per *Abdur Rahim, J.*—High Court can expunge irrelevant and scandalous matters in judgment of Court subordinate to it. (*Oldfield, J. Contra*)

Per *Abdur Rahim, J.* (*Oldfield, J. dissenting*)—The High Court has jurisdiction to expunge irrelevant and scandalous matters in the judgments of Courts subordinate to it under S. 107, Government of India Act, 1915. Such powers are of extremely wide character but must be exercised in extremely exceptional cases, and with great caution. They are covered by the expression "superintendence" in the section: 33 *I. C.* 608, *Cons.* [P 655 C 2]

Per *Oldfield' J.*—The High Court has not the power to expunge irrelevant and scandalous matters in the judgments of subordinate Courts under S. 107, Government of India Act, 1915, especially when the application to expunge them is made by persons who are not parties to the proceedings. [P 656 C 1, 2]

K. Srinivasa Iyengar—for Petitioner.

Abdur Rahim, J.—I have had the advantage of reading the judgment which has been just delivered by my learned brother, and I agree that the petition ought to be dismissed, though not on the ground on which he has proceeded. I am of opinion that we have jurisdiction to direct the expunging of irrelevant and scandlous matters in the judgment of the Subordinate Court under S. 107, Government of India Act, 1915. The powers of superintendence vested in the High Court are of extremely wide character, and it seems to me that if we find a case in which a subordinate Court has gone out of its way to introduce matters in its judgment which are absolutely irrelevant and scandalous in their nature, we can remove those passages from the judgment, so that they may not be circulated and published to the prejudice of persons who are or are not concerned in the suit either as a party or as a witness. It is quite true that, as pointed out, there is no precedent for such action except in a recent case (C. R. P. No. 888 of 1916), to which I was a party. There the question of jurisdiction was not discussed, though it was assumed that we had jurisdiction to delete certain passages from the judgment of the Subordinate Court. On the other hand, the question was considered in another recent case (C. R. P. Nos. 587, 588 and A. A. O. Nos. 205 and 206 of 1914) *Ramabadra Naidu* v. *Subramania Iyer* (1) by Sadasiva Aiyar and Moore, JJ., in which Sadasiva Aiyar, J.' expressed his opinion affirming our jurisdiction. I quite realize that it must be in extremely exceptional cases that the High Court will be called upon to interfere in a matter of this sort, and I

(1) [916] 33 I. C, 608.

am entirely of opinion that we ought to act with the greatest caution in making such an order as has been applied for in this case. On the merits however the application, in my opinion must fail, because it could not be said that the remarks which are objected to were altogether irrelevant in the view which the Subordinate Judge took of the case. I do not suggest for a moment that those remarks were justified upon the evidence and in fact. We have expressed our opinion in the judgment in the appeal that they were not justified at all. But on the other hand, it could not be said that the observations were clearly irrelevant and did not bear on the merits of the case. For these reasons I agree in dismissing the petition.

Oldfield, J.—In this petition we are asked to expunge certain portions of the judgment of the Subordinate Judge of Kumbakonam, in Original Suit No. 79 of 1914, which has come before us on appeal. We are asked to do so by a person, who was not a party to that suit and was merely the vakil of a party, in the exercise of our alleged powers under S. 107, 5 & 6 Geo V. C. 61. It has not been shown that any Court in England has ever given similar relief or that any other High Court has done so, either under the provisions above specified or the corresponding S. 15, 25 & 26 Vic. C. 104. In this High Court such relief has been given only, so far as we have been shown in one recent case, C. R. P. No. 888 of 1916, but without discussion of the Court's power to give it, whilst in another C. R. P Nos. 587, 588 and A. A. O. Nos. 205, and 206 of 1914 *Ramabadra Naidu* v. *Subramania Iyer* (1), one learned Judge held that it might be given in suitable cases and the other refused to express an opinion; and in the latter case it may be observed that the appellants petitioners were parties to the proceedings. There is accordingly no course of authority binding on us in petitioner's favour; and the absence of such authority is further material as justifying a doubt whether the exercise of the power in question is essential to the performance of our duty of superintendence under the provision above referred to.

In the absence of authority the matter must be decided on general principles. It seems to me, with great respect, that the exercise of this power is not necessary and would not be advisable and that therefore the right to ask for it should not be newly recognized at this date as covered by the general term "superintendence". It has not been shown that any function resembling this has ever been treated as covered by it. It is true that in some cases, to which (as I understand my learned brother) he would confine interference, the judgment may contain irrelevant matter, scandalous or blasphemous, by which strangers to the proceedings may be aggrieved and which as in the instance above referred to, could justly be expunged without investigation of any fact in issue. But such cases will be very rare; and it is not necessary on their account to authorize a course of procedure. which would involve us in the risk of grave inconvenience. For there would be entailed, firstly, in many cases the novel recognition of the right to the Court's assistance in favour of persons not parties to or directly interested in any proceeding before it; secondly, the investigation of many cases. in which the relevancy and correctness of the observations complained of would not be ascertainable readily or without inquiry into the merits. Such inquiry would frequently, it is to be feared, be asked for on account of personal enmity against the Judge; and its result would not necessarily be in any degree convincing, since it would have been reached without the assistance of any one interested to oppose the petition. In these circumstances, I would not interpret the Court's duty of superintendence as covering the grant of the relief asked for by petitioner and I would therefore dismiss his petition without expressing an opinion on its merits.

S.N./R.K. *Petition dismissed.*

A. I. R. 1919 Madras 656

SESHAGIRI AIYAR AND PHILLIPS, JJ.

Ramaswami Pillai—Defendant—Appellant.

v.

Govindasami Naicker — Plaintiff — Respondent.

Second Appeal No. 2225 of 1917, Decided on 4th November 1918, from decree of Dist. Judge, Tanjore, in Appeal Suit No. 19 of 1917.

(a) Provincial Insolvency Act (1907), S. 16 (2) —Order of adjudication — Absolute stay

of all proceedings is not effected—Leave to sue only is necessary.

An order of adjudication does not, under S. 16 (2), effect an absolute stay of all proceedings against the insolvent by suit or otherwise, but contains only direction that before a suit is brought a condition precedent should be complied with, namely, the obtaining of leave to sue from the Cou-t. [P 657 C 1]

(b) Limitation Act (1908), Ss. 15 and 9—Suit on pro-note after executant adjudged insolvent— Insolvency proceedings do not save limitation.

Section 15 does not operate to save limitation in cases where the suit could have been instituted on complying with a preliminary requisite in that behalf, viz. the obtaining of leave to sue from the Court. [P 657 C 1]

Therefore, in a suit instituted on a pro-note the plaintiff cannot claim to deduct the time during which insolvency proceedings were pending against the defendant: 8 *Mad.* 229; 9 *I.C.* 786, and (1872) 7 *Ch. App.* 646 *Dist.* [P 657 C 2]

C. A. Seshagiri Sastri for *K. Krishnasawmy Aiyangar*—for Appellant.

K. Bashyam Ayyangar for *S. Narasimha Aiyangar*—for Respondent.

Judgment—This second appeal can be disposed of on the short point of limitation. The bond and the pro-note sued on were executed in February and April 1910. The suit was brought in July 1915. In October 1910 defendant 1 applied to be adjudged an insolvent and was so adjudged in December 1911. In July 1914 that adjudication was annulled, because there was a composition with the creditors. Apparently the present plaintiff received no dividends under the composition. He is the assignee of the bond and the pro-note. The question is whether his present claim is barred by limitation. Mr. Bashyam Ayyangar for respondent contended that S. 15, Lim. Act, saved the bar.

His argument was that the order of adjudication was tantamount to an order to stay all further proceedings in the matter. As we read S. 16, Cl. (2), Provincial insolvency Act, what the order of adjudication effects is not an absolute stay, but a direction that before a suit is brought a condition precedent should be complied with, namely, the obtaining of leave to sue from the Court. In our opinion S. 15, Lim. Act, does not operate to save limitation in cases where the suit could have been instituted on complying with the preliminary requisite in that behalf. The learned vakil relied on *Shunmugam* v. *Moidin* (1). That case proceeded on the construction of the particular order before the Court. Moreover, the authority of that decision is much shaken by the decision of the Judicial Committee in *Beti Maharani* v. *Collector of Etawah* (2). As regards *In re General Rolling Stock Company, Joint Stock Discount Company's. Claim* (3) it is clear that what the Court of appeal laid down was that so long as the matter is pending before the Bankruptcy Court the liquidator can admit a claim to proof and the fact that leave to prove the debt was given or refused does not affect the question In *Thuchakovil Unni Koya* v. *Arapayil Pathutti Umma* (4) this Court held, on a construction of S. 273, Civil P. C, that there was a total prohibition against persons other than the decree holder from executing the decree. In that view S. 15 clearly applied.

Having regard to S. 9, Lim. Act and to the observation of the Judicial Committee in *Soni Ram* v. *Kanhaiya Lal* (5) we are unable to agree with the District Judge that S. 15, Lim Act, is applicable to this case: vide also *Doraisami Padayachi* v. *Vaithilinga Padayachi* (6) For these reasons, we think that the suit was barred by limitation. We must therefore reverse the decree of the District Judge and restore that of the District Munsif with costs here and in the Court below.

S.N./R.K. *Appeal allowed.*

(1) [1885] 8 Mad. 229.
(2) [1895] 17 All. 198=22 I. A. 31 (P C).
(3) [1872] 7 Ch. App. 646=41 L. J. Ch. 732.
(4) [1910] 35 Mad. 622=9 I. C. 786.
(5) [1913] 35 All. 227 = 40 I. A. 74 =19 I. C. 291 (P.C).
(6) [1917] 41 I. C. 581.

A. I. R. 1919 Madras 657

WALLIS, C. J. AND SPENCER, J.

Bhanireddi Venkan Doragaru and *others*—Plaintiffs—Appellants.

v.

Secy. of State and *others*—Defendants—Respondents.

Civil Appeal No. 63 of 1917, Decided on 2nd April 1918, against decree of Addl. Sub-Judge, Rajahmundry, in Original Suit No. 49 of 1916.

(a) Madras Revenue Recovery Act (1864), S. 59—Sale under S. 59—Suit to set it aside is to be brought within six months from date of sale.

A suit to set aside, a sale which purports to have been held under the provisions of S. 59, Madras Revenue Recovery Act, by an officer competent to conduct it under the authority of the Act, should be brought within six months from the

date of the sale as provided in the section: 45 *I. C.* 653; 12 *Mad.* 168, (*F.B.*); *A. I. R.* 1916 *P.C.* 141 and 15 *Mad.* 219, *Cons.* [P 659 C 1]

(b) **Madras Revenue Recovery Act (1864), S. 59—Statements of facts taking case out of S. 59 must be made in plaint and proved.**

If the plaintiff challenges the right of the Government to sell the property by showing that the provisions of the Act could not be legally applied and that his case is out of the scope of S. 59, he should set forth the necessary facts in the plaint and prove them. [P 659 C 1]

A. Krishnaswami Aiyar and *P. Somasundram*—for Appellants.

Govt. Pleader and *P. Narayanamurti*—for Respondents.

Judgment.— The plaintiffs brought this suit against Government for a declaration that the sale of the villages of Peddipalum and Ankampalum in their Peddipalum Mokhasa for arrears of revenue was illegal and to recover the property from defendant 2 who purchased it at the revenue sale. The Subordinate Judge dismissed the suit because he found that the plaintiffs had no case on the merits and because the suit was in his opinion barred by limitation. The plaintiffs appeal. There is no dispute about the fact that this Mokhasa was held by the grantees and their heirs upon a favourable jodi or quit rent on condition of rendering military service and that it was liable to be subjected to the payment of full assessment in case of any alienation of the land; that in December 1906 the Government imposed full assessment on the ground that there had been such alienation, and that in March 1907 these villages were sold by an officer of Government purporting to act under the sections of Madras Revenue Act 2 of 1864, which provide for sales of immovable property for default in payment of the revenue on the due dates.

There can be no doubt that this suit, which was instituted in July 1914, is barred by S. 59, Act 2 of 1864, if that section which allows only six months' time for "parties deeming themselves aggrieved by proceedings under this Act" to institute suits in a civil Court is applicable to it. Mr. A. Krishnaswamy Ayyar for the appellants argues that if Government acted illegally in imposing the full assessment there were legally no arrears of revenue and that the revenue sale was consequently held without any jurisdiction and must be treated as void ab initio.

This question has recently been considered by this Court in *Vadlur Chinna Nagi Reddi* v. *Devineni Venkatramaniah* (1), where it was held following the Full Bench decision *Venkata* v. *Chengadu* (2) and distinguishing *Secy. of State* v. *Radha Kishore Manikya* (3) and other decisions of the Judicial Committee, that if there are no arrears or if the land in respect of which the arrears are due is not included in the holding of the alleged defaulter, that constitutes a want of jurisdiction which will render S. 59 inapplicable, but if the proceedings are intra vires though irregular, this section applies. This distinction between sales which though wrongful or irregular are substantially sales under the Act and sales which are ultra vires was observed in *Raman* v. *Chandan* (4) and in *Raman Naidu* v. *Bhassoori Sanyasi* (5), which were not considered in the case in *Vadlur Chinna Nagi Reddi* v. *Divineni Venkatramaniah* (1). Now in this case this Subordinate Judge has found that the arrears for which the revenue sale in 1907 was held

"was for the non-payment of ths usual jodi, not to speak of the enhanced amount levied by the Collector under the special circumstances."

It is in our opinion unnecessary to consider the evidence upon which this conclusion is based because, if the plaintiffs' case was that the sale was without jurisdiction because there were no arrears at all due upon the land, it was their duty to allege and prove it. If we refer to the pleadings, it does not appear from the plaint that the plaintiff ever set up such a case. Their main contention was that the Government was not justified in treating, as a breach of the conditions as to alienation, a sale in invitum held in execution of the money-decree in Original Suit No. 29 of 1900, which was in a subsequent suit declared by a competent Court to be an invalid sale. In their written statement the Government admitted the allegation that they levied full assessment on the ground that the Court sale in Original Suit No. 29 of 1900 was a breach of the terms upon which the grant was made. At the trial in the lower Court the question was raised whether the Government were entitled to

(1) [1918] 45 I. C. 653.
(2) [1889] 12 Mad. 168 (F.B.).
(3) A. I. R. 1916 P. C. 141=44 Cal. 328=38 I. C. 379=43 I.A. 303 (P.C.).
(4) [1892] 15 Mad. 219.
(5) [1903] 26 Mad. 638.

justify their action by relying upon the alienation made by the plaintiffs, which they had not mentioned in their written statement and as to which we cannot say on the evidence on record whether or not they were relied on when the enhanced assessment was imposed.

It is unnecessary to consider this question. The revenue sale purported to be one which was authorized by Act 2 of 1864 and it was conducted by an officer competent to conduct sales for arrears of revenue under the authority of that Act. If the plaintiffs intend to challenge the right of the Government to bring this property to sale by showing that the provisions of this Act, including S. 59, could not be legally applied, they should have alleged and proved the necessary facts to take the case out of its scope. As they have failed in this respect we must agree with the lower Court in regarding the suit as barred. The appeal is dismissed with costs (two sets).

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 659

ABDUR RAHIM AND SESHAGIRI AIYAR, JJ.

Muthukrishna Naicken—Defendant—Appellant.

v.

Ramchandra Naicken and *others*—Plaintiffs—Respondents.

Civil Appeal No. 226 of 1916, Decided on 25th April 1918, against decree of Temporary Sub-Judge, Chingleput, in Original Suit No. 13 of 1916.

(a) Will—Construction—Bequest by Hindu for performance of "thaligais" in temples—Allocation of income not indicated—Brother's sons appointed as vars to conduct charities—When will was registered and also in certain legal proceeding relating to properties in question, testator making statements of his intention to bequeath properties for charitable purposes—Suit under S. 92, Civil P. C., for removal of vars and for scheme—Dedication held not void for uncertainty—"Vars" meant only trustee for charities—Court had power to direct surplus income to imparting religious instruction—Trust held public trust—Statements made by testator at registration of will and also in civil proceedings were admissible under Evidence Act (1872), Ss. 6 and 32.

One *A*, a Hindu, left a will appointing his brother's son as his vars "to conduct charities Tiruvendanthai, Tirukkadalmalai and Tirupathi with the help of my properties." The mode of conducting the charity was specified to be the giving of thaligais in the temples on the Tirunakshatram day, but no special allotments were made for the purpose. At the registration of the will in his house the testator declared before the registrar that he intended by the will to bequeath properties to charities. It also transpired that in a suit against the testator for a declaration that part of the properties in dispute and some other properties did not belong to him solely the testator had filed a written statement stating that he acquired the properties for charity and intended to make a testamentary disposition in that behalf. In a suit instituted under S. 92, Civil P. C., for removal of defendant the vars aforesaid from trusteeship and for a scheme for the management of the trust:

Held: (1) that the dedication was definite and not void for vagueness or uncertainty: 23 *Bom.* 725 (*P. C.*) and 30 *Mad.* 340, *Dist.* [P 663 C 1]

(2) That the mention of the word "vars" in the will did not make defendant 1 the sole owner of the properties subject to the carrying out of the directions relating to charity, but only constituted him trustee for the charities: 24 *Bom.* 420; 20 *All.* 84 (*P. C.*), *Dist.* and 23 *I. C.* 166 (*P. C.*), *Foll.* [P 662 C 1, 2]

(3) That the direction as to the performance of thaligai was not meant to be exhaustive but only illustrative and that it was competent to the Court after the allotment of a particular fund for the thaligai, to direct the rest of the income to be devoted for imparting religious instruction. [P 667 C 2, P 668 C 1]

(4) That statement made by the testator at the registration of the will and in judicial proceedings relating to the properties comprised in the bequest were admissible under Ss. 6 and 32, Evidence Act. [P 664 C 2]

(5) That the trust was a public and not a private trust: 14 *Mad.* 1; 20 *Bom.* 495 and 30 *I. C.* 74, *Dist.* [P 664 C 2]

(b) Civil P. C. (1908), S. 92—Suit under—Court should not sanction compromise giving trust property to party.

A Court should not sanction a compromise of a suit under S. 92 under which any portion of the trust properties is given to any of the parties. [P 661 C 1, 2]

(c) Hindu Law—Will—Doctrine of cypres is in harmony with Hindu Shastras.

Per *Abdur Rahim, J.*—The rule as to cypres is quite in harmony with the teachings of Hindu Shastras and has been applied in many cases relating to charitable gifts by Hindus. [P 661 C 1]

(d) Civil P. C. (1908), S. 92—Scheme suit—Charitable bequest by testator—Object mentioned not exhausting corpus of fund—General intention to devote whole fund to charity found—Court can apply doctrine of cypres and carry out testator's intention—Cypres.

Per *Seshagiri Aiyar, J.*—The principal consideration where the object mentioned does not exhaust the corpus of the fund is to find out whether there was a general testamentary intention or purpose. Even though the object may be specified and the bequest otherwise definite if the law will not allow the application of the fund for the purpose it may be that the Courts are not at liberty to infer a general testamentary intention in favour of charity in general and to direct the application of the property to other purposes of a charitable kind. [P 663 C 1, 2]

The primary rule is to ascertain whether the object aimed at by the testator could be carried out without making a new will for him. Al-

though there may be vagueness in the selection of the places or in the allocation of the funds, so long as it is ascertainable that the testator had a particular object in view and that he intended that the funds left by him should be appropriated to that object, Courts are bound to see that the persons appointed by the testator do not misappropriate the funds [P 663 C 2, P 664 C 1]

If the Court can ascertain that there was a general charitable intention the fact that the particular object for which the charity was intended did not exist or that the fund intended for that charity could not exhaust the whole income will not be any reason for holding that the bequest failed in whole or in part. If it appears that the donor intended that in any event the fund should be devoted to charity and that a particular institution was named merely as the channel by which that intention was to be effected the whole fund will be regarded as having been dedicated to charity and the Court will proceed to carry out the intention of the testator on the principle of cypres. [P 664 C 1]

(e) Will—Construction — Rule of English law that even answers to interrogatories may be regarded either as codicil or will does not apply to Hindu wills.

The rule of English law that even answers to interrogatories may be regarded either as a codicil or a will may not apply to testamentary dispositions in India. Under the Hindu Wills Act and the Succession Act it is doubtful whether such informal declarations could be regarded as testamentary. [P 664 C 1, 2]

(f) Hindu Law—Will—Grants given to religious institution made as general thanks-offering—Grants ear-marked but not exhausting recurring income—It is legitimate to direct their application to promotion of knowledge—Cypres.

There is nothing in the religion of the Hindus, in their traditions and in the consciousness of the people which will compel Courts to respect prejudices which sap at the root of religion and which pervert and not advance its precepts. Therefore whenever grants made to religious institutions are not ear-marked or, if ear-marked are not intended to exhaust the recurring income and whenever they are made as a general thanks-offering it is proper and legitimate to direct their application to the promotion of knowledge. [P 667 C 2]

(g) Will—Construction— Doctrine of cypres should receive as extended application as possible to give effect to true intent of donor—Cypres.

Indian Courts have ample powers to give directions towards the application of the trust income even though the trustee may not himself be competent similarly to apply it The doctrine of cypres should receive as extended an application as possible so as to give effect to the true intent and aim of the donor His lapses, his ignorance and his failure to understand the situation should not fetter the Courts so long as the purposes specified by him are not violated. [P 668 C 2]

(h) Civil P C. (1908), S. 92—Under S. 92 Court can sanction scheme on cypres application.

Under S. 92, the Court can sanction a scheme on a cypres application of a charitable trust. [P 669 C 1]

T. Rangachariar—for Appellant.

T. R. Ramachandra Aiyar—for Respondents.

Abdur Rahim, J.—I agree in the conclusions arrived at by my learned brother in his learned and exhaustive judgment which I had the advantage of reading. On the question of the interpretation of the will of Alavandar, there can be little doubt that he intended to devote all his properties to charity and did not desire to make a gift of them to the appellant. It will be superfluous on my part to add anything to the reasons given in my learned brother's judgment on this point. Nor can I usefully add anything to what he has said on the question whether the provisions of the will constitute such a definite and certain gift to religious and charitable objects as the Courts could give effect to. The testator was a religious minded and charitable person and was particularly attached to certain temples at Mahabalipuram and Tirupathi, and reading the will in connexion with the other relevant evidence in the case and in the light of the history of Alavandar's life it seems to me that his intention was clearly to further the interests of the Hindu religion by endowing certain forms of worship in connexion with those temples.

The third question relating to the scheme and the application of the doctrine of cypres has, I must admit given me some difficulty. This is not a case of an ancient foundation where, owing to changes in the circumstances since the date of the foundation, surplus income has become available that was not in the contemplation of the founder and about which he has given no specific directions. The suit has been instituted immediately after the death of the founder and the question is whether he intended that the entire income of the property should be devoted to the performance of Thalikai in the temples mentioned in the will or not. My learned brother has described in his judgment what a Thalikai consists in. But there is nothing clearly to show either that Alavandar himself devoted all the income of the property merely to offerings of food to the deity or that he intended that the entire income should be devoted to that purpose alone My learned brother is of opinion that Alavandar could not have intended that the

income of property however much it might increase in course of time, should be spent in Thalikais alone, and having regard to his intimate knowledge of these matters I should not be justified in suggesting any doubt as to the soundness of this conclusion. I accept his conclusion that the mention of Thalikai was to use his own language, meant to be illustrative and not exhaustive, and I have no hesitation in holding that a general charitable intention is .apparent from Alavandar's will. In that view of the intentions of the donor, the application of the surplus income in the way outlined in my learned brother's judgment would be substantially carrying out the testator's intentions. As to the law on the question of the doctrine of cypres, whether the ancient texts of Hindu law clearly enunciate such a doctrine in so many words or not, I am persuaded that the rule is quite in harmony with the teachings of Hindu Sastras and has been applied in many cases relating to charitable gifts by Hindus, I therefore agree in the decree proposed.

Seshagiri Aiyar, J.—One Alavandar left a will appointing his divided brother's son, defendant 1 herein, at his vars. The will is dated 22nd June 1914. The testator died on 8th August of the same year. The present suit was brought under S. 92, Civil P. C. in December 1914, alleging that the property left by Alavandar was dedicated to charity, that defendant 1 had misappropriated the funds, that therefore he should be removed from the trusteeship cf the charity, and that a scheme should be framed for its managemant. Defendant 1 contended that the dedication was incomplete and ineffective and that consequently he was entitled to the property left by the will. The Subordinate Judge came to the conclusion that the property was dedicated to certain charities and that defendant 1 was guilty of acts of malversation. In the result he held that it was not necesssary to remove defendant 1 from his position as trustee, but that a co-trustee should be appointed with him and that a scheme should be framed for the management of the trust properties. Defendant 1 has appealed. It may be stated at the outset that the plaintiffs, who obtained the sanction of the Advocate-General for instituting the suit, presented a compromise along with defendant 1 in this Court. As in our opinion the compromise was aimed at giving a portion of the trust property to defendant 1, we refused to accept it and directed the case to be argued on the merits.

The main qnestion relates to the construction of the will. In that document the testator says that he left the family while he was young and become a Sanyasi. The evidence shows that all the properties were his self-acquisition. It is unnecessary to consider whether he was really a Sanyesi as mentioned by him. The will states:

"As I am now infirm and weak in body, I, in order that charities may be continued after my life (with) the undermentioned immovable and moveable properties to the following places, viz., Tiruvedanthai, Tirukkadalmalai and Tirupathi, have by this will appointed my younger brother Veerasami Naicken's son Muthukrishna Naicken who has no share or claim as my "vars," and have given him all affairs after my life."

Mr. Rangachariar first contended that under the will his client, defendant, became the owner of the properties, subject to the carrying out of the directions relating to the charity. I am unable to agree with him. The learned vakil argued that the language of the will was ambiguous. He referred to the expression "in order that the charity to these places." There can be no doubt that what the testator meant was that the charity should be performed in those places. The next suggestion was that there was no direction as to the utilization of the properties mentioned in the will, because there is no participle governing the words "under-mentioned properties." The word "with" has been added by the translator. We asked the Bench Clerk to translate it and he agreed with the previous translation. From my knowledge of Tamil I feel no doubt that these two translators are right in intrcducing the word "with ' before the words "under-mentioned properties." Alavandar was an illiterate man, and in construing the will of persons of that class, we must put ourselves in their position.

The next contention was based on the use of the word "vars" in the will. The contention of the appellant's vakil was that defendant 1 was instituted heir to the whole property, the suggestion being that the term "vars" was used in its technical sense. I do not think that this contention is well-founded. The word "vars" in the context .only means 'suc-

cessor." The testator says in the previous portion that he himself has been conducting the charities. In the very next sentence the testator takes care to say that this brother's son "has no share or right," this indicates that it is not a beneficial interest in or ownership of the property that Alavandar was giving to his brother's son, but only the privilege of conducting the charities which he had been performing during his lifetime. He further says that the patta should remain in his name notwithstanding that his brother's son was to be his successor. The expression "I give him all powers" does not mean that rights of disposition over the property are given, but only rights of managing the property as trustee. I feel no doubt that the property was dedicated to charity and that defendant 1 was appointed as the first trustee. Mr. Rangachariar referred to two cases to explain the meaning of the term "vars" *Chunilal* v. *Baimuli* (1) and *Suraj Mani* v. *Rabi Nath Ojha* (2). If we accepted the contention of the learned vakil, we would be making a will for Alavandar from the language employed under very different circumstances by a testator in Bombay and by another living on the banks of the Ganges, a procedure not only repugnant to all ideas of construction but to the decision of the Privy Council in *Venkata Narsimha Appa Row* v. *Parthasarathy Appa Row* (3). In the expressive language of Lord Moulton in that case, what the Court has to do is

"to put itself into the testator's arm-chair, to look to the surrounding circumstances consistent with his race and religious opinions."

but not to add under any circumstances to the testamentary disposition. The following sentence is peculiary applicable to the present case:

"That native testators should be ignorant of the legal phrases proper to express their intentions, or of the legal steps necessary to carry them into effect is one of the most important of the 'surrounding circumstances' which the Court must bear in mind, and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions, but those intentions must be ascertained by the proper construction of the words he uses, and once ascertained they must not be departed from."

Applying this test I agree with the opinion of the Subordinate Judge that the bequest was to the charity and not to defendant 1 subject to the performance of certain charities. The next point argued by the learned vakil was that the dedication was vague and indefinite, and that consequently either the whole of the property or such portion of it as would remain unspent after meeting the special purpose mentioned in the will should be regarded as undisposed of reside. Before dealing with the cases quoted in this connexion, I might refer to the language itself in which the bequest is clothed. I have already mentioned the fact that the testator referred to the circumstances that he himself was performing the charities in the three shrines already referred to. At the end of the will he says:

"after my lifetime Thaligai shall be given in Swami Kovil at the Tirunakshatram every month."

The contention for the appellant was that Thaligai referred to was not intended for distribution to the poor or in the temple. I am to a certain extent conversant with observances in Vishnu temples. I am aware that when a rich man speaks of giving a Thaligai in a temple, he very often stipulates that the food should be offered to the deity, and that after deducting certain Swatantrams, the rest of it should be returned to him for use in his house. But ordinarily when a devotee establishes a fund for Thaligai in a temple, it means that the consecrated food is to be distributed among the 'Desantries,' as they are called, or the worshippers who might assemble at the time of the Aradhanam. The ordinary significance of making Thaligai is the latter and not the former one. I must therefore refuse to accept the contention that the Thaligai was intended to be offered by defendant 1 in order to be utilized by him in any way he liked later on. There is force however in the contention of the learned vakil about the way in which the Subordinate Judge has read the sentence referred to above. The Subordinate Judge seems to think that the word Swami Koil only refers to Mahabalipuram or Tirukkadalmalai. I think he is wrong here. The testator meant to refer to all the three temples mentioned by him and not to one alone. I am also satisfied that the Subordinate Judge is wrong in thinking that the Tirunakshatram referred to was the birthstar of the

(1) [1900] 24 Bom. 420.
(2) [1908] 30 All. 84=35 I. A. 17 (P.C.).
(3) [1914] 37 Mad. 199=23 I. C. 166=41 I. A. 51 (P.C.).

deceased testator. I cannot accept the view that the testator was speaking of his birth star as Tirunakshatram. Tirunakshatram in the chief Vishnu temples is the birth star of the deity. Every month that Nakshatram falls on a particular day, and that is generally a day in which the god is taken out in procession, or some special ceremonies are conducted. Therefore the Tirunakshatram referred to by the testator is the birth-star of the deities in the three temples. Subject to these corrections in the view taken by the Subordinate Judge, I agree with him that there is no vagueness in the dedication. The three places in which the charities are to be performed are mentioned; a particular form of charity is indicated, and the particular occasion in which such a charity is to be performed is also mentioned. I see nothing vague in such a disposition.

Now I shall examine the cases quoted by the learned vakil for the appellant. In *Runchordas Vandravandas* v. *Parvatibai* (4) there was no specification of the charity or of the locality in which the charity was to be performed. In that case the Judicial Committee quoting *Morice* v. *Bishop of Durham* (5) stated:

"Unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided that the Court can neither reform maladministration nor direct a due administration."

That defect does not exist in the present case. Here the subject and the objects are both ascertained and specified. In the other case, *Parthasarathi Pillai* v. *Thiruvengada Pillai* (6), Subramania Aiyar, J., in a very learned judgment, pointed out that a bequest for Dharmam would not by itself be invalid, but felt bound, by reason of the decision of the Judicial Committee in *Runchordas Vandravandas* v. *Parvatibai* (4), to hold that the bequest in that particular case was void for uncertainty. In this Madras case beyond saying that the executors shall utilize the properties for Dharmam no place and no mode of charity were indicated. On the other hand the decision in *Surja Kunwari* v. *Pande Har Narain Ram* (7) shows that dispositions like the present are enforceable.

The principal consideration where the object mentioned does not exhaust the corpus of the fund is to find out whether there was a general testamentary intention or purpose. Even though the object may be specified and the bequest otherwise definite, if the law will not allow the application of the fund for the purpose, it may be that the Courts are not at liberty to infer a general testamentary intention in favour of charity in general and to direct the application of the property to other purposes of a charitable kind. That was in effect the decision in *Doraisawmy Pillai* v. *Sandanatham mal* (8) to which the learned vakil drew our attention. In that case the properties were endowed for a chatram which the testator intended to build. Before his death the chatram was not built. The learned Chief Justice and Coutts-Trotter, J., came to the conclusion that as the object for which the endowment was made had failed, the property lapsed into the residue. But here, as I pointed out already, the places wherein the charities are to be performed are in existence. In recent years the English Courts have viewed with less disfavour similar bequests to charities. In *Wordie's Trustees* v. *Wordie* (9) it was held that

"a bequest to such charitable institutions or societies which existed for the benefit of women and children requiring aid or assistance of whatever nature, but the said institutions and societies to be under the management of Protestants"

was not void for uncertainty. Again in *Cameron's Trustees* v. *Mackenzie* (10)

"a bequest of residue to trustees to distribute the same among such charitable institutions, persons, or objects as they might think desirable"

was held enforceable. And in *Bannerman's Trustees* v. *Bannerman* (11)

"a power in favour either of religious or charitable institutions, one or more, conducted according to Protestant principles"

was held good. The primary rule is to ascertain whether the object aimed at by the testator could be carried out without making a new will for him. Although there may be vagueness in the selection of the places or in the allocation of the funds, so long as it is ascertainable that the testator had a particular object in view and that he intended the funds left by him should be appropriated to that object, Courts are bound to see that the persons appointed by the testator do not

(4) [1899] 23 Bom. 725=6 I.A. 71 (P.C.).
(5) [1905] 32 E.R. 947=7 R.R. 232.
(6) [1907] 30 Mad. 340.
(7) [1917] 39 All. 311=38 I.C. 166.
(8) [1915] 20 I. C. 225.
(9) [1915] S. C. 310.
(10) [1915] S. C. 313.
(11) [1915] S. C. 398.

misappropriate the funds. *The Corporated Society* v. *Price* (12), *Bunting* v. *Marriott* (13), *Biscoe* v. *Jackson* (14) and *Attorney General* v. *Lawes* (15), all show that if the Court can ascertain that there was a general charitable intention, the fact that the particular object for which the charity was intended did not exist or that the fund intended for that charity could not exhaust the whole income will not be any reason for holding that the bequest failed either wholly or in part. As was pointed out in *Loscombe* v. *Wintringham* (16), if it appears that the donor intended that in any event the fund should be devoted to charity and that a particular institution was named merely as the channel by which that intention was to be effected, the whole fund will be regarded as having been dedicated to charity and the Court will proceed to carry out the intention of the testator on the principle of *cypres*. The decision in *Abdul Kader* v. *Bai Safiabu* (17) is to the same effect. My conclusion on this part of the case is that there is a general charitable intention in the will of Alavandar that the property left by him should be appropriated for the performance of charities in the three temples already mentioned, and, therefore no part of the bequest fails for want of definiteness.

There is also another consideration which induces me to hold that the bequest is valid. Exs. A (1) and B, two statements made by the testator, show that he intended to make a will like the present one and that he intended by that will to bequeath properties to the charities. Mr. Rangachariar objected to receiving these two documents in evidence. I think both the documents were properly admitted by the lower Court. It may be that the suggestion of Mr. T. R. Ramachahdra Aiyar that Ex. A (1) should be regarded as a codicil is somewhat farfetched. The citation from Jarman on Wills, Vol. I, p. 35, that even answers to interrogatories may be regarded either as a codicil or will may not apply to testamentary dispositions in this country. Under the Hindu Wills Act and the Indian Succession Act it is doubtful whether such informal declarations could be regarded as testamentary. But I think Ex. A (1) is admissible in evidence under S. 32, Cl. (7), Evidence Act. It is a statement taken by the Sub-Registrar in the house of the testator before registering the will, and it was made two days after Ex. A. I think the language of Cl. 7, S. 32 covers this case. I also think that this statement is part of the res-gestae and as such receivable in evidence under S. 6, Evidence Act. As regards Ex. B it was a written statement filed by Alavandar in a suit brought against him to declare that part of the properties in dispute and some other properties did not solely belong to him. In his written statement he said that he had acquired the properties for the purposes of a charity and that he intended to make a testamentary disposition in that behalf. This is certainly a statement which was opposed to the pecuniary interest of the person making it and as such is covered by S. 32 (3), Evidence Act. Reading Exs. A (1) and B along with Ex. A, I am of opinion that the testator had a clear testamentary intention in favour of charity.

The next point for consideration is whether the trusts declared by the testater are public trusts or only private trust as contended for by Mr. Rangachariar. I have already pointed out that the use of the word "thaligai" should not mislead us. The charities were intended to be performed in three public religious institutions. One of the objects was to feed the devotees. I fail to see how this can be regarded as a private trust. The decision in *Sathappayyar* v. *Periasami* (18), which related to a gift by the then zamindar of Sivaganga to his own religious preceptor with a view to the property being utilized for a special purpose, has no bearing upon this question. In that case it was held that the gift was primarily to the preceptor and that there was only a direction or a suggestion that the property should be appropriated in a particular manner, and that consequently the beneficial interest vested in the preceptor. Nor has *Trimbak* v. *Lakshman* (19) any bearing on the present question. In *Sriranga Chariar* v. *Pranatharthihara Chariar* (20) the grant was to a

(12) 1 J. & La. T. 498.
(13) [1854] 19 Beav. 163=52 E. R. 311.
(14) [1887] 35 Ch. D. 460=56 L. J. Ch. 540.
(15) [1849] 8 Hare 32=19 L. J. Ch. 300.
(16) [1850] 13 Beav. 87=51 E. R. 34.
(17) [1911] 12 I. C. 702=36 Bom. 111.
(18) [1891] 14 Mad. 1.
(19) [1896] 20 Bom. 495.
(20) [1915] 30 I. C. 74.

person and an object was specified. It was held that it was not a public trust. These authorities are not applicable to cases where there is no bequest to any individual but only to charity. Before dealing with the question as to how the funds should be appropriated, I might deal with the contention of Mr. Rangachariar that his client should be the sole trustee. It is true that the suit was instituted within six months of the death of the testator. Nonetheless the evidence in this case shows that the personal habits of defendant 1 are of such a nature as would justify co-adjutors being appointed along with him. Moreover I cannot shut my eyes to the fact that defendant 1 claimed in this suit that no part of the property should go to the trust. At the same time I am in agreement with Mr. Rangachariar that defendant 1 should not be wholly removed. The best course will be to appoint two more trustees, of whom one at least should be a non-Brahmin, to co-operate with him in the management of these properties. It is desirable also that defendant 1 should be given a salary to see that the charities are properly conducted. The details of the scheme will be left to the lower Court.

This brings me to the last question, whether it is open to us to direct the application of the income to objects other than the performance of Thaligai in the temples. I do not at present propose to do anything more than indicate in the general way the objects on which the fund may be spent. On a rough calculation the income which is likely to be derived is about Rs. 8,000 a year. After paying the expenses of the management and the remuneration of the trustee, there may be a balance of about Rs. 6,000. In my opinion one fourth of it, namely, Rs. 1,500 should be spent in the three temples, Rs. 500 in each, for the purpose of feeding people and conducting Utsavams. The balance should be utilized for giving religious instruction. Mr. T. R. Ramachandra Aiyar, without seriously objecting to the allocation, of any portion of the income to education, made us understand that such a provision in the scheme must not be taken to have been made by consent of the parties. As the question regarding the application of surplus income comes up before the Courts very often, I propose to deal with the jurisdiction of the Court in such matters. Although the extent of jurisdiction over temples exercised by the ancient kings of the land is not traceable in any of the writings handed down to us, there can be no manner of doubt that the affairs of religious institutions were directly under the control of the sovereigns. The Muzerai Department of Mysore, and the conduct of temple affairs in Travancore and Cochin all point to the conclusion that the administration of Devastanams has been and is a department of the State. Even mutts are subject to Governmental supervision. The mutt properties in Mysore often pass into the hands of the Government with a view to their more efficient management. There is no reason for presuming that a different state of affairs prevailed in ancient India. Regn. 7 of 1817 states in the preamble that

"it is the duty of the Government to provide that all such endowments be applied according to the real intent and will of the grantor."

It is not unreasonable to assume that such alduty was inherited from the ancient sovereigns of the land, although the notion that the sovereigns is bound to administer ecclesiastical affairs properly is an English idea as well. In Koutilya's Arthasastra, in the chapter headed "Replenishment of the treasury," some Machiavellian advice is tendered to the king regarding the appropriation of the temple income. The minister, like those that served some of the English Kings, seems to have been concerned only with aiding the king in securing money for temporal purposes without reference to the morality or legality of the attempts. I have referred to Chanakya's disingenuous advice to the sovereign only for the purpose of showing that the revenues from the temples were indented, upon rare occasions, for the general administration of the land. There is evidence that in the days of the East India Company the surplus income from the temple properties was appropriated to general purposes. Controversies are still carried on by individual institutions claiming a refund of such income. In more recent years, the legislature has enacted a law (vide the Tirupati Devastanam Act) authorizing the utilization of a portion of the temple income for the purposes of advancing secular education. Courts have sanctioned expenditure for imparting in-

struction in Sanskrit and Tamil (vide the scheme for the Rameswaram Devastanam). I see no reason for holding that these instances have been considered by religious devotees as amounting to a misapplication of the temple income. A remarkable letter by the Rajah Sarabhoji of Tanjore, dated 28th January 1801, addressed to the then British Resident shows in what spirit and with what intents religious charities were gifted and administered. After referring to the fact that persons from all over India travel by foot to Rameswaram where Chatrams have been built, the letter says:

"For the accommodation of these travellers principally, the chatrams have been established and to each of them a pagoda, choultries and schools are annexed."

Then the nature of the charities is explained. Then follow these sentences:

"In each chatram, a teacher to teach the four Vedams is appointed and a school master and doctors skilful in the cure of diseases, swellings and the poison of reptiles. All the orphans of strangers who may come to the chatram are placed under the care of the school-master. They are also fed three times a day and once in four days they are anointed with oil They receive medicine when they require it. Clothes also are given to them and the utmost attention paid to them. They are instructed in the sciences to which they may express a preference and after having obtained a competent knowledge of them the expenses of the marriage are defrayed."

The above extract explains with what eye ancient kings looked upon the dispensation of charities. I have been at pains to find out whether the Hindu Shastras countenance the distinction between religious and charitable purposes. My research shows that in India religious purposes have been considered only as a branch of the charitable purpose. Jaimini in his Sutras says: "* * * Dharma or charity is that which is ordained" K. L. Sarkar in his Mimamsa Rules of Interpretation rightly points out that this ordaining is not from the vedas alone, it may be from the Smritis and some of the accepted itihasas and puranas as well. When the Tanjore Rajah in providing for the safe conduct and comforts of the pilgrims considered that education is a form of charity which would enable the donor to attain salvation, he interpret ed truly the shastraic injunctions in this behalf. Vaidyanatha Dikshitar, who has in his monumental work prescribed the duties of house-holders, discusses at some length the form and nature of charity best calculated to lead a man to heaven. He first quotes a very well-known text from taittiriya Upanishad on the excellence of dharma: "***" Then he quotes a few very apt slokas from Manu: "***" In the matter of Danam the Veda says: "All beings praise Danam. Everything rests on Danam. Therefore, it is said that Daman (gift) is the noblest and the supreme." Manu says:

"There are three classes of the highest gifts: namely, the gift of cows, land and saraswathi, viz., (learning). Gift of learning is more praiseworthy than giving of food. In learning, Para Vidya (knowledge relating to the Para Brahman) —is considered to be superior. And therefore Swarga (Heaven) and Moksha (salvation) are vouchsafed to the donor of such knowledge. He who imparts knowledge to the ignorant or constructs rest houses, attains the same merit as a person who has gifted land."

From the above extract it will be seen that among all the commendable gifts the gift of a cow, of a piece of land and of education are considered to be the noblest. Of these three, the gift of education is more praiseworthy than the other two. In education, "that which imparts to the donee a knowledge of the supreme is to be preferred." It is clear from the above Smriti text that Manu regarded vidya dharmam or gift of education of any kind as conducive to salvation. His preference of Para Vidya, education relating to a knowledge of Para Brahman, shows that in his opinion every endeavour to remove ingorance and to infuse light is acceptable to God. *In* the face of such a pronouncement, it would be absurd to argue that a general gift by a devotee intended as a propitiatory offering to God would be misspent if a portion of it is utilized for giving secular education. The final scheme approved by the District Board of Tanjore for the utilization of the surplus funds shows that they carried out the letter and spirit of the instructions given by Raja Saraboji in the letter already referred to. What the District Board and the legislature have done is not beyond the competence of Courts which act as the sovereign's delegated authority in conserving and properly administering charitable gifts.

The difficulties we are experiencing are traceable to the constitution of committees under Act 20 of 1863. The supervision of the sovereign power ceased, and with it the power to apply the surplus income to purposes most conducive to the general welfare and comforts of the

devotees. The first committees applied their minds to conserving the income and to spending it on rituals and ceremonials which the common people most desired. They were not given the powers which the sovereign exercised. The Act was so drawn up as to leave most essential matters unprovided for. The earlier trustees owed their appointments, in not a few cases, to the accident of being temporarily in charge of the affairs of an institution. The result has been disastrous. When an ineffective law is administered by a person anxious to be maintained as trustee, and who feels that he is responsible to no one, there is bound to be peculation and mismanagement. The multiplication of utsavams is due more to a desire to find channels of expenditure which might give a profit to the spender than to serve the legitimate wishes of the devotees. Moneys have been recklessly allotted for these tamashes, not in a few instances, to the detriment of the more legitimate ceremonials in the temple. I am glad that it has been recently ruled that money borrowed for fireworks is not chargeable on the trust. See *Adiraja Arsu* v. *Sheik Budan Sahib* (21). I do not believe that sane men would seriously advance the theory that it is more pleasing to God that moneys should be spent in fireworks and in engaging dancing girls than in imparting education to the sons of the devotees. There can be no manner of doubt as to the wishes of the people on such matters. But we have unfortunately a machinery for the administration of religious institutions which gives scope for abuses of a serious kind on the part of those entrusted with the management of such institutions.

The Hindu Shastras, as I pointed out, attach great importance to the imparting of knowledge. True religiousness, according to Hindu notions, is possible only to those who are learned. I fail to see why the application of temple income to the promotion of knowledge, which in the main must lead a man aright, should be considered improper. No doubt when a devotee ear-marks the offering for a particular purpose, it is not open to the authorities to divert it to other purposes. Even, here, when the purpose is legitimately satisfied by the application of a portion of the income, the balance can be devoted to the promotion of useful knowledge. But in the vast majority of cases where the offerings are contributed without any set purpose, the management will be justified in applying them to purposes connected with the deffusion of knowledge. A sufficient portion of the income may be spent on spectacular demonstrations which attract and please the ordinary worshipper. He often desires that the deity should have such accompaniments to festivals and ceremonies as would please the eye and give an air of magnificence and of sumptuousness. But panderings to such cravings should have limits. I do not say that a puritanic standard of religiousness should be imposed. But it is not the function of the managers to encourage observances which have no connexion with the fundamentals of religious worship. In very many instances, expenditure on tamashes produces the opposite effect. The worship of the deity is lost sight of, in the desire to witness the amusements ; and not infrequently, vice is encouraged and spread by these practices. I have no hesitation in saying that the modern developments regarding processions lead the people far away from the paths of religion and are calculated to bring it into disrepute. I think there is nothing in the religion of the Hindus, in their traditions and in the consciousness of the people, which will compel Courts to respect prejudices which sap at the root of religion and which pervert and not advance its precepts. Therefore whenever the grants made to religious institutions are not ear-marked or, if ear-marked, are not intended to exhaust the recurring income, and whenever they are made as a general thanks offering, it is proper and legitimate to direct their application to the promotion of knowledge.

There is one other aspect of the question. The donations made to a deity often take the strictly legal aspect of charity as understood by English lawyers. Grants for feeding the devotees, for giving them shelter, for giving them water are made in connexion with religious institutions. Grants are frequently made to reward persons who chant the Vedas or the Prabhandam when the utsavams are in progress. I cite these instances to show that in the eyes of a donor, the feeding of the poor and the encouragement of educated men are re-

(21) [1918] 44 I. C. 815.

garded as purposes gratifying to the deity ? If that is so, how can a management be charged with misapplication, if it uses the surplus funds to enable young men to gain knowledge or to give them food while reading in schools and colleges? In England it has been held that the advancement and propagation of education and learning are charitable purposes : see *Whicker* v. *Hume* (22). I think this principle is applicable with greater force to Indian conditions. In *Thompson* v. *Thompson* (23) it was held that where the gift is general and indirect, its application to provide a fund for unsuccessful literary men would be valid. Where the relief of poverty is the object of the donor, it has been held that the object can be effectuated by the apprenticing of poor children or by giving pensions to destitute men : see *Attorney-General* v. *Minshull* (24) and *Attorney-General* v. *Wansay* (25). In *Estlin, In re* ; *Pritchard* v. *Thomas* (26), appropriation of such funds for founding homes for lady teachers was upheld. In *Hall* v. *Derby Sanitary Authority* (27) the establishment of orphanages from such funds was held to be proper. Further, as pointed out by Mr. Ganapathi Aiyar in his Hindu and Mahomedan Endowments, p. 58, the Hindu Shastras do not draw a sharp line of distinction between religious and charitable grants. The word "poorta" which signifies pious acts open to all classes of society connotes both religious and charitable acts. See also West and Buhler, pp. 206 and 207. It would therefore be idle to impute to Hindu devotees an intention that in making offerings or donations they contemplated purely religious purposes as opposed to charitable purposes.

I have thus far endeavoured to show that the trustees of a temple would be acting well within their powers in using temple income to promote knowledge. As regards the functions of the Court in such matters, there can be no doubt. I pointed out in *Sitharam Chetty* v. *Subramania Aiyer* (28) that the Courts in this country have inherited the jurisdiction of the Chancery Courts in England. In a Tinnevelly case, *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar* (29), which I decided sitting with the learned Chief Justice, I held that just as a Court of Chancery would not allow a trust to die for want of a trustee, so also the Indian Courts have ample powers to give directions towards the application of the trust income even though the trustee may not himself be competent similarly to apply it. The doctrine of cypres should receive as extended an application as possible so as to give effect to the true intent and aim of the donor. His lapses, his ignorance and his failure to understand the situation should not fetter the Courts so long as the purposes specified by him are not violated.

It was pointed out in *Attorney-General* v. *Lawes* (15) the jurisdiction of the Courts of Chancery should be exercised with a view to prevent the failure of the donation altogether. Courts in this country should act on the same principle. In the present case I have held that there is a general charitable intention. The mode of carrying it into effect is not provided for with any certainty. It would be absurd to suggest that the Rs. 6,000 should be wholly spent in Thaligais. The truth is that the donor intended that his earnings should be spent in the temples without taking care to provide how they should be spent. His mention of Thaligai was meant to be illustrative and *not* exhaustive. The evidence to which Mr. Ramachandra Aiyar drew our attention shows that in his lifetime. Alavandar spent monyes for other religious purposes than giving Thaligais. Very likely the testator did not expect such a large income from the properties. He was not educated enough to give the necessary directions in his will for the proper allocation of the income. That duty can be performed by the Court. As was pointed out in *Ommanney* v. *Butcher* (30), Courts have often to supply defects of this nature in a trust bequest. As I pointed out before, when the mode indicated by the donor cannot reasonably exhaust the income, the doctrine of cypres can be invoked. In England, the appropriate mode of effectuating a charitable trust is by sanctioning a scheme. The case-law on the point is thus summarized in 4 Halsbury, para. 316. As

(22) [1858] 7 H. L. C. 124=28 L. J. Ch. 396.
(23) [1844] 1 Coll. 381=8 Jur. 839.
(24) [1798] 4 Ves. Jun. 11=31 E. R. 6.
(25) [1808] 15 Ves. Jun. 231=33 E. R. 742.
(26) [1903] 72 L. J. Ch. 687=89 L. T. 88.
(27) [1886] 16 Q. B. D. 163=55 L. J. M. C. 21.
(28) [1916]39 Mad. 700=32 I. C. 211.
(29) [1917] 41 Mad. 124=42 I. C. 366.
(30) [1823] Turn & R. 260=37 E. R. 1098.

this judgment has already become lengthy I shall content myself by extracting the passage here :

"A scheme is generally necessary on any cy-pres application of a charitable trust unless the trust is altered merely in detail. Schemes are also required where the trusts of the instrument of foundation are ambiguous or insufficient and no particular objects are defined, or where there are no trustees, or the trustees are dead or refuse to act or where there has been an increase in the revenue of the charity, or the persons managing the charity have misapplied its property, or where for any other reason it is thought expedient to regulate the administration of the charity."

In my opinion S. 92, Civil P. C., gives Indian Courts similar powers. In the present case, the scheme should be of such a nature as to give effect to the expressed intention of the testator and to apply the surplus income for educational purposes. Without unduly fettering the discretion of the lower Court, I may indicate the main lines on which the scheme should be framed : (a) An establishment for collecting the income should be sanctioned, not exceeding Rs. 500 a year ; (b) Defendant 1 should be paid Rs. 40 a month for superintending the charities ; (c) with him should be associated two more trustees of whom one at least should be a non-Brahmin ; (d) Rs. 1,500 out of the net income should be spent in Thaligais and Utsavams ; Rs. 500 in Tiruvedanthai and Mahabalipuram to be spent on the Tirunakshatram day ; and Rs. 500 to be utilized for purchasing Prasadam in Tirupati during Brahmotsavam to feed non-Brahmin worshippers ; (e) the balance should be spent for giving religious education in Tamil Prabandam. With these suggestions, the appeal is dismissed. Costs of both parties in both Courts will come out of the trust fund.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 669

SPENCER AND KRISHNAN, JJ.

V. Subramania Ayyar—Counter-Petitioner—Appellant.

v.

Mulla Veettil Assan Koya — Petitioner—Respondent.

Appeal No. 363 of 1917, Decided on 22nd August 1918, against order of Dist. Judge, South Malabar, D/- 24th September 1917, in civil Misc. Petn. No. 160 of 1917.

(a) Mahomedan Law—Gift—Delivery of seisin is necessary to complete gift—Gift to minor under protection of donor unaccompanied by delivery—There is presumption of intention to complete transfer.

Though delivery of seisin is necessary in the case of gifts by Mahomedans in order to complete the gift yet where a father or grandfather is living with his minor son or grandson and makes a declaration of gift before any dispute arises, such a declaration would be sufficient to raise a presumption in favour of the latter that the former intended to complete the transfer. But in order to rebut that presumption, or on the other side to strengthen it other indicia of the transfer of possession may be looked to such as the attornment of tenants to the donee, the mutation of names in the Collector's registers and the application of the profits of the property gifted, as such facts may show that the alleged gift was or was not intended to operate as a transfer to the donee. In cases of gifts by a Mahomedan father or grandfather to his minor son or grandson under the protection of the donor if it be shown that the minor has the benefit of the produce of the lands that fact would indicate that transfer of ownership has been made. The burden of proof is not in the first instance on the minor or anyone who seeks to support the gift to show that the income of the property was spent for the minor's benefit. On the other hand the person who seeks to invalidate the gift must show that in spite of the gift the donor continued to deal with the property as if it was his own. [P 670 C 1; P 671 C 1, 2; P 672 C 1]

(b) Mahomedan Law—Gift—Grandfather making gift to minor grandson—Fact that father is alive and living in same house does not invalidate gift.

The fact that the father was alive and living in the same house with the grandfather when a gift was made by the latter to his minor grandson will not invalidate the gift. In such a case acceptance could be made by the guardian of the minor donee. [P 671 C 2]

T. R. Ramchandra Aiyar, C. V. Ananthakrishna Aiyar and *K. P. Ramakrishna Aiyar*—for Appellant.

S. Swaminadhan and *K. Kuttikrishna Menon*—for Respondent.

Spencer, J.—This is a case of a gift of property by a Mahomedan grandfather in favour of his grandson. Two cases of gifts by Mahomedan grandparents in favour of their grandsons have come before this Court in recent years. They are reported: *Fakir Nynar Muhamed Rowther* v. *Kandasawmi Kulathu Vandan* (1) and *Alamanayakunigari Nabi Sab* v. *Murukuti Papiah* (2). The latter was a case similar to the present of a gift made to a grandson during the lifetime of his father at a time when all the three lived together in the same house. One of these cases had the advantage of being heard by Abdur Rahim, J., and the other had the advantage of being heard by Tyabji,

(1) [1912] 35 Mad. 120=14 I. C. 993.
(2) [1915] 29 I. C. 439.

J. The whole question of gifts to minor sons has again been elaborately and learnedly discussed by Tyabji, J., in *Rahman Bi* v. *Fatima Bibi* (3). From these rulings and from what the text-books say on the subject it appears to be sound law that although delivery of seisin is necessary in the case of gifts by Mahomedans in order to complete the gift,.yet where a father or grandfather is living with his minor son or grandson and makes a declaration of gift before any dispute arises, such a declaration would be sufficient to raise a presumption in favour of the latter that the former intended to complete the transfer. But in order to rebut that presumption,or on the other side to strengthen it other indicia of the transfer of possession may be looked to such as the attornment of tenants to the donee, the mutation of names in the Collector's registers and the application of the profits of the property gifted, as such facts may show that the alleged gift was or was not intended to operate as a transfer to the donee. It is also stated in *Alamanayakunigari Nabi Sab* v. *Murukuti Papiah* (2), that a gift to a minor will not fail merely because the person who takes charge of the subject of the gift on his behalf is not his father and at p. 741 (of 29 *M. L. J.*), where a grandfather, father and son, all live together in one houae, it will not materially affect a gift of lands which inmate of the house is in actual care of the minor, but if it be shown that the minor has the benefit of the produce of the lands that fact would indicate that a transfer of ownership has been made. Now in the present case the gift deed, Ex. A, oontains a declaration that henceforth the donee should have possession and hold the property by himself or through others, pay the Government revenue, and the purapad due to the jenms, attorn to the jenmis and take renewals from them in his own name when necessary, recover the properties in the possession of the tenants with the rent or cause them to attorn to him and so enjoy the properties for ever.

There is a further statement that the documents of title were therewith given to the donee. In the schedule attached to this gift deed under the heading of possession the donee's name appears as the present possessor and the donor's as the previous possessor of the lands gifted. The District Judge in this order observes that witnesses 2 and 3 for the petitioner gave evidence that the grandson's parents acknowledged the gift in his favour. No such statement appears in their evidence, so far as we are able to see, and the respondents' pleader has been unable to refer us to any such statement. It is however in evidence that the revenue was paid on behalf of the minor and that he was enjoying the property. As this refers to a state of things which existed after the grandfather, Athan, died, it does not assist us in tho determination of the question whether there was a transfer of possession during Athan's lifetime. But on the other side the counter-petitioner adduced no evidence to show that Athan continued to enjoy the property even after he had gifted it away, and therefore the legal presumption remains that the minor, who was living with his grandfather, enjoyed the benefit not only of the house but of the produce of the land also. The District Judge was therefore right in finding on the evidence before him that the gift was a complete and valid one and that the properties now sought to be proceeded against in execution were not liable to be attached for Athan's debts. The civil miscellaneous appeal must be dismissed costs.

Krishnan, J.—The only point argued by the appellant's vakil in this case is that the gift evidenced by Ex. A, is invalid under the Mahomedan law as it was not completed by the delivery of possession of the properties included in it, by the donor Athan to the donee Assan Koya or to his legal guardian, his father Pokku, he being a minor. The District Judge rejected this contention and upheld the gift and after careful consideration, I am inclined to think that his judgment is right. No doubt the ordinary rule of Mahomedan law is that a gift is not valid till it is completed by the delivery of the property given so far as it is capable of such delivery. This rule is stated by Sir R. K. Wilson in his book on Mahomedan law, para. 301, as well as by Mr. Ameer Ali in his book, Edn. 4, Vol. 1, p. 112; it is also stated in Baillie's Digest, p. 520, and it has been recognized by the Courts : see *Choudhri Mehdi Hasan* v. *Muhammad*

(3) [1915] 31 I. C. 545.

Hasan (4), *Vahazullah Sahib* v. *Boyapati Nagayya* (5) and *Ismal* v. *Ramji Sambhaji* (6). The Privy Council recently held that the registration of the deed of gift is not a proper substitute for the delivery of possession : see *Sadik Husain Khan* v. *Hashim Ali Khan* (7). There is however a well-recognized exception to the above rule. It is stated by Sir R. K. Wilson in para. 303 of his book in the following words :

"No transfer is necessary in the case of a gift by a father to his infant son, the declaration of gift being considered to change the possession by the father on his own account into possession as guardian on his son's account, and the law is the same in every other case where the donee is a minor in lawful custody of the donor."

Though the gift in the present case was by the grandfather to the minor when his father was alive, it is found, and the finding has not been disputed by the appellant's vakil, that at the time of the gift the minor was living with his grandfather under his care and in his custody. The parties are Moplas of South Malabar and as is usual among them, Athan and several of his sons and their wives and children were all living together in the same house as one family. It was a matter of difference of opinion at one time between the early Mahomedan lawyers whether, when the child was in the charge of the grandfather the brother, the mother or the uncle, a gift made to it by one of them or by a stranger could be validly taken possession of for him by the person in charge of the child when the father was present and capable of taking, and whether such acceptance was enough to validate the gift. It seems to be now settled that such acceptance is sufficient and the gift is good in law. This question is discussed at some length by Mr. Ameer Ali in his book, Vol. 1, pp. 124 to 130. In Baillie's Digest also it is stated in the chapter on gifts that

"besides the father and the grandfather, the brother, the paternal uncle, the mother and othar relatives have all, on a favourable construction, the power to take possession of a gift for a minor when he is in their family."

That being so where such a person makes a gift to a minor it follows that no express acceptance or transfer of possession is needed to complete the gift. The declaration of his intention to hold the property on behalf of the minor makes his possession thereafter the possession of the minor. The fact that the father of the minor is alive and present when such a gift is made does not affect its validity. In a similar case of a gift by a grandfather to a minor grandson living with him in the same house, his father being alive, it was held by this Court that the absence of proof of delivery of possession of the subject of the gift to the minor's father was not fatal to the validity of the gift : see *Alamanayakunigari Nabi Sab* v. *Murukuti Papiah* (2). I must therefore hold that the want of evidence of an actual delivery of possession of the properties by Athan to any one on behalf of the minor Assan Koya does not invalidate the gate to him. The subject-matter of the gift in the present case was the kanom right under Ex. C that Athan had over the properties and not the properties themselves. The recitals in Ex. A show that Athan purported to transfer possession of the properties and hand over the documents, (apparently the kanom deed and the leases from tenants in possession) to Assan Koya ; it is a fair inference from this that if he continued in possession, such possession was held by him on behalf of the minor. Tyabji, J., has held in the case already cited, *Alamanayakunigari Nabi Sab* v. *Murukuti Papiah* (2) that :

"the real question in these cases is whether after the gift the donee was given the benefit of the subject of the gift or whether its produce continued to be taken and dealt with by the donor and applied to his own benefit just as he had done before making the gift."

The question still remains whether the gift is to be held valid or invalid when there is no clear evidence on either side. There is I think, a presumption in a case like the present where the minor is being fed and clothed and taken care of by the donor that the donor holds possession and collects the income on the minor's behalf ; in fact it seems precisely on such a presumption that the actual transfer of possession necessary in ordinary cases of gift is dispensed with in the case of such minors under the Mahomedan law. It is therefore clear that the burden of proof in this case is not in the first instance on the minor or on anyone who seeks to support the gift to show that the income of the property was spent for the minor's

(4) [1906] 28 All. 439=33 I. A. 68 (P. C.).
(5) [1907] 30 Mad. 519.
(6) [1899] 23 Bom. 682.
(7) A. I. R. 1916 P. C. 27 = 38 All. 627 = 36 I. C. 104 = 43 I. A. 212 = 19 O. C. 192 (P. C.).

benefit. On the other hand, the person who seeks to invalidate the gift must show that in spite of the gift the donor continued to deal with the property as if it was his own. This question did not exactly arise in *Alamanayakunigari Nabi Sab* v. *Murukuti Papiah* (2) as the finding submitted by the District Judge on which the gift was declared invalid was

" that the produce of the land was not applied to the use of the donee but, on the contrary, continued to be applied in the same way as it was before the alleged gift."

In the case of *Rahiman Bi* v. *Mahomed Fatima Bibi* (8) the deed of gift itself showed that the donor (who was the father of the donee) purported to reserve in his own favour what in effect was a life interest ; it was on this ground that it was distinguished by one of the learned Judges who decided it, in his latter judgment in *Alamanayakunigari Nabi Sab* v. *Murukuti Papiah* (2), it is thus clearly distinguishable from the present case. There is no reliable evidence on the attaching creditor's side in this case to prove any act or conduct on Athan's part inconsistent with the presumption that he held possession of the properties on the minor's behalf after his gift to him. Athan died about three months after the execution of Ex. A. Though Ex. A provided that the donee should pay the Government revenue on the lands and the rent or purapad to the jenmi, Athan made no payments either for himself or for the minor as he died before they fell due : and when they did fall due there is reliable evidence to show that the minor's mother paid it on his behalf. She has ever since continued to make the payments as they became due from time to time. Athan's heirs apparently never objected to this course. The jenmi has recognized Assam Koya as the kanomdar under Ex. C and the tenants in possession of some of the lands included in the kanom Ex. C have attorned to him though no doubt all this was done after Athan's death. But no inference adverse to the validity of the gift can be drawn from the fact that these things were not done in Athan's lifetime as he lived only for a short time after the gift. What evidence there is in the case is thus in favour of the validity of the gift than against it. The gift was not disputed till Athan's creditor, the appellant before us, attached the properties in execution proceedings from which this appeal arises. In these circumstances it seems to me that there is no ground made out here for invalidating the gift.

If the transfer of possession of the properties gifted was required to validate the gift the burden of proof would have been as argued by the appellant's vakil on the donee to prove that it was completed by delivery of possession by the donor during his lifetime : see *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (4). But in the present case, as I have already held, the burden is on the appellant and not on him. As the only point raised before us against the validity of Ex. A fails, this appeal must be dismissed with costs.

S,N./R.K. *Appeal dismissed.*

(8) A. I. R. 1915 Mad. 1=23 I. C. 651.

A. I. R. 1919 Madras 672

AYLING AND KRISHNAN, JJ.

Ramaswami Goundan—Petitioner,

v.

Kali Goundan—Opposite Party.

Civil Revn. Petn. No. 111 of 1918, Decided on 31st October 1918 against order of Dist Collector, Trichinopoly, D/- 16th August 1917.

(a) Madras Estates Land Act (1908), S. 192—S. 192 vested the High Court with power of revision under Civil P. C. (5 of 1908), S. 115.

Section 192, Madras Estates Land Act, renders S. 115, Civil P. C., applicable to all suits, appeals and other proceedings under the former Act, and thus vests the High Court with the power of revision in respect of orders passed under that Act. [P 673 C 1]

(b) Civil P. C. (1908), S. 115—Exercise of power of revision is discretionary.

The exercise of power of revision is always discretionary, and where the petitioner has already applied to the revenue authorities without success, the High Court will decline to exercise its power of revision unless imperatively called upon to do so to prevent a miscarriage of justice. [P 673 C 1]

(c) Madras Estates Land Act (1 of 1908), S. 131—Deposit required by S. 131 not made for last day owing to absence of presiding officer—Deposit made next day is valid.

Where the deposit required by S. 131 cannot be made on the last day of the time allowed owing to the absence of the presiding officer, a deposit made the next day will satisfy the requirements of the section. [P 673 C 2]

K. V. Sesha Aiyangar—for Petitioner.

L. S. Veeraraghava Aiyar—for Opposite Parties.

Ayling, J.—This petition arises out of an order of the Deputy Collector of Namakkal under S. 131, Madras Estates

Land Act, setting aside a sale for arrears of rent. The preliminary objection is taken that this Court has no power to revise such an order. I do not think this objection can be upheld. It is true that S. 205 of the Act (read with the Schedule, Part B, No. 19) gives a power of revision to the Board of Revenue or the District Collector in the case of such an order; and in the present case, petitioner has invoked the interference of both the authorities named without success. But S. 192, renders S. 115 of the present Civil P. C. (old S. 622) applicable to all suits, appeals and other proceedings under the Madras Estates Land Act. It may seem undesirable that the power of revising the same order should vest in two authorities so different in their constitution and ordinary procedure as this Court and the Board of Revenue, and one may wonder whether such a result was deliberately intended by the legislature or arrived at by inadvertence. Nevertheless we have to interpret the Act as it stands. It is impossible to say that the grant of the power of revision to this Court is inconsistent with the grant of similar power to the Collector and Board of Revenue; and I think it must be held that S. 192, vests this Court with the power of revision which petitioner invokes. Its exercise is of course always discretionary and where as in the present case the petitioner has previously applied to the revenue authorities under S. 205 without success, I think this Court might reasonably decline to exercise it unless imperatively called upon to do so to prevent a miscarriage of justice. The facts of the case are clearly set forth in the order of the District Collector declining to interfere which runs thus:

"On 24th May, the last day open to him, the counter-petitioner appeared with the deposit and applied to have the sale set aside. The Divisional Officer was absent on casual leave; the clerk therefore told him to come on the 26th, which he did. In the circumstances I cannot say that the sale was improperly cancelled even though no notice was given, as it ought to have been to the purchaser. I decline to interfere in revision and dismiss the petition."

Petitioner's main contention is that the deposit of the amount by the defaulting raiyat within the period of 30 days from the sale is a condition precedent to the passing of an order setting aside the sale, and that unless it is strictly complied with, no matter what the circumstances may be, an order setting aside the sale is ultra vires and illegal. The admitted failure to give notice to the auction-purchaser before passing the order is also said to be an infringement of O. 21, R. 92, and to equally invalidate the order. As regards the first objection, however strict the wording of S 131 may seem to be and although S. 5, Lim. Act, is not in terms applicable, authority is not wanting for a more reasonable and liberal interpretation of the section. *Shoosiee Bhusan Rudro* v. *Gobind Chunder Roy* (1) was a precisely similar case to the present one under the Bengal Tenancy Act; the learned Judges held that on general principles, when a fixed period is given to do a certain act and the person bound to perform it is from no act of his own, but from some act or order of the Court, prevented from carrying it out, he gets the advantage of the next open day. This ruling was followed and the same principle applied in other cases in the same Court [vide *Peary Mohun Aich* v. *Anunda Charan Biswas* (2) and by a Bench of this Court in *Sambasiva Chari* v. *Ramasami Reddi* (3)] to a case under the Rent Recovery Act. It has been embodied in a statutory rule in S. 10, General Clauses Act, as regards cases where the Court or office is actually closed. In the present case it may be said that the office or Court of the Deputy Collector was not closed on the last day of performance, but only the presiding officer, the Deputy Collector himself, was absent on leave.

This makes no difference. In consequence of his absence respondent found it just as impossible to get his deposit received as if the office or Court had been shut up, and his failure to perform the act required of him within the time specified was equally occasioned by the act of the Court and by no act of his own. I find nothing inconsistent with this in *Chundi Charan Mandal* v. *Banke Behary Lal Mandal* (4). In that case it was not shown that the judgment-debtor's failure to deposit the full amount within the prescribed period was due to any act or mistake of the Court: and the learned Judges are at

(1) [1891] 18 Cal. 231.
(2) [1891] 18 Cal. 631.
(3) [1899] 22 Mad. 179.
(4) [1899] 26 Cal. 449.

pains to make it clear that if it had been their decision might (not to say would) have been different. In another case quoted as *Bibi Sharofan* v. *Mahomed Habibuddin* (5) there is nothing to indicate that the failure to deposit within the prescribed time was due to any act of the Court: and the learned Judge whose judgment is relied on (Mookerjee, J.) had subscribed to the general principle laid down in *Shooshee Bhusan Rudro* v. *Gobind Chunder Roy* (1): vide his judgment in *Mahomed Akbar Jaman Khan* v. *Shukhdeo Panday* (6). Appellant's vakil drew our attention to Government Notification No. 145, Revenue, dated 27th March 1912, under which a deposit under S. 131 is allowed to be paid into any Sub-Treasury and suggested that as this alternative course was open to him, respondent should not be allowed the benefit of the general principle. The course prescribed by the Act is payment to the Collector, and we are in no position to say that when respondent found the latter's office closed against him, he was in a position to avail himself of the alternative course. In my opinion it was competent to the Deputy Collector to set aside the sale in the circumstances, although the deposit was not made within the prescribed time.

Coming to the second point, whether failure to give notice is a mere irregularity, or vitiates the whole proceedings, is open to agreement. But taking the view most favourable to appellant, I should not be prepared to exercise our revisional powers in this case on that ground alone. If the objection were allowed, our only course would be to set aside the Deputy Collector's order, and remand the application for disposal after due notice to appellant. But we have now had the advantage of hearing the case fully argued in all its aspects; and it is clear that appellant could bring forward no tenable objection to the setting aside of the sale and that the Deputy Collector's order was a perfectly just, reasonable and proper one (apart from the omission to give prior notice). To remand the case in such circumstances would be futile. I would dismiss the petition with cost.

Krishnan, J.—I agree and have nothing further to add, except that I have already dealt with the revisional power of the High Court in my judgment in *Paramaswami Aiyangar* v. *Alamu Nachiar* (7) which may be referred to.

S.N./R.K. *Petition dismissed.*

(5) [1911] 10 I. C. 148.
(6) [1911] 10 I. C. 51.
(7) A.I.R. 1919 Mad. 510=42 Mad. 76=49 I.C. 11.

** A. I. R. 1919 Madras 674
Full Bench

WALLIS, C. J., AYLING AND SESHAGIRI AIYAR, JJ.

Valan Pakkiri Taragan and *others*—Defendants—Appellants.

v.

Subbayan Samban and *others*—Plaintiffs—Respondents.

Second Appeal No. 370 of 1917, Decided on 14th November 1918, against decree of Dist. Judge Tinnevelly, in Appeal Suit No. 390 of 1915.

**** Specific Relief Act (1877), S. 42—Order interdicting use of highway for processions—Persons interdicted have cause of action although order is intra vires and no special damage is proved — Criminal P. C. (1898), S. 144.**

An order by a Magistrate under S. 144, forbidding a person or body of persons from using a highway for the purpose of processions, invests the person or persons interdicted with a cause of action if they allege it to be an infringement of their legal rights, though such an order be in itself intra vires and no special damage is alleged or proved.

A person or body of persons who claim a right to go in procession along a public highway can bring a declaratory suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage. (*Authorities reviewed.*) [P 675 C 2]

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* and *N.A. Krishnier*—for Appellants.

M. D. Devadoss—for Respondents.

Opinion

Wallis, C. J.—In *Satku* v. *Ibrahim Aga* (1), the facts are not set out in the report, and all that appears is that the plaint averred obstruction of the plaintiffs in their use of the highway by the defendants and also an order of the Magistrate under S. 518, (now 144), Criminal P. C., prohibiting the plaintiffs from using the highway in the particular way to which the defendants took objection. Sir Michael Westropp, C. J., after reviewing the English decisions as to the right of an individual member of the public to maintain an action for the obstruction of a public thorough-fare and showing that of such action would lie without proof special damage, dismissed the plaintiffs'

(1) [1877-78] 2 Bom. 457.

suit on that ground. The obstruction in the cases cited consisted of interference with the surface of the highway which interfered with the right of the public to pass and repass freely. The same principle would, no doubt, apply if the defendants obstructed the public by assembling on the highway for their own purposes, as for the purpose of holding a market. That also would be a public nuisance and the rule as to special damage would apply. If however the defendants assembled to prevent the plaintiffs from exercising their lawful right to pass along the highway in a particular manner, that would appear not to be a case of public nuisance but of trespass or threatened trespass to the plaintiffs, and in trespass an action lies without proof of special damage. That indeed is the general rule, the rule as to special damage in cases of public nuisance being the exception. The Bombay High Court has recently taken this view in *Baslingappa Parappa Chedachei* v. *Dharmappa Basappa Chedachel* (2) and has refused to apply the decision in *Satku* v. *Ibrahim Aga* (1) to a case like this. In that case the plaintiffs sued to establish their right to go in procession with a temple car along a particular road which was denied by the defendants. The lower appellate Court thought that the plaintiffs had the right they claimed, but dismissed their suit as no special damage was shown, following *Satku* v. *Ibrahim Aga* (1). The High Court reversed the decrees of the lower Courts and gave the plaintiffs a declaration and an injunction observing, in the course of their judgment, that the suit was not for the removal of a public nuisance, but for a declaration of the right of an individual community to use the public road, a suit which they held to lie without proof of special damage. This case, in my opinion, was rightly decided and should be followed.

The case is stronger both on principle and authority where, in addition to the plaintiff's right to use the road in a particular manner being challenged by the defendants, the plaintiffs have been prohibited from exercising it under S. 144, Criminal P. C. In deciding in a case like this how to exercise the power given him by the section to direct any person to abstain from a certain act

"if he considers that such direction is likely to prevent or tends to prevent obstruction, annoyance or injury or a disturbance of the public tranquillity or a riot or an affray"

the Magistrate must be governed largely, though not exclusively, by the opinion he forms as to the legal rights of the contending parties. He is not the proper judge of these rights and all that he can do is summarily and on materials which are necessarily imperfect to form an opinion that one side or the other has made out a prima facie case of right and to give due weight to that opinion in deciding what order to pass. The effect however of the order which the Magistrate is empowered to pass by the section in the general interest is that for two months it becomes a punishable offence for the party to do an act which he may be in a position to establish his right to do before a competent tribunal. Further the order may be extended by the Government, and even if not extended, must necessarily form a precedent for the passing of a similar order whenever the circumstances recur.

In these circumstances, even if there were any rule of law prohibiting persons from establishing by suit their rights to use the road in a particular manner against those who challenge it unless they could show special damage, and in my opinion there is no such rule, I should still hold that the statutory interference under the order with the legal rights of the party without any adjudication upon them would of itself give him a cause of action in a civil Court for the establishment of his right so as to prevent the order being continued by Government or renewed on a future occasion owing to a misapprehension of his rights if not so established. This would appear to be the result arrived at in the recent decisions of the Court which are referred to in the order of reference, except in *Kalmatappa* v. *Joish Narayan Bhat* (3) which should be overruled and also in *Maunada Mudali* v. *Nallayya Goundan* (4). In the earlier cases which are referred to in the order the Court seems to have been hampered by the decision in *Satku* v. *Ibrahim Aga* (1) and to have avcided the difficulty by holding that in the particular case the illegal or improper order of the Magistrate constituted the cause of action. In some of

(2) [1910] 34 Bom. 571=7 I. C. 663.

(3) [1917] 42 I. C. 337.
(4) [1909] 32 Mad. 527=1 I. C. 870.

the cases it is not easy to see wherein the illegality or impropriety consisted, and this consideration has been rightly discarded in later cases such as in *Maunada Mudali* v. *Nallayya Goundan* (4) which should I think be followed. I would answer both questions in the affirmative.

Ayling, J.—I agree that both questions should be answered in the affirmative. As stated in the order of reference, I regard the decision in *Baslingappa Parappa Chedachal* v. *Dharmappa Basappa Chedachal* (2) as statutory and convenient; and was only deterred from following it by the rulings of Divisional Benches of this Court, e. g., in *Kandasawmy Mudali* v. *Sabraya Mudali* (5), in which the decision in *Satku* v. *Ibrahim Aga* (1) had been treated as barring suits to declare a right of way where no special damage or special cause of action was proved. Now that the matter has been referred to a Full Bench, I have no hesitation in adhering to the view taken in the later Bombay case. The first question is really unnecessary if the second be answered as above; but I would only add that I fail to see why, when a magisterial order purporting to be passed under S. 144, Criminal P. C., is alleged as the cause of action, it should make any difference whether the said order is intra vires or ultra vires of the Magistrate who passed it. Its legality, as distinguished from its expediency, will ordinarily depend on considerations entirely dissociated from the civil rights of the parties affected. If it is held that an illegal order which may be disobeyed with impunity gives a right of action, all the more should a legal order which cannot be contravened without a breach of the criminal law. If a legal order gives no cause of action, then the person injuriously affected will in most cases be without a legal remedy; for he could only secure special damage by disobeying the order and committing a criminal offence.

Seshagiri Aiyar, J.—I am of the same opinion. I am satisfied after listening to the very full arguments of Mr. Ramachandra Aiyar that there should be no distinction between orders intra vires and ultra vires with reference to a right of suit. It is practically offering a premium to break the law, if it is held that a party is not entitled to have recourse to a civil suit to establish his right after an adverse order against him by the Magistrate. I fail to see why the mistake of a Magistrate in clutching at jurisdiction or in passing an order which the law does not permit him to pass should place the party against whom it is made in a more advantageous position as regards civil remedy than a party against whom a Magistrate has acted within his powers, and has exercised his functions within the limits of law. In either case the party seeks the assistance of the Court on the ground that the order is wrong and deprives him of his common rights; consequently there can be no justification for an artificial distinction drawn between illegal and legal orders.

The earlier cases which laid down that for an injury which is common to himself and to the rest of the public the complaining plaintiff should allege special damage proceeded on the ground that otherwise there would be multiplicity of suits. That seems to have been the basis of the English decisions on the point. But in England there is apparently no procedure by which the magistracy can prohibit particular classes, communities or bodies of persons from exercising civil rights. In my opinion magisterial orders cause special injury to the persons prevented. Therefore the rule of English law is not strictly applicable in India. If I am right in this view, it would lead to no good to classify such orders into proper and improper ones and to invest the latter alone with the attributes of special injury. In both cases the party is equally affected. In both cases it is desirable that the party should have an opportunity of proving that his rights have been interfered with.

I am of opinion that *Maunada Mudali* v. *Nallayya Goundan* (4), *Muthayya Reddi* v. *Sudalaimuthu Nadar* (6) and *Andi Moopan* v. *Muthuvirama Reddi* (7) lay down the law correctly. In the Bombay High Court there are a number of cases which hold that an order issued by the police would not furnish a cause of action, but that special damage should be proved. *Virupaxappa Fakirappa* v. *Sherif Sab Mulla Masud Sab* (8) and *Dundappa Mallappa Sigandhi* v.

(5) [1909] 32 Mad. 478=1 I. C. 716.

(6) [1910] 5 I. C. 902.
(7) [1915] 29 I. C. 248.
(8) [1909] 2 I. C. 494.

Secy. of State (9). They are inconsistent with *Baslingappa Parappa Chedachal* v. *Dharmappa Basappa Chedachal* (1). Although this latter decision is based on a dictum in *Sadagopalchariar* v. *Rama Rao* (10), which is not to be found in it, the conclusion is that special injury need not be proved when a portion of the public sues to establish a right of procession through a public highway. In my opinion this view is right. The dicta in *Muthialu Chetti* v. *Bapun Saib* (11), *Kandasawmy Mudali* v. *Subraya Mudali* (5) and *Kalmatappa* v. *Joish Narayana Bhat* (3) that unless the order of the Magistrate is ultra vires special damage should be proved must be overruled. My answer to both the questions is in the affirmative.

S.N./R.K. *Answered in the affirmative.*

(9) [1917] 37 I. C. 563.
(10) [1903] 26 Mad. 376.
(11) [1878-80] 2 Mad. 140

A. I. R. 1919 Madras 677

SESHAGIRI AIYAR AND BAKEWELL, JJ.

Mannikkath Ammini Ammal and *others*—Plaintiffs—Appellants.

v.

Nanikkath Padmanabha Menon and *others*—Defendants—Respondents.

Second Appeal No. 2065 of 1915, Decided on 27th April 1917, against decree of Temporary Sub-Judge, Palghat in Appeal Suit No. 849 of 1914.

(a) Malabar Law — Tarwad — Right to maintenance cannot be denied unless tarwad is unable to give separate allowance.

The right of a member of a Malabar tarwad for maintenance or an allowance is an incident of coproprietorship in the property of the tarwad and that right cannot be denied unless circumstances show that the tarwad is not in a position to give a separate allowance. [P 678 C 1]

(b) Malabar Marriage Act (1896), Ss. 17 and 18—Ss. 17 and 18 are not intended to deprive member of tarwad of his or her rights in tarwad.

Sections 17 and 18 were not intended to deprive a member of a tarwad of his or her rights in the tarwad. The registration of the marriage of a female member of a tarwad, therefore under the Act does not cause a forfeiture of her rights and cast the duty of maintaining her and her children on her husband. [P 678 C 1,2]

(c) Malabar Marriage Act (1896), S. 18—S. 18 leaves guardianship of property untouched.

Section 18 of the Act only provides for personal guardianship and leaves the guardianship of property untouched. [P 678 C 2]

J. L. Rozario—for Appellants.

C. V. Ananthakrishna Aiyar—for Respondents.

Judgment.—The suit is by a female member of a tarwad and her children for maintenance against the tarwad: the defence is that as plaintiff 1's marriage has been registered under Act 4 of 1896, she and her children should entirely look to the husband of plaintiff for maintenance and not to the tarwad. The question is said to be one of first impression; the learned vakils on both sides have addressed to us very full arguments on the question. In our opinion the view of the lower appellate Court is wrong. At the outset it might be mentioned that the expression "maintenance" is loosely applied to this class of cases. The allowance claimed by an Anandravan of a Malabar Tarwad or by a junior member of a joint Hindu family is not as a dependent upon the owner of the property, but as one who in his own right is entitled to participate in the income.

The Common law in both cases having vested the management in the senior member, the claim for separate allowance is an indicia of proprietorship and not founded upon moral or quasi legal obligations or on inability to maintain himself or herself. The authorities to which Mr. Rozario drew our attention have established this position with practical unanimity. In *Putanvitil Teyan Nair* v. *Putanvitil Rayavan Nair* (1) it was held that the possession of separate property should not be taken into account in considering whether a member of the tarwad was entitled to separate allowance. This decision proceeded on the theory that each member has a right to a share in this income. *Ekanat Thayu Kunji Ama* v. *Ekanat Shungunni Valia Kymal* (2) has to some extent qualified the above decision by pointing out that where the tarwad has not sufficient income to maintain all the members decently, the fact that one of them has other means of livelihood would be a factor that can be taken into account. Here again the right to claim the allowance even where there are other means seems to have been accepted. In *Achutan Nair* v. *Kunjanni Nair* (3) it was distinctly stated that the right to an allowance should be based on the right of co-ownership of property. *Maravadi* v.

(1) [1882] 4 Mad. 171.
(2) [1883] 5 Mad. 71.
(3) [1903] 13 M. L. J. 409.

Pamakkar (4) accepts this principle as well founded. In *Naku Amma* v. *Ragavo Menon* (5) it was held that a member of a tavazhi was entitled to sue the tavazhi for an allowance even though he was being maintained by the main tarwad. This is another illustration of the principle of co-ownership. This latter decision was affirmed by the Full Bench in *Chukkara Kannan* v. *Kunhi Pokker* (6). Thus it is clear that the right of a member of a tarwad for an allowance is an incident of co-proprietorship in the property of the tarwad and that consequently that right could not be denied unless circumstances show that the tarwad is not in a position to give a separate allowance.

In this appeal the questions whether the plaintiffs were justified in living away from the tarwad house, whether there are circumstances which would justify the allotment of an allowance when they do not choose to live with the other members and whether the claim for arrears is sustainable have not been gone into. Those questions will have to be dealt with by the lower appellate Court. Mr. Ananthakrishna Aiyar mainly relied upon Ss. 17 and 18, Act 4 of 1896. The learned vakil argued that the term "maintenance" suggested that it is a subsistence allowance and that if that subsistence is given by another who is bound by law to provide it the tarwad is absolved from liability. This argument ignores the weight of the consideration we have set out, namely that the claim by a tarwad member is of the character of proprietary right to a share in the income. It is true, as pointed out by the learned vakil, that Cl. 2, S. 17 only leaves unaffected the customary right, if any, against the tarwad but the right secured by Cl. (1) is a personal right, a right, given by the statute against persons who comply with certain formalities. Such a right cannot take away the right of property. S. 18 was relied on as showing that the father or the husband is alone entitled to maintain the children of the wife.

That section introduces an exception to the general rule that the natural guardian of an Anandravan is the Karnavan. The legislature has recognized that the welfare of the minor wife or the minor children would be safer in the hands of those who are more nearly connected by blood than the Karnavan. It has at the same time imposed a limitation upon the husband or the father by enacting it as a condition precedent to guardianship that they should manifest their interest in the welfare of the minor by making some sacrifice. This section only provides for personal guardianship and leaves property guardianship untouched. We do not think these provisions were intended to deprive a member of a tarwad of his or her rights in the tarwad. For these reasons we must reverse the decree of the lower appellate Court and remand the appeal for disposal on the merits. Costs will abide the result..

S.N./R.K. *Case remanded.*

(4) [1912] 36 Mad. 293=14 I. C. 383.
(5) [1913] 38 Mad. 79=18 I. C. 1.
(6) [1915] 39 Mad. 317=30 I. C. 755 (F.B.).

A. I. R. 1919 Madras 678
Full Bench

WALLIS, C. J., AYLING AND KUMARASWAMI SASTRI, JJ.

Kulasekara Naicker and *others*—Plaintiffs—Appellants.

v.

Jagadambal Ammal and *others*—Plaintiffs and Defendants—Respondents.

Original Side Appeal No. 69 of 1917, Decided on 18th February 1919, from judgment of Coutts-Trotter, J., D/- 3rd September 1917.

Letters Patent (Madras), Cl. 15—*Order as to costs by Judge sitting on Original Side on review of taxation of taxing officer is judgment.*

An order as to costs passed by a Judge sitting on the Original Side on a review of taxation by the taxing officer is a "judgment" within the meaning of Cl. 15 and an appeal lies therefrom to a Devision Bench; 8 *I. C.* 340, *Foll.* [P 678 C 2]

R. Subramania Aiyar—for Appellants.

A. Narasimha Chariar for *V. V. Srinivasa Aiyangar*—for Respondents.

Opinion.—Accepting the interpretation put upon the word "judgment" in Cl. 15, Letters Patent, in *Tuljaram Row* v. *Alagappa Chettiar* (1), the most recent decision on the subject of a Full Bench of this Court, we think that an order as to costs is not the less a judgment within the meaning of Cl. 15, Letters Patent, because it relates to costs only. We do not think that the obeservations of White C. J., in the later case in *Numberumal Chettiar* v. *Krishnaji* (2) are opposed to this view. The one earlier decision of

(1) [1910] 35 Mad. 1=8 I. C. 340.
(2) A. I. R. 1914 Mad. 418=22 I. C. 919.

the Full Bench in *Saravana Mudaliar* v. *Rajagopala Chetty* (3) was binding on the Bench in that case and the learned Chief Justice merely distinguished it by showing that it was inapplicable to the facts of that case. We answer the question in the affirmative.

S.N./R.K. *Answered affirmatively.*

(3) [1907] 17 M. L. J. 569.

A. I. R. 1919 Madras 679 (1)

PHILLIPS AND KRISHNAN, JJ.

Balasundara Pandiam Pillai—Plaintiff—Appellant.

v.

Authimulam Chettiar —,Defendant—Respondent.

Second Appeal No. 839 of 1917, Decided on 7th March 1918, against decree of Sub-Judge, Tuticorin, in Appeal Suit No. 104 of 1916.

(a) Limitation Act (1908), Art. 91—"Entitled" means entitled under Specific Relief Act (1877), S. 39.

The word "entitled" in Art. 91, Sch. 1, Lim. Act, means entitled by law, i. e., under S. 39, Specific Relief Act. [P 679 C 1]

(b) Specific Relief Act (1877), S. 39—Suit for cancellation of document—Time begins to run from when plaintiff becomes aware of facts creating resonable apprehension.

In a suit for cancellation of a document time will begin to run from the time when plaintiff becomes aware of facts which create in him a reasonable apprehension that he will suffer injury if the document be left outstanding. [P 679 C 1, 2]

Judgment —The right to bring a suit to have a document adjudged void and to have it cancelled is governed by S. 39, Specific Relief Act. One of the provisions in this section is that the person suing must have reasonable apprehension that the instrument, if left outstanding, may cause him serious injury. Under Art. 91, Lim. Act, time begins to run when the facts "entitling" the plaintiff to have the instrument cancelled or set aside become known to him. We think that the word "entitled" must be interpreted as meaning "entitled by law," i. e. under S. 39, Specific Relief Act, for we can find no other provision of law which gives a right to bring such a suit to avoid an injury before it is suffered. This is the view taken in *Singarappa* v. *Talari Sanjivappa* (1), and according to it the period of limitation in the present case began to run not when the facts which would render the document invalid became known to plaintiff, but when he became aware of facts which aroused a reasonable apprehension that he would suffer serioues injury if the document were left outstanding. The plaintiff says he felt this apprehension when the document was registered, and we can see no circumstances to justify us in finding that he must have had a reasonable apprehension before that date. If the date of registration is taken as the starting point for limitation the suit is within time. We accordingly set aside the decree of the lower Court and remand the suit to the District Munsif for disposal on the merits. Costs will abide the result.

S.N./R.K. *Case remanded.*

(1) [1905] 28 Mad. 349.

A. I. R. 1919 Madras 679 (2)

AYLING AND SADASIVA AIYAR, JJ.

(*Kozhipurath*) *Kunnikrishna Menon Karnavan* and *others*—Defendants—Appellants.

v.

(*Kozhipurath*) *Kunhikavamma* and *others*—Plaintiffs—Respondents.

Second Appeal No. 48 of 1916, Decided on 25th April 1918, against decree of Dist. Judge, South Malabar, in Appeal Suit No. 369 of 1914.

Malabar Law — Maintenance — Female member of tarwad quits tarwad house for proper purpose when she does so in order to reside with her husband—Her right to maintenance is not conditional on her husband's inability to maintain her—Person setting up custom by which woman living away with husband is not entitled to separate maintenance has to prove it.

There is no principle of Marumakkathayam law requiring that the practice of female members of a tarwad living with their husbands and away from the tarwad house should be discouraged. A female member of a tarwad therefore quits the tarwad house for a proper purpose when she does so in order to reside with her husband. [P 680 C 2]

A woman living with her husband does not forfeit her right to maintenance while she lives away from the tarwad house, and her right thereto is not conditional on her husband's inability to maintain her. [P 681 C 1]

If, notwithstanding the above general rule, a custom prevailing in South Malabar is set up to the effect that a junior member living with her husband is not entitled to separate maintenance, such special custom ought to be proved by the party setting it up. [P 681 C 2]

K. Pandalai—for Appellants.

A. V. K. Krishna Menon — for Respondents.

Sadasiva Aiyar, J. — The karnavan and the senior anandravan of the defendant's tarwad are the appellants before us. The plaintiffs are a Nair lady and

her children who are members of the defendants' tarwad. Tht plaintiffs sued for arrears of maintenance. The defence was that, as the plaintiffs were living away from the tarwad house, though under the protection of plaintiff 1's husband, they are not under the Marumakkatayam law entitled to claim separate maintenance. The lower appellate Court overruled this plea and hence the second appeal. The learned District Judge has thus summarized the law :

"A junior member is entitled to maintenance in the tarwad house, or, if he or she show good reason for living away from it outside the tarwad house. That is the substantive rule, and various adjective reasons have been grouped round it, such as insufficient accommodation or family quarrels. No special sanctity attaches to these reasons apart from the rule and as observed in *Maravadi* v. *Pammakar* (1) the list of good reasons is not yet exhausted. The latest is that to be found in *Vellathumkara Muthu Amma* v. *Vellathumkara Gopalan* (2), which is pertinent to the present case and where it is ruled that a good reason of absence for a wife who claims maintenance is living with her husband. The absurdity of attaching sanctity to old reasons, and cavilling at new would be plain if one imagined a woman denied her maintenance under *Vellathumkara Muthu Amma* v. *Vellathumkara Gopalan* (2), for making a home for her husband, but obtaining it under *Peru Nayar* v. *Ayyappan Nayar* (3), by a subsequent quarrel with her uncle."

Dr. Pandalai, the learned counsel for the appellants, contended, (a) that though a female member's living with her husband might be a proper reason for her living away from the tarwad house her right to claim separate maintenance is nevertheless subject to the condition that the husband is unable to maintain her and her children ; (b) that though in North Malabar living with the husband might be a proper reason for living away from the tarwad house and claiming separate maintenance it was not so in South Malabar where the defendant's tarwad is situate ; (c) that plaintiff 1 must, by living with her husband who is well able to support her be deemed to have waived when she so went to live with her husband all claims for maintenance against her tarwad, at least during the period of her residence with her husband. (Though there are as many as 17 grounds entered in the memorandum of second appeal they are either repetitions of the above 3 contentions or relate to contentions not argued before us). In *Maravadi* v. *Pammakkar* (1) decided by Sundarier and Spencer, JJ., it is said:

"According to the aliyasanthana system which is very similar in its incidents to the Marumakkathayam law, as no member is entitled to enforce partition of the family property which belongs to all the members, every junior member is entitled to be maintained by the karnavan.... The income belongs to all and all are entitled to participate in the benefit of it.... Each member of the tarwad has a right to be maintained and suffers a personal wrong if that right is not accorded to him. The right is not confined to cases where a member has no means of his own; because by virtue of his ownership in the tarwad property he is entitled to participate in its income. A suit for maintenance by a junior member of a Marumakkathayam or Aliyasanthana family falls under Art. 127, Lim. Act, (a suit to enforce the right to share in the joint family property) and not under Art. 129, which applies to suits which are strictly for a right to maintenance which a person has over property belonging to another."

The general result of the decided cases is, in our opinion, that in order that a member of a Marumakkathayam or Aliyasanthana tarwad may be entitled to separate maintenance, he or she should be able to allege some good ground for doing so. It would be unwise to hold that the decisions up to date have exhausted the list of good grounds which may be urged. It is recognized practice in South Kanara for a woman and her minor children to live with her husband. It is a common practice in North Malabar and it is a growing practice in South Malabar: *see Parvathi* v. *Kamaran Nayar* (4). The interest of social improvement would be against discouraging such a practice. There is no principle in the Marumakkathayam or Aliyasanthana law requiring that it should be discouraged. We are not bound to shut our eyes to the fact that families governed by this system of law are often numerous and consist of persons related in every different degrees of kindred and no social or economical service is done by compelling them all to reside in one house where they have good grounds for not doing so. Several cases have come to this Court which show that in the houses of rajahs and other well to-do tarwads is it the rule to allow separate maintenance. In *Vellathumkara Muthu Amma* v. *Vellathumkara Gopalan* (2) Sundara Aiyar, J., and myself (the judgment was pronounced by Sundara Aiyar, J., whose authority on questions of Malabar law is deservedly, if I

(1) 2 M.H.C.R. 12.
(2) [1912] 36 Mad. 593=16 I. C. 895.
(3) [1878] 2 Mad. 282.
(4) [1883] 6 Mad. 341.

may say so, very high) expressed the opinion that the desirability of living with one's husband is a good cause for a lady to live away from the tarwad house. "It was argued there" that is in *Maravadi* v. *Pammakkar* (4):

"that custom was against it. The answer given was that the custom of all members of a tarwad living together is only a social custom. Some social customs may change without affecting the legal rights of parties. All members of a tarwad are entitled to the tarwad property and are entitled to the benefit of that property. The only way in which a junior member can receive benefit out of the tarwad property is by receiving maintenance. No decided case has been brought to our notice where it was held that a woman would not be quiting her tarwad house for a proper purpose when she does so in order to reside with her husband. As far as we are aware it is not considered improper. On the other hand it is considered honourable that a wife should live with her husband if asked to do so. The members of the tarwad also consider it honourable both to themselves and to the lady who is asked by her husband to live with him that she should comply with his wishes. Perhaps it should be added that an exception should be made in the case of some aristocratic families who consider their own social position so high that it would be derogatory to their ladies to quit their tarwads to live with their husbands, at any rate in a case where the husband is not of an equally high rank. The general rule however is, as we have stated it, we cannot therefore regard that living with one's husband is a good ground for a woman governed by the Marumakathayam law being compelled to forfeit her right to maintenance while she lives away from the tarwad house."

In a more recent case, *Manikkath mmini Ammal* v. *Nanikkath Padmanabha Menon* (5). decided in April 1917, just a year ago Seshagiri Aiyar and Bakewell, JJ., observe as follows:

"The expression 'maintenance, is loosely applied to this class of cases. The allowance claimed by an anandravan of a Malabar tarwad or by a junior member of a joint Hindu family is not as a dependant upon the owner of the property but as one who in his own right is entitled to participate in the income. . . . The claim for separate allowance is an indicia of proprietorship and not founded upon moral or quasi legal obligations or on inability to maintain himself or herself. . . . The possession of separate property should not be taken into account in considering whether a member of the tarwad was entitled to separate allowance. [*Putanvitil Teyan Nair* v. *Putanvitil Ragavan Nair* (6)] In *Achutan Nair* v. *Kunjuni Nair*(7) it was distinctly stated that the right to an allowance should be based on the right of co-ownership of property."

Then the learned Judges referred to *Maravadi* v. *Pammakkar* (1), *Naku Ammu* v. *Raghava Menon* (8) and *Chakkara Kannan* v. *Kunhi Pokker* (9), in support of their opinion that the right of a member of a tarwad for an allowance is an incident of co-proprietorship in the property of the tarwad and that consequently that right could not be denied unless the junior member lives separately for a purpose which is not proper his claim being of the character of a proprietary right to a share in the income. Dr. Pandalai argued that these decisions went beyond the law as laid down in certain earlier Madras decisions which based the right to maintenance itself not on co-proprietorship, but on the fact of the residence in the tarwad family house and merely dispensed with that condition as to residence in exceptional cases. I do not think that we should be justified in entering into a discussion at present as to whether *Maravadi* v. *Pammakkar* (1) which elaborately discusses the earlier decisions stated the result of those decisions with meticulous accuracy. Whether it is North Malabar or South Malabar or the district where Aliyasanthana prevails, the reasons are alleged by the claimant for her separate maintenance where proper reasons are alleged by the claimant for her not living in the tarwad house itself are all clearly applicable. If there is a custom prevailing in South Malabar that notwithstanding this general rule based upon the broad principles of the Marumakathayam law a junior member living for the proper purpose of residing with her husband is not entitled to separate maintenance, such a special custom ought to be proved by the party setting it up.

The evidence on the defendant's side in this case consisting mostly of statements by the karnavans of several aristocratic families is merely to the effect that in their opinion, a female member whose husband is in a position to support her ought not to claim separate maintenance and that no person in such a position has to their knowledge, claimed it. Such negative evidence given by such gentlemen is of very little value. If several instances are given where after demands made in such cases, maintenance was refused and the claimants acquiesced in the refusal or the claimants were unsuccessful when they brought such rejec-

(5) A. I. R. 1919 Mad. 677=41 Mad. 1075=48 I. C. 104.
(6) [1882] 4 Mad. 171.
(7) [1908] 13 M. L. J. 499.
(8) [1913]38 Mad. 79= 18 I. C. 1.
(9) [1915] 39 Mad. 317=30 I. C. 755.

ted claims before the Courts, such evidence will no doubt prove the alleged custom in derogation of the claim which is prima facie a perfectly legitimate claim according to the principles of the Marumakataayam law. (I assume of course without deciding that the custom, if established, would not be immoral or opposed to public policy). In the result, I think that the contentions put forward with such ability and strenuousness by the Counsel on behalf of the appellants are not sustainable and I would dismiss the second appeal with costs.

Ayling, J.—I agree and have little to add. I was at first inclined to accept the contention that the lady's right to be maintained out of the tarwad property while living with her husband was conditional on the latter being unable to maintain her. But it is impossible to do so in the face of the decisions in *Putanvitil Teyan Nair* v. *Putanvitil Ragavan Nair* (6) and *Thayu* v. *Shunguni* (10) and the recent unreported case referred to by my learned brother [*Manikkath Ammini Ammal* v. *Manikkath Padmanabha Menon* (5). The only possible defence to the suit (that of waiver) has been found against by both the lower Courts. I therefore agree that the appeal must be dismissed with costs.

S. N. / R. K. *Appeal dismissed.*

(10) [1882] 5 Mad. 71.

A. I. R. 1919 Madras 682

SADASIVA AIYAR AND BAKEWELL, JJ.

Manayam Mahalakshamamma Garu —Plaintiff—Petitioner.

v.

Muchika Appalaraju — Defendant — Opposite Party.

Civil Misc. Petn. No. 3782 of 1916, Decided on 18th November 1917.

(a) Godavari Agency Rules, Rr. 10 and 16 —Order by Agency Munsif in execution of decree of Government Agent is not appealable to Government.

The employment of an Agency Munsif by the Government Agent to execute a decree of the latter's Court under R. 10, Godaveri Agency Rules does, not make the Agency Munsif the incumbent of the judicial office of the Government Agent himself. The Government Agent continues to preside in his own Court and the Agency Munsif is only an employee under the Government Agent in the matter of the execution of that particular decree. He occupies the same position as a Commissioner or an Amin or a ministerial officer employed by an ordinary Court to assist it in particular judicial proceeding.

An order, therefore passed by the Agency Munsif in the course of execution of a decree of the Government Agent, is not a decree, and no appeal lies against it to the Government under R. 16, of the Agency Rules: 27 *Mad.* 109, *Dist.* [P 683 C 1]

(b) Practice—Court—Proceedings of subordinate officer are not proceedings of Court.

The proceedings of a Subordinate Officer of a Court of Justice do not become the proceedings of the Court itself unless the Statute law makes them so in respect of particular matters or unless those proceedings are submitted to the presiding Officer of the Court and adopted or approved by him. [P 684 C 1]

T. R. Ramachandra Aiyar—for Petitioner.

V. Ramesam—for Opposite Party.

Sadasiva Aiyar, J.—This is a petition to the Government under R. 16, Godaveri Agency Rules, which has been preferred to the High Court for disposal. The petition prays to set aside the order of the Agency Munsif of Polavaram, dated 4th October 1916 passed in Execution Petition No. 93 of 1910 on his file.

The appellant was the decree-holder on Original Suit No. 1 of 1897 on the file of the Government Agent's Court, the decree of the High Court in appeal in that suit being dated January 1902.

As regards execution of decrees of the Agency Courts the relevant rules are as follows:

"Rule 10 (1), with the exception of the Court of the Government Agent, who shall be at liberty in the execution of decrees, to employ an assistant or Munsif, all decrees of other Courts within his jurisdiction shall be carried into effect by the Court by which the suit may have been decided. If the person against whom, or the property against which, it is sought to execute any decree resides, or is situated within the jurisdiction of a Court of the same Agency other than the Court issuing the decree, such decree shall be executed in the manner provided in R. 14, Cl. (2)"

(that is, by forwarding the process in execution to the Court of the Divisional Assistant within whose jurisdiction the person or property resides or lies who shall ordinarily cause the same to be executed). Cl. (2):

"decrees shall be executed by an order addressed to the proper officer of the Court."

In the present case, the Government Agent seems to have employed the Polavaram Agency Munsif to execute the Agency Court's decree of 1902. That decree awarded to the plaintiff possession of the forest lands of Singanapalli. To give such possession in execution, the boundary lines between the Singanapalli forest and Chengondepalli forest had to be demarcated. On 18th July 1904 the Agency Munsif determined by descrip-

tion on paper the boundary lines as follows: (a) East by a line drawn from Maredukoyya Dimma to the summit of Racha Kodutula Konda and (b) thence midway between the plateau on the top of the said hill and of Darakonda to the centre of Yerrakonda (c) summit shall rest in Singanapalli. Then in 1910, the plaintiff applied by Execution Petition No. 93 of 1910 for the cutting of the boundary line as above fixed in the order of July 1904. The Munsif appointed a Commissioner to cut the boundary line and he cut the boundary line according to the best of his ability and according to the three directions (a), (b) and (c) above given in the Munsif's order. While the Commissioner was thus cutting the boundary line, the defendant presented Civil Miscellaneous Petition No. 6 of 1915 against the Commissioner's proceedings to the Agency Munsif, his principal objections to the Commissioner's doings being that Yerrakonada and Darakonda referred to in direction (b) in the order of 1904, were not the hills which the Commissioner thought to be of those respective names but that they were two other hills and that the Commissioner should be directed to draw the boundary line between the tops of the two correct hills and not of the wrong hills. The Munsif practically accepted the defendant's judgment-debtor's) contention and passed an order accordingly. It is against that order, that the present appeal in the usual form of a petition to the Government under R. 16 has been filed.

It is clear that if this order of the Agency Munsif in execution of the Government Agent's decree is the judicial order of the Agency Munsif's Court itself in execution, no appeal is provided against it under the Godaveri Agency Rules. Those Rules are published in the Madras Code, Vol. 2, 1915 pp. 1258 to 1263, and it is only against the decree in original suits (see R. 4) that appeals lie from the Munsif to the Assistant Agent, a second appeal from the Assistant Agent to the Agent and a third appeal from the Agent by petition to the Government (which means practically to the High Court) under R. 16. The Civil Procedure Code not applying, orders passed in execution are not decrees: see *Sri Sri Sri Vikramadeo Maharajulum Garu* v. *Sri Neladevi Pattamadhadevi Garu* (1). Hence no appeal lay even to the Assistant Agent from the order in dispute and much less, of course, a third appeal to this Court: see Civil Miscellaneous Petition No. 513 of 1911 decided by Sundara Aiyar, J., and myself.

Mr. T. R. Ramachandra Aiyar who appeared for the petitioner decree-holder, (who might be called the appellant) was, therefore, obliged to argue that though the order purports to be one passed by the Agency Munsif, it is in the eye of the law, an order of the Government Agent himself and hence R. 16, which allows a petition against all proceedings of the Government Agent (including proceedings in execution) to the Government applies in this case. The sole question therefore is whether the order of the Agency Munsif under appeal, is in the eye of the law a proceeding of the Government Agent himself. Mr. Ramachandra Aiyar's arguments, if I followed him aright, were formulated in two ways: (1) an Agency Munsif employed by the Government Agent under R. 10 to execute the decree of the Government Agent's Court, becomes himself the Government Agent or the Government Agent's Deputy by delegated authority and his order became a proceeding of the Government Agent himself; (2) even if the Munsif's Court did not become the Government Agent's Court, the Munsif became an officer of the Government Agent's Court and his proceedings as an officer of the Government Agent's Court became the proceedings of the Government Agent himself. On the first branch of the argument, he cited Broom's Legal Maxims p. 655:

"It may likewise, be well to observe, that delegated jurisdiction, as distinguished from proper jurisdiction, is that which is communicated by a Judge to some other person, who acts in his name, and is called a deputy; and this jurisdiction is in law, held to be that of the Judge who appoints the deputy, and not of the deputy; and in this case the maxim holds, delegatus non potest delegare. Nor can an individual clothed with judicial functions delegate the discharge of those functions to another, unless as in the case of a County Court Judge, he be expressly empowered to do so: 51 and 52 Vict. Ch. 43, Ss. 18 to 21."

51 and 52 Vict. Ch. 43, Ss. 18 to 21 allow a County Court Judge to appoint a barrister of not less than seven years' standing to act for him as his deputy when he is temporarily incapacitated through illness etc. It is clear that such a deputy is the only Judge of the County

(1) [1903] 26 Mad. 266.

Court during the period of his deputation and his employment does not create another judicial office. Now the employment of the Agency Munsif by the Government Agent to execute a decree of the latter's Court under R. 10 cannot make the Agency Munsif the incumbent of the judicial office of the Government Agent himself. The Government Agent continues to preside in his own Court and the Agency Munsif is only an employee under the Government Agent in the matter of the execution of that particular decree. I at first thought when considering these obscure and unsatisfactory Agency Rules that R. 10 probably meant that the Government Agent might transfer the execution from his own Court to that of the Agency Munsif. But seeing that R. 10, Cl. 1, does not provide even for the transfer of a decree for execution from one Court under the Government Agent to another Court even under the same Agent but only for execution of processes sent by one such Court to another and that the word "transfer" seems to have been scrupulously avoided, I think after the best consideration that I have been able to give to the subject that the Munsif or the Assistant Agent employed by the Government Agent to execute the latter's decree, does not thereby acquire independent judicial powers over the execution proceedings and that he does not become the Government Agent's Court by and in being so employed, and is only in the same position as a Commissioner or an Amin or a Ministerial Officer employed by an ordinary Court to assist it in particular judicial proceedings. The analogy of a delegation by a County Court Judge to a Barrister who is the sole County Court Judge for the time being cannot therefore be invoked so as to make the proceedings of the Agency Munsif the proceedings of the Government Agent himself.

As regards the second branch of the argument, the proceedings of a Subordinate Officer of a Court of Justice do not become the proceedings of the Court itself unless the statute law makes them so in respect of particular matters or unless those proceedings are submitted to the presiding officer of the Court and adopted or approved of by him. Mr. Ramachandra Aiyar referred us to the decision in *Maharaja of Jeypore* v. *Sri Niladevi Pattamahadevi* (2) as supporting his contention. That case arose out of a petition under R. 31, Vizagapatam Agency Rules corresponding to R. 16, Godaveri Agency Rules and there is some obscurity in the statement of facts in the report of that case. The order in execution, in that case is said in the report (preceding the judgment) to have been passed by the Acting Senior Assistant Agent and to have been confirmed by the Agent on appeal against which appellate judgment the petition is said to have been presented under R. 20 which relates, however, to appeals against decrees. This report seems to be a mistake because orders in execution are not decrees. In the body of the judgment however R. 31, is referred to and that is also the rule mentioned in the report of the same case as found in 13 Madras Law Journal 151 *Maharaja of Jeypore* v. *Sri Niladevi Pattamahadevi* (2). Hence we must take it that the appeal in that case was against an order in execution passed by the Government Agent himself and not against an order in appeal from a Senior Assistant Agent. This is also confirmed by the following sentence at p. 111 (of *I.L.R.* 27 *Mad.*) of the report:

"It was further urged that the order was not that of the Agent but of his Assistant and so R. 31 was inapplicable, but we find that the order was passed under the authority of the agent as is expressly stated therein."

Thus the order in that case was *the* order of the Agent himself though signed by the Assistant Agent under the express authority of the Government Agent. That is, the Government Agent applied his judicial mind to the matter, passed an order and asked the Assistant Agent to sign the order for him (the Agent). Hence the High Court held in that case that R. 31 corresponding to Godaveri R. 16 applied and an appeal by way of petition lay. Similarly in Civil Miscellaneous Petition No. 532 of 1911, Sir Sankaran Nair and Sir William Ayling, JJ., treated that petition as an appeal against the order of the Agent directing the Special Assistant Agent to dismiss certain petitions as barred by limitation while conceding that against an order of the Special Assistant Agent himself, no appeal lay. In the present case, the order of the Agency Munsif was not passed with the knowledge or signed under the "authority" of the Govern-

(2) [1904] 27 Mad. 109.

ment Agent. The Government Agent did not pass the order himself and did not give authority to the Agency Munsif to sign the order for him. I do not therefore think that the decision in *Maharaja of Jeypore* v. *Sri Niladevi Pattamahadevi* (2) applies to this case.

In the result I would uphold the preliminary objection put forward by Mr. Ramesam that R. 16 cannot be invoked in this case as there was no order by the Government Agent himself. I think that where the Government Agent employs the Munsif to execute the Government Agent's decree, the Agent retains full control over the proceedings which are being conducted by the Agency Munsif as the Government Agent's employee and that the appellant's proper course was to have made representations to the Agent against the proceedings of the Munsif, and if the Agent passes proceedings on such representations against the appellant, to apply afterwards by petition under R 16. I would therefore dismiss the present petition with costs.

I wish to state in conclusion that it seems to be high time that these unsatisfactory Agency Rules are revised by a proper draftsman. In *Rajendra Singh* v. *Maharaja of Jeypore* (3), Seshagiri Aiyar and Napier, JJ., state:

"It is somewhat anomalous that the Agent should hear appeals from cases which he alone has power to entertain and which are beyond the pecuniary jurisdiction of the Divisional Assistants. The analogy of the Civil Courts Act in the Presidency is against such a procedure. But we have to interpret the rules as we find them however much we may consider that they should have been different."

I find also that in 1863 itself, the rules relating to criminal justice had been cancelled in the Ganjam and Vizagapatam Agency and the Code of Criminal Procedure seems to be now in force in the Agency Tracts. It is to be desired that though all the elaborate rules of the Civil Procedure Code may not be made at once applicable to the Agency Tracts, the rules actually framed should follow the language of the corresponding sections of the Civil Procedure Code as far as possible, instead of using the loose expressions ound in most of the existing rules.

Bakewell, J.—I agree with the order proposed by my learned brother.

S.N./R.K. *Petition dismissed.*

(3) [1915] 30 I.C. 76.

A. I. R. 1919 Madras 685

AYLING AND SESHAGIRI AIYAR, JJ.

American Baptist Foreign Mission Society—Defendants—Appellants.

v.

Amalanadhuni Pattabhiramayya —Plaintiff—Respondent.

Civil Appeals Nos. 354, 355 and 368 of 1916, Decided on 18th February 1918, against decree of Temporary Sub-Judge, Guntur, in Original Suit No 99 of 1914.

(a) Transfer of Property Act (1882), S. 51 — Purchaser in good faith from limited owner—Improvements effected by purchaser —Person seeking to set aside sale is entitled to market value at time of sale.

The principle of S. 51, T. P. Act, applies to a purchase from a Hindu widow where the purchaser believing in good faith that he has acquired an absolute title to the property effects improvements on it but it is afterwards held that there was no necessity for the sale.

In such a case the person seeking to set aside the sale is entitled to the market value of the property at the time of suit excluding the value of the improvements effected by the purchaser. [P 686 C 2]

(b) Transfer of Property Act (1882), S. 54 —Recitals as to object of sale are evidence of representation made to purchaser.

The recitals in a deed of sale as to the object of the sale or the intended appropriation of the consideration therefor are evidence especially where the document is an old one of the representation made to the purchaser. [P 686 C 1]

(c) Civil P. C. (1908), O. 22, Rr. 3 and 6 — Party dying before conclusion of arguments— Judgment delivered without legal representatives being brought on record is nullity.

Where a party to a suit died after arguments were partly heard and judgment was pronounced on a subsequent day when the arguments were closed without the legal representative of the deceased being brought on the record.

Held: that the judgment was a nullity and was not binding on the deceased's representative. [P 689 C 2]

(d) Civil P. C. (1908) O. 20, R. 1—All argumentsmust be heard.

Order 20, R. 1, contemplates that all arguments should be heard before the case can be regarded as ripe for judgment. [P 690 C 1]

Grant, Greatorex and *Venkatasubaramiah*—for Appellants.

V. Ramadoss—for Respondent.

Judgment.*Appeal No.* 354 *of* 1916.—This appeal relates to item 1. It was purchased by Dr. Clough in December 1884 and was subsequently sold by him to the present appellants. The plaintiff as reversioner to the estate of Kesavulu Naidu sues to recover possession of this and other properties on the ground that the alienations by Kesavulu's widow Lakshmi Devi are not

binding on him. It is in evidence that on the death of Kesavulu his mother created disturbances and that suits were brought to establish Lakshmi Devi's right. The litigation ultimately ended in favour of the widow. This was between 1874 and 1878. During this period and subsequently the widow was alienating her husband's properties piecemeal. In 1884 she executed two documents (Exs. 19 and 20), the one being an agreement to sell and the other the actual conveyance. The plaintiff contends that this conveyance Ex. 20 is not binding on him. The Subordinate Judge has held that necessity was not proved and has directed the appellant to remove the materials within a fixed time.

We are unable to uphold the decree. There can be no question on the evidence that the purchaser paid full and adequate consideration for the sale. We see no reason to disbelieve the evidence of D. W. 1. The deed of sale refers to two previous documents as having been discharged, Exs. 16 and 18. In Ex. 16 it is recited that Rs. 300 was borrowed to execute repairs to the bungalow standing on item 1. This recital is evidence after the lapse of nearly 30 years from the date of the sale of the representation that was made to the purchaser: see *Nanda Lal* v. *Jagat Kishore Acharjya* (1). That recital is corroborated by the evidence of D. W. 1. We see no reason for holding that the sum of Rs. 300 was not paid for effecting the repairs upon the bungalow which was let out for rent to the Municipality. To this extent we hold that necessity has been proved. The Subordinate Judge was inclined to take this view but he did not act upon his inclination because the widow derived benefit by the improvement. We are unable to follow him in this. As regards the rest of the consideration we have reluctantly come to the conclusion that its binding character has not been made out. Ex. 18, which refers back to Ex. P. deals only with the personal debts of the widow. There is no evidence to connect these debts with liabilities binding on the estate. It is true that the purchaser seems to have taken legal advice before purchasing. The extent of the advice given and the amount of the information disclosed to the legal adviser have not been spoken to by anyone. We are unable to say therefore that the necessity for the remainder of the purchase money has been made out.

The only question now is how should the equities between the parties be adjusted. We are not satisfied that S. 51, T. P. Act is not applicable to the present case. *Raj Kishore Das* v. *Joint Singh* (2) gives no reason for holding that transferees from limited owners are not within the purview of the section. There is nothing in the language of it to lead to such a conclusion. We are therefore inclined to hold that S. 51 is applicable. Even if the section is not applicable in terms we think the principle of it is applicable to the case. We feel no hesitation in holding that the purchaser acted honestly in believing that he secured an absolute right by the transfer from the widow. He took legal advice and secured some documents showing that there were previous debts. We accept the reasoning in *Mathunsa Rowthan* v. *Apsa Bin* (3) and hold that where the purchaser acts honestly and to the best of his information he is protected by S. 51, T. P. Act. It is found that the purchaser spent nearly Rs. 10,000 in putting up a bungalow on the premises. Under these circumstances the proper decree to be passed will be to direct the appellant to pay the reversioner the difference between the present market value of the land without taking into account the building thereon and the sum of Rs. 300 which we hold is binding on the estate. We feel no doubt that the plaintiff ought to have intervened to prevent the costly building being put up on the premises. He may not be bound to sue for declaration but his failure to sue is an element to be taken into account in considering whether the present holder should not be allowed to retain the property. We think that under the circumstances of the case it would be highly inequitable to turn the appellant out of the property. The Subordinate Judge must be asked to report to this Court within six weeks from this date the present market value of item 1 eliminating from his consideration the

(1) A. I. R. 1916 P. C. 110=44 Cal. 186=43 I. A. 249=36 I. C. 420 (P. C.).

(2) A. I. R. 1914 All. 227=36 All. 387=23 I. C. 364.

(3) [1911] 36 Mad. 194=12 I. C. 444.

value of the building existing on it. Ten days will be allowed for filing objections.

Appeal No. 355 *of* 1916.

We agree with the Subordinate Judge that it is not shown that the sale of item 4 by Lakshmi Devi under Ex. B to Bapayya was for necessity or for the benefit of the estate. We must therefore uphold his decree in so far as it directs defendants 15, 16 and 17 to deliver possession of that property. It is clear that these defendants added to the original extent by purchasing from others. The Subordinate Judge has held that as the property sold under Ex. B could not be conveniently enjoyed by the plaintiff without the added property the plaintiff should be given possession of the whole plot and that the appellants should be paid Rs. 45 as compensation. We think the Subordinate Judge is wrong in this. Plaintiff claimed and is only entitled to the properties of Kesavulu. No question of equitable adjustment by asking defendants to give up their property can arise in this suit. We must modify the decree by deleting the portion relating to compensation and by directing that plaintiff be put in possession only of the properties purchased under Ex. B. Each party will bear his own costs in this Court.

In compliance with the order contained in the above judgment in Appeal No. 354 the Temporary Subordinate Judge of Guntur snbmitted the following.

Finding.—I have been directed by the High Court to report the present market value of item 1 eliminating from consideration the value of the bungalow existing on it. The total extent of the site is 5 acres 26 cents. The plaintiff alleged in the plaint that at the date of the sale to Dr. Clough in 1884 the suit site with the building which then stood on it was worth Rs. 3,000. The value of the building having been estimated in the plaint at Rs. 1,600 the site according to plaintiff was worth Rs. 1,400 at the date of the sale. It was pleaded by defendant 1 in his written statement that the site was worth at that date including the building on it, only the price paid for it, namely, Rs. 1600. The building having been valued in the written statement at Rs. 600, the value of the site according to the defendant, was Rs. 1,000 at the date of sale. My predecessor held that the building was worth only Rs. 600 as alleged by the defendant. It follows from that finding, that the site without the building, worth at the date of the sale Rs. 1,400 according to the plaintiff and Rs. 1,000 according to the defendant. Bearing that in mind, we have to see what its present market value is.

The plaintiff has now examined 9 witnesses, and defendant 1, besides recalling and examining Mr. Baker (D. W. 9), has examined three witnesses. While the plaintiff's witnesses value the suit at one rupee or one and a quarter rupee per square yard, Mr. Baker, who represents the Mission, and his second witness Punnayya depose that the suit site is worth only about Rs. 600 per gorru and that the whole site does not therefore exceed in value Rs. 1,000. The plaintiff's witnesses state that, if the suit site is parcelled out and sold for building purposes, it would fetch about Rs. 25,000 at Re. 1 to Re. 1-4-0 per square yard. Mr. Baker and his second witness depose that the suit site, being situated at the northernmost extremity of Ongole Town, is not likely to be taken up for building purposes at all. Mr. Punnayya, the witness examined by the Mission, was for a long time Municipal Councillor and for nearly 4 years Chairman of the Ongole Municipality. He corroborates Mr. Baker's statement that the Town of Ongole has extended east, west and south, but has shown no tendency to extend and will not extend northwards for several reasons and that ordinary dwelling-houses will never be constructed on the suit site, as those reasons are specially applicable to it. They are: (1) its vicinity to cemeteries and Panchama quarters, (2) its vicinity to exposed beef and meat stalls, (3) its situation in the midst of cultivated lands, (4) its isolation and consequent liability to attack from thieves and (5) its proximity to the tank into which all the village water is drained. It is admitted on behalf of the plaintiff that the suit site is within a very short distance of the Municipal market which was constructed about 25 years ago, and that the northern and eastern portions of the market measuring about 1 acre odd have been lying absolutely vacant. It is proved by Mr. Punnayya that the Municipal market, which was constructed for

the sale of both vegetables and meat, ceased to be a vegetable market on account of its distance from the dwelling-houses and its vicinity to exposed beef stalls. The few houses west of the Municipal market are mostly occupied by Mahomedans. The two Telaga residents in that locality occupy very humble positions in life being schoolmasters. It is not denied that there is a large stretch of nearly 80 acres of land east of the Donka which forms the eastern boundary of item No. 1. There has been admittedly no attempt to build houses in all that area. A few cattle-sheds and houses have no doubt been built on Survey Nos. 80 to 86 marked in the Commissioner's plan Ex. EE, but it is elicited from P. W. 3 that those houses and cattle-sheds are owned by persons whose cultivable lands lie immediately behind them.

In support of his contention that the suit site is worth one rupee per square yard, the plaintiff's vakil relies upon 4 sale deeds which relate to sites not far off from the suit site. Ex. HH is a sale deed taken by P W. 3 of 6 gadis or 48 square yards of land for Rs. 90 for constructing a cattle-shed. P. W. 3 admits that the sale deed was executed in his favour recently and that the price fixed thereunder was not intended to be the real price. It is elicited from him that the adjacent site belonging to his vendor has been proposed to be acquired by the Municipality for public purposes and that the price of the land covered by his sale deed, Ex. HH, was more or less fixed with a view to claim from the Municipality a high price for the land proposed to be acquired. Exs. GG and GG-1 relate to Survey No. 214. Ex. GG is a sale-deed executed in 1909. It shows that a portion of Survey No 214 measuring 30 gadis or 240 square yards fetched a price of Rs. 100 Ex. GG 1, dated 5th January 1917, relates to a site immediately west of the site covered by Ex GG. It shows that 6 3/4 gadis equal to 50 square yards were purchased under it for Rs. 44. It is elicited from P. W. 2 who proves those sale deeds that Survey No. 214 is in the vicinity of Brahmin quarters. Survey No. 214 is situated at a fairly long distance from the suit site and in view of the admitted fact that it lies within the vicinity of Brahmin quarters, the price paid under Exs. GG and GG-1 cannot be accepted as a standard for fixing the value of the suit site. The next sale deed on the basis of which the plaintiff's vakil urges that the suit site should be valued at Re. 1 per square yard is Ex. JJ, dated 20th June 1917. Under it P. W. 4 purchased 26 gadis of site for Rs. 200 in the Mahomedan quarters west of the Municipal market. The purchaser is admittedly a contractor from the Municipality of the slaughter house situated in the vicinity of the site comprised in his sale deed. From the standpoint of his business it is an advantage to him to own a site in the vicinity of that slaughter house. The price paid by him cannot therefore be accepted as a standard for determining the value of the suit site. P. W. 5, who recently purchased a site in that locality has not chosen to produce his sale deed which would throw light onlthe value of a site in that locality. He says that he paid Rs. 350 for that site but conveniently states that he does not know the extent comprised in his sale deed.

It is urged on behalf of the Mission that the suit site is not worth more than Rs. 1,000, and in support of that contention reliance is placed on Exs. 29 and 30 filed by witnesses 3 and 4 examined on remand. Ex. 29 is a sale deed dated 21st January 1917, relating to 17 cents of land immediately north of the suit site. That extent was purchased *under* that sale deed for Rs. 50 as *proved* by D. W. 3. Ex. 30 is a sale deed dated 25th June 1917 relating to one acre and 29 cents of land immediately west of the suit bungalow. That extent was purchased under that deed for Rs. 200. If the value of the suit site is to be fixed with reference to the price paid under Exs. 29 and 30, the present market value of the suit site would no doubt not exceed Rs. 1,000. It is however elicited from Mr. Punnayya, the ex-Chairman of the Municipal Council, that the sites north and west of the suit site are certainly inferior in value to the suit site for building purposes. It is admitted that both these sites are situated at a lower level than the suit site: vide also the Commissioner's plan and report Exs EE and EE-1. In this connexion the admission of the Mission that the suit site was worth Rs. 1,000 even in 1884 when it was purchased by Dr. Clough has to be borne in mind. It is a

matter of common knowledge that the prices of lands have risen considerably within recent years.

The evidence recorded at the original trial shows that the building which stood on the suit site at the date of the sale to Dr. Clough fetched a monthly rent of Rs. 15. It is admitted by Mr. Baker that the Municipal Hospital was located in that buliding. In fixing the present value of the suit site the existence of that building and the rent which was realized from it cannot be ignored. My predecessor was of opinion that the income from the fruit-bearing trees which stood on the suit site at the date of sale was sufficient to cover the expenses of the repairs to that building. On a full consideration of the evidence adduced by both the parties I am clearly of opinion that the claim made by the plaintiff at Re. 1 per square yard is grossly exaggerated and that the Mission's estimate of the present market value of the suit site at Rs. 1,000 is unduly low. I accepted the evidence of Mr. Baker and Mr. Punnayya that the extension of the town northwards for the reasons mentioned by them highly problematical and that the construction of any houses on the suit site which is situated at the northernmost extremity of the town is utterly unlikely but at the same time I am not prepared to accept their statement that the suit site is not worth more than Rs. 600 per gorru. Taking into consideration the fact that the suit site with the building which stood on it at the date of the sale yielded an annual income of not less than Rs. 180 and taking also into account the admissions of the plaintiff and defendant 1 that at the date of the sale in 1884 the site without the building (which was valued by my predecessor at Rs. 600) was worth Rs. 1,400 and Rs 1,000, according to the plaintiff and defendant 1 respectively, and the rise in the price of land since that date, I fix the present market value of that site at 20 times the aforesaid income and find that the present market value of item 1, eliminating from consideration the value of the existing building, is Rs. 3,600.

Judgment.— *Appeal No.* 354.—We accept the finding of the Subordinate Judge and in modification of his decree direct that defendant 1 be allowed to retain possession of item 1 in the plaint schedule and that he be directed to pay to the plaintiff-respondent the sum of Rs. 3600, less Rs. 300 found binding on the plaintiff, with interest thereon at 6 per cent from the date of the plaint till the date of payment. Each party will bear his own costs in this Court including the costs of the finding called for. Plaintiff is entitled to his costs against defendant 1 in the Court below. In other respects the decree of the Subordinate Judge is confirmed.

Appeal No. 368.—On the merits we think the Subordinate Judge has come to the right conclusion. The evidence has been discussed by him fully and we see no reason to differ from him. At the last moment an argument was advanced to the effect that the decree against the appellant is a nullity. The facts bearing on this point are these: The case was argued after evidence was let in on 19th April 1916. It was adjourned to the 26th for further arguments. On the 20th defendant 14 died: no legal representative of his was brought on the record and judgment was delivered on 3rd May holding among other things that the alienation in favour of defendant 14 was not binding on the plaintiff. The present appellant 2 is the legal representative of the deceased defendant 14. It is contended on her behalf that the decree passed behind her back after her husband's death was without jurisdiction and we are constrained to uphold this contention. Before O. 22, R. 6, was enacted it was held by this Court in *Raghunatha Thatha Chariar* v. *Venkatesa Tawker* (4) that a judgment pronounced after the argument was closed must be taken to speak not from the date on which it was actually pronounced but from and on the date that the judgment was reserved after argument. O. 22, R. 6, gives legislative sanction to this view of the law. After the new rule was enacted it was held in *Subramania Aiyar* v. *Vaithinatha Aiyar* (5) that a judgment pronounced under similar circumstances would be a nullity: vide., also *Vishvanath Dnyanoba* v. *Lallu Kabla* (6) and *Narendra Bahadur Chand* v. *Gopal Sah* (7). Mr. Ramadoss

(4) [1903] 26 Mad. 101.
(5) [1915] 38 Mad. 682=31 I. C. 198.
(6) [1909] 4 I. C. 137.
(7) [1913] 20 I. C. 506.

contended that the spirit of O. 22, R. 6, will be satisfied, if defendant 14's arguments were heard before his death although the other parties had not concluded their arguments. We are unable to accept this contention. O. 20, R. 1, to which the learned vakil for the appellants drew our attention contemplates that all the arguments should be heard before the case can be regarded as ripe for judgment. The view of the Judicial Committee in *Radha Prasad Singh* v. *Lal Sahib Rai* (8) is also to the same effect. We must therefore hold that the decree passed against appellant 2 was made without jurisdiction. That decree must be set aside and the case should be remanded to the Subordinate Judge so far as the appellant 2 is concerned. The lower Court will have to deal with any application that may be made to it to bring in the legal representative of defendant 14. The costs will abide the result. The appeal so far as defendant 11 is concerned is dismissed with costs.

S.N./R.K. *Order accordingly.*

(8) [1891] 13 All. 53=17 I. A. 150 (P. C.).

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* * A. I. R. 1919 Madras 690

WALLIS, C. J., SADASIVA AIYAR AND SPENCER, JJ.

Official Assignee of Madras and *another*—Appellants.

v.

V. P. L. R.M. Palaniappa Chetty—Respondent.

Letters Pattent Appeal No. 267 of 1916, Decided on 4th April 1916, against judgment of Abdur Rahim, Offg. C. J. D/- 30th August 1916, in Original Side Appeal No. 79 of 1915.

*** * (a) Contract Act (1872), Ss. 247, 245, 240, and 248.—Words "admitted to the benefits of the partnership" in S. 247 do not apply to minor members of Hindu trading family—Joint trading family consisting of father and minor son—Debts incurred during minority—Minor son is not personally liable even though he takes active part in business both when he was minor and after he came of age—Hindu law, Joint Family. (Per *Wallis C. J.* and *Spencer J. Sadasiva Aiyar J.* contra).**

Per *Wallis, C. J.* and *Spencer, J.* (*Sadasiva Aiyar, J.* dissenting).—A member of a Hindu trading family is not personally liable for debts contracted for the purposes of the trade during his minority, even though he took an active part in the business both when he was a minor and after he came of age. He cannot, therefore on attaining majority be adjudicated an insolvent in respect of such debts. [P 693 C 1,2]

Per *Wallis C. J.*—The words "admitted to the benefits of the partnership" in S. 247, Contract Act have been used owing to the incapacity of minors under the Act to enter into the agreement of partnership described in S. 239. They do not apply to the minor members of a Hindu trading family. [P 691 C 1]

The interest of a minor in a joint Hindu family business, whether existing at the date of his birth or founded during his minority, is acquired by virtue of his belonging to the family and does not depend on any agreement on his part or on his admission by the other members of the family to the benefits of the partnership consequently such minors are not governed by Ss. 247 and 248, Contract Act. Further, the fact of a minor helping in the family business does not constitute admission to the benefits of the partnership within the meaning of S. 247, but may be referred to his position as a minor member of the family. [P 693 C 1]

The operation of S. 248 should not be extended beyond the cases which directly fall within it so as to impose on the members of a Hindu family a personal obligation for debts contracted in the family business during their minority [P 693 C 1]

Per *Sadasiva Aiyar, J.*—S. 248, Contract Act applies to Hindu trading families and a minor member becomes liable equally with the adults for trade debts incurred during his minority. [P 695 C 2]

The personal liability of a minor partner for a family partnership debt is created, not by the contract made for him by his guardian as such, but by the rules of Hindu law and also of the partnership law as embodies in S. 248, Contract Act. [P 695 C 1, 2]

Per *Spencer, J.*—Mere co-parcenership does not give rise to a presumption that a business carried on by one of the co-parceners in a joint family is a family business. It must also be shown that the business was set up with the aid of family funds [P 697 C 1]

A definite and conscious act on the part of the other partners is needed for admitting a minor to the benefits of partnership [P 697 C 1]

"Admission to the benefits of partnership" means something more than the mere incidence of birth in a paticular family. [P 697 C 2]

The equivocal acts of a minor will not invest him with the responsibility of a partner. Ss. 245 and 246, Contract Act can be applied only to the conduct of persons who are competent to contract, and not to minors. [P 697 C 2]

Every minor born in a trading family would, as a matter of course, be admitted to the benefits of partnership, but there must be some agreement on the part of the partners to admit him, some consentient act. [P 697 C 2]

(b) Hindu Law—Joint Family—Nattukottai trading family—Presumption is that son assisting father though minor is partner Contract Act. (1872), S. 245.

In Nattukottai trading families the fact that the son assisted his father in the trade, both while he was a minor and after he became a major, raises a reasonable inference that he was always a partner with his father in the family business. In a Nattukottai Chetty trading family the onus would lie on a member to prove that he was not a partner during his majority. [P 695 C 1; P 697 C 1]

D. Chamier, *King* and *Partridge*—for Appellants.

Shenai and *P. Kandasami*—for Respondent.

Wallis, C. J.—I agree with my learned brothers that on the facts of this case the business must be taken to have been started by defendant 1 as the joint family business of himself and his minor son, defendant 2, who subsequently attained majority before the date of the insolvency. This raises the important question whether defendant 2 was liable to be adjudicated an insolvent in respect of debts incurred for the purposes of the business during his minority and after he attained majority. As regards debts incurred during his minority the first question is, can he be made liable under S. 248, Contract Act, which makes a minor who has been admitted to the benefits of a partnership within the meaning of S. 247 liable on attaining majority for all obligations incurred by the partnership since he was so admitted, unless he gives public notice within a reasonable time of his repudiation of the partnership. It has often been pointed out that this section goes much further than the English law, which does not make a partner admitted during minority personally liable after attaining majority except for obligations incurred after that date, but I have not come across any discussion of the reasons which actuated the legislature in enacting this more stringent rule. All the minor members of the family who are in existence when a joint family business is started and all minors who are subsequently born into it may in one sense be said to be admitted to the benefits of the partnership; and if this is the sense in which these words are used in the Act, then on attaining majority they all become personally liable for all the outstanding obligations of the partnership incurred since the foundation of the business or dates of their birth, as the case may be.

The words "admitted to the benefits of a partnership" appear to have been used owing to the incapacity of minors under the Contract Act to enter into the agreement of partnership described in S. 239. On a careful examination of the authorities, I do not find any case in which they have been held applicable to the minor members of a Hindu trading family. In *Samlbhai Nathubhai* v. *Someshvar* (1) the learned Judge observed in a some whatsimilar case that it was not a case of an ordinary partnership arising out of contract, but a case of joint ownership in a trading business created through the operation of Hindu law between members of an undivided Hindu family, and that the rights and obligations arising out of such a relationship could not be determined by exclusive reference to the Contract Act. They also observed that the partnership created by the descent of an ancestral trade upon the members of a Hindu undivided family has many but not all of the elements existing in an ordinary partnership, and they considered it unnecessary to determine

"whether a Hindu who becomes entitled to a share in a trading business is ipso facto and without his own consent involved in all the liabilities of a partner."

Instead of resting their decision on the provisions of Ss. 247 and 248, Contract Act they decided, as I read their judgment, independently of those provisions that an adult member of a Hindu trading family, who left the business to be managed by his elder brother and never repudiated his interest in it, must be held personally liable for the debts properly incurred by the brother in the course of the business. The debts, so far as appears, were incurred after the appellant had attained majority. In *Haroon Mahomed, in the matter of* (2) Sir Charles Sargent, C. J., and Scott, J., decided that an adult Hindu, who had taken some part in a joint family business and allowed it to be carried on without repudiating his interest in it, was a partner and personally liable. No reference was made to the Contract Act. In *Vadilal* v. *Shah Khushal* (3), Chandavarkar, J., observed that

"from the mere fact that certain persons are members of a joint family, it does not necessarily follow that they are partner in a firm which only one of them says is his, unless it was set up with the help of family funds."

But in *Gokal Kastur* v. *Amarchand* (4) the same learned Judge is reported to have observed during the course of the argument that it had been held in *Samal, bhai Nathubhai* v. *Someshvar* (1) that the Contract Act does not apply to Hindu family business debts; but, as al-

(1) [1880-81] 5 Bom. 38.
(2) [1890] 14 Bom. 189.
(3) [1903] 27 Bom. 157.
(4) [1907] 9 Bom. L. R. 1269.

ready observed, the learned Judges do not appear to have gone quite so far, though they no doubt preferred to dispose of the case independently of the Contract Act. In the course of his judgment Chandavarkar, J., who delivered the judgment of the Court, dealt with the question how far the managing member's contracts make the other adult members personally liable, and decided, that they did, on grounds altogether independently of the provisions of Ss. 247 and 248, which were apparently held to be inapplicable. He also questioned the decision in *Chalamayya* v. *Varadayya* (5), which will be referred to later. Again in *Raghunathji Tarachand* v. *Bank of Bombay* (6) Chandavarkar, J., in holding that the minor's share in a joint family business was liable for a debt incurred for the purposes of the business, rested his decision on the principles of Hindu law, and stated that it was unnecessary to rely on S. 247, Contract Act. Batchelor, J., in his judgment in the same case no doubt was disposed to regard S. 247 as applicable, but he was only dealing with the question whether the minor's share was liable, and had not toconsider the question whether, if S. 247 were held applicable, the minor would not necessarily be made liable under S. 248 on attaining majority for all the outstanding obligations of the firm contracted since he acquired an interest by birth.

As regards Calcutta, *Johurra Bibee* v. *Sreegopl Misser* (7) was decided without reference to the Contract Act. In *Joykisto Cowar* v. *Nittyanand Nundy* (8) a Bench of three Judges consisting of Garth, C. J., Markby, J., and Mitter, J., decided that the minor's share was liable on the analogy of S 247, Contract Act, but did not apparently consider that the minor had by birth been "admitted to the benefit of the partnership" within the meaning of S. 247 so as to make that section and S. 248 applicable. In *Bemola Dossee* v, *Mohun Dossee* (9) the question was, whether a mortgage of joint family property for the purposes of the joint family business was binding on the joint family, and it was held that it was, without reference to the Contract Act.

Lastly in *Lutchumanen Chetty* v. *Siva Prokasa Modeliar* (10) Sale, J., held that a Hindu infant, who by birth and inheritance acquired an interest in a joint family business, did not necessarily become a partner, and could only become a member of the partnership by a consentient act on the part of himself and his partners. The observations in *Sanyasi Charan Mandal* v. *Asutosh Ghosh* (11) do not refer to the question of personal liability after attaining majority for debts contracted during minority. *Anant Ram* v. *Channu Lal* (12) was a case of a member of a joint Hindu family entering into a partnership with strangers, and has no bearing on the present question. In *Bishambhar Nath* v. *Fatek Lal* (13) it was held that a member of a joint Hindu trading family, who after attaining majority never took any active part in the business or had any concern with its management directly or indirectly after he attained majority, could not be held personally liable for debts incurred by the managing member of the business after he attained majority. Distinguishing *Samalbhai Nathubhai* v. *Someshvar* (1) and *Haroon Mahomed, In the matter of* (2) and approving *Chalamayya* v. *Varadayya* (5), Stanley, C. J., held that the managing member of such a business could not pledge the separate estate which another member might acquire;

"unless it be that by some consentient act on the part of the latter he has accepted the position of a partner and ratified the transactions out of which the obligation to the creditors arose,"

citing with approval the observations of Subramania Aiyar, J., in *Chalamayya* v. *Varadayya* (5).

The position of the minor members of a joint Hindu trading family is described in para. 300 of Mr. Mayne's Hindu Law, where it is pointed out that, where the business is carried on in partnership with strangers, there can be no question of the minor members of the family becoming members of such a partnership by birth. This view has been affirmed in the recent Full Bench decision in *Gangayya* v. *Venkataramiah* (14). He then

(5) [1899] 22 Mad. 166.
(6) [1909] 34 Bom. 72=11 Bom. L. R. 255=2 I. C. 173.
(7) [1875-76] 1 Cal. 470.
(8) [1877-78] 3 Cal. 738.
(9) [1880] 5 Cal. 792.
(10) [1899] 26 Cal. 349.
(11) [1915] 42 Cal. 225=26 I. C. 836.
(12) [1903] 25 All. 378.
(13) [1907] 29 All. 176.
(14) [1918] 41 Mad. 454=43 I. C. 9.

goes on to consider the case of the business being carried on wholly by members of the family, and takes the view that the minor members do not become partners by birth even in these cases. The interest of a minor in a joint Hindu family business, whether existing at the date of his birth or founded during his minority, is acquired by virtue of his belonging to the family and does not depend on any agreement on his part or on his admission by the other members of the family to the benefits of the partnership. Consequently I think that such minors are not governed by Ss. 247 and 248, Contract Act. This, I think, is in accordance with the weight of authority and there is no direct authority the other way. Further, I think that the fact of a minor helping in the family business, as in the present case, does not constitute admission to the benefits of the partnership within the meaning of S. 247, Contract Act, but may be referred to his position as a minor member of the family.

Dealing with the present case independently of the Contract Act, I think that defendant 2, by taking an active part in the business after attaining majority, has made himself personally liable for obligations of the business contracted after attaining majority. It is therefore unnecessary to consider what would have been the extent of the managing member's authority to pledge his personal credit if after attaining majority he had taken no part in the management, a point as to which ths decisions I have quoted are not easy to reconcile.

As regards obligations contracted during minority, there is no case in the reports in which it has been attempted to make a member of a Hindu trading family personally liable for such obligations, and to adjudicate him an insolvent merely on the ground that he took an active part in the business after attaining majority or both before and after attaining it. No such result follows in England, where a minor partner after attaining majority continues in the partnership. If such an obligation is to be enforced in India, it can only be on the analogy of S. 248, Contract Act, which as I have shown is inapplicable. I am not prepared to extend the operation of that section beyond the cases which directly fall within it so as to impose for the first time apparently on the members of a Hindu family a personal obligation for debts contracted in the family business during their minority. In this connexion I may refer to the observation of Sausse, C. J., in *Ramlal Thakursidas* v. *Lakhmichand Muniram* (15), which was eited with approval by Stanley, C. J., in *Bishambhar Nath* v. *Fateh Lal* (13), that

"the recognition of a trade as inheritable property renders it necessary for the general benefit of the family that the protection which the Hindu law generally extends to the interests of a minor should be so far trenched upon as to bind him by acts of the family manager necessary for the carrying on and consequent preservation of that family property; but that infringement is not to be carried beyond the actual necessity of the case."

It is in my opinion going beyond the actual necessity of the case to hold members of a Hindu trading family personally liable for debts contracted during their minority and I am therefore of opinion that defendant 2 is only personally answerable for and liable to be adjudicated an insolvent in respect of debts incurred since he attained majority. As there were no such debts, the appeal fails and must, in my opinion, be dismissed with costs.

Sadasiva Aiyar, J.—This Letters Patent Appeal was argued with reference to the following questions :

(1) Did the first insolvent debtor V. P. L. R. M. Ramasami Chetty, when he started his Madras business in 1910, intend it to be an individual business of his own in which the gains were to be his self-acquisitions and the liabilities were to be his personal liabilities, or did he intend it to be a family business in which his minor son V. P. L. R. M. Palaniappa Chetty, the second insolvent, was to be a sharer as the undivided member of the joint Hindu family consisting then of the father and son ? (2) Is a Hindu father of the Nattukottai Chetty caste entitled to begin a trade business in such a manner that it becomes an undivided family partnership business in which his minor son gets an interest along with his father? (3) Taking it as the law that a minor member of a trading joint family is not liable for the trade debts beyond the extent of his interest in the family property (in other words, that the property which belongs to the minor by collateral inheritance, etc., as his separate property is not liable for such debts), does that

(15) [1862-65] 1 B. H. C. R. App. 51.

same limitation on liability apply also in favour of the adult male members of the family partnership, provided they do not take active part in the conduct of the business? (4) Does S. 248, Contract Act (or, at any rate, the principle of that section) apply to a member of a joint family who got an interest in the joint family trade when he was a minor and who after attaining majority did not give public notice within reasonable time of his repudiation of his membership in the partnership? (5) Has the second insolvent petitioner, by his conduct after he attained majority and by his non-repudiation of the partnership by public notice, become personally liable for all the obligations incurred in the family trade by his father during his (second insolvent's) minority.

Both the father and the son, the two respondents, were adjudicated insolvents on 28th January 1915 on the petition of a trade creditor about nine months after the second insolvent attained majority. The second insolvent applied in September 1915 to have the adjudication, so far as he was concerned, cancelled on the ground that he was not personally liable for the debts incurred by his father in the cloth trade business begun in 1910 when he was a minor, and that he was willing that his share in the ancestral family house might also be taken possession of by the Official Assignee for satisfying the creditors.

Backwell, J., held that, having regard to the customs and manners of Nattukottai Chettys and their usually initiating their minor sons into the family business even before they attain majority, to the father and the son using the same Chetty Vilasam of 4 or 5 initials before their respective names, to the business having been carried on under that Chetty Vilasam and to the 2nd insolvent debtor's having failed to give notice of the repudiation referred to in S. 248, Contract Act, the 2nd insolvent was taken in as a member of a family firm by his father and continued to be such till he was adjudicated insolvent after he attained majority and that he was therefore personally liable for the debts of the firm and that he was properly adjudicated insolvent. On this view, he refused to cancel the 2nd insolvent's adjudication. The question whether S. 248, Contract Act directly applied, or whether the principle of that section could be applied to Hindu family trading firms, or whether there should be active carrying on of trade even as regards an adult member of the firm in order to make him personally liable and whether respondent 2 did actively carry on such trade after he became an adult, have not expressly been dealt with in the learned Judge's judgment. On appeal by respondent 2, the learned Senior Judge (against whose judgment this letters patent appeal is filed) held that as the Mrdras business was not an ancestral business inherited by the father and son, but was started by the father newly in 1910, and as respondent 2 who was then a minor could not give his consent to his (father's) treating it as a joint family business and as no definite act such as "allotment of a share or distribution of profits or something of an analogous character") had been proved to have been done by the father, the evidence was insufficient to show that respondent 2 was admitted to the benefits of his father's business as a partner when he was a minor. The learned Judge further held that even if the business was a joint family business, the appellant would not be personally liable, but only his share in the property acquired out of the proceeds of the trade and in the ancestral property would under the Hindu law be liable for the debts. He relied for this conclusion on the decisions in *Chalamayya* v. *Varadayya* (5) and *Sheik Ibrahim Tharagan* v. *Rama Ayyar*, *I. L. R* 35 *Mad.* 692 [the name of the case should be *Sanka Krishnamurthi* v. *Bank of Burma* (16)]. The other learned Judge (Phillips, J.,) held, on a consideration of the fact that there was a nucleus of ancestral property on whose credit presumably the business at Madras was launched and on a consideration of the conduct of the father and son, that the business was a joint family business and that under S. 248, Contract Act, respondent 2 became fully liable as a partner for the debts incurred during his minority.

On the questions of fact involved in the case, I am, after the best consideration which I have been able to give to them, inclined to agree with the trial Judge and with Phillips, J., that the father intended it from the very begin-

(16) [1911] 35 Mad. 692=11 I. C. 79 =14 I. C. 389.

ning to be a joint family business belonging to himself and his son and that the son accepted the position after he attained majority. The evidence required to arrive at such a conclusion need not be so strong in the case of Nattukottai Chettys, whose ancestral properties even are presumed to be involved in all the trade businesses carried on by them : see *Chidambaram Chetti* v. *Ramaswami Chettiar* (17), *Arunachalam Chetty* v. *Vellaiappa Chetty* (18) and *Bank of Bengal* v. *Ramanadhan Chetty* (19) and A. A. O. No. 319 of 1914, as in the case of Hindus belonging to a community whose family business is not trade. It appears from one of the affidavits on record that the father and son raised Rupees 3,000 on the mortgage of their ancestral house in respect of certain debts connected with the Madras business and it is significant that this allegation in the affidavit on the other side has not been sought to be denied by the respondents in the evidence given before the Court by them. Though a partnership under S. 239, Contract Act is based on "agreement" and though a minor cannot enter into a valid agreement as regards other matters, S. 247, Contract Act allows the admission of a minor partner into a business, thus creating an exception to the usual rule as to agreements being valied only as between majors.

Further partnership in a family business does not depend upon the consent of the partners in many cases [see *Anant Ram* v. *Mansa Ram* (20)], but upon the family being a trading family and the bnsiness being conducted for the benefit of the family, persons born into the family from time to time becoming partners as a matter of course. While the acts of a son, who assists his father in the latter's separate business may not be evidence of partnership in a case where the father does not belong to a trading community [see *Narasimhappa* v. *Chinna Kenchappa* (21)], the fact that a Nattukottai Chetty's son assists his father in the trade business carried on under the family Vilasam, both while he was a minor and after he became a major, raises a reasonable inference that he was alway's a partner with his father in a family business. I think that the right of a Hindu father belonging to a trading community to begin a lawful and ordinary trade business as a joint family business in which himself and his minor sons were to be partners cannot be disputed. On the above conclusions I think S. 248, Contract Act applies and respondent 2 had become liable (on the date of the creditors' petition) equally with his father for the trade debts contracted by his father from the very beginning of the business.

As regards *Chalamayya* v. *Varadayya* (5), it was not a case of a debt due by a partnership family business to which S. 248, Contract Act could be applied but an ordinary family debt incurred by the manager for a family purpose. Though that case could be distinguished on that ground, I wish to state that in my opinion, the adult junicr members of a joint Hindu family and the minor members after they attain majority are personally liable and to the extent of their separate properties also (that is, not merely to the extent of their interests in joint family properties) for debts incurred for family necessities by the managing member, who is the agent of the family entitled to pledge the credit of all the family for debts incurred for family necessity—I think the texts quoted by Subramania Ayyar, J., at pp. 170 and 171 (of *I. L. R.* 22 *Mad.*) clearly imply such personal and extended liability. I am with great respect unable to agree with the learned Judge in his interpretation of those texts. In *Gokal Kastur* v. *Amarchand* (4), Chandavarkar, J., in considering *Chalamayya* v. *Varadayya* (5), says at p. 1292 (of 9 *Bom. L. R.*) :

"Whether that decision laying down that principle is correct according to Hindu law or not, it is unnecessary to decide in the present case. It is sufficient however to say that we have serious doubts about the correctness of a principle."

I am further inclined to doubt the correctness of the decisions quoted to us that the personal liability of the adult male members in a joint family partnership depends on their being proved to have taken an active part in the business. As regards *Sanka Krishnamurthi* v. *Bank of Burma* (16), the defendant in that case was a minor even on the date of the suit and the direct question involved was the right of the minor's mother acting as his guardian to give a

(17) A. I. R. 1915 Mad. 506=26 I. C. 911.
(18) A. I. R. 1915 Mad. 748=27 I. C. 376.
(19) [1915] 28 I. C. 260,
(20) [1916] 32 I. C. 780.
(21) [1917] 38 I. C. 244.

power-of-attorney to an agent of such a wide character as to make the minor personally liable for debts incurred by such agent even in fraud of the minor and whether when the guardian herself cannot claim the benefit of indemnity against the minor's property, the creditor can claim any right of subrogation to that benefit. As regards the observations in *Waghela Rajsanji* v. *Shekh Masludin* (22), all that they amount to is that the covenant of a mere guardian cannot impose a personal liability on the minor ward. But the personal liability of a minor partner for a family partnership debt is created not by the contract made for him by his guardian as such, but by the rules of Hindu law and of partnership law by which the debt incurred by a major manager of Hindu family partnership business has to be paid personally by the minor members also. In the result, I would hold that both independently of the Contract Act, that is by the rules of Hindu law and by S. 248, Contract Act also (as I think that that section too applies though it is not necessary to rely on it) respondent 2, was personally liable for all the debts in respect of the non-payment of which he was adjudicated an insolvent and I would restore the judgment of Bakewell, J., allowing the appeal.

Spencer, J.—The question for our decision is whether the respondent, who belongs to a Nattukottai Chetty trading family, is personally liable for the trade debts of that family incurred before he attained majority, or whether he is not liable at all personally. The respondent attained majority in April 1914 and was adjudicated insolvent in January 1915. If he was a partner, it will follow from S. 249, Contract Act that he is personally liable for the ordinary debts of the firm incurred while he was a partner. Persons who by their words or conduct lead others to believe them to be partners and persons who get credit by allowing themselves to be represented as partners incur all the responsibility of partners under Ss. 245 and 246. Minors in this country are incapable of becoming partners in their own right, as by S. 11, Contract Act they are declared to be not competent to contract. But they may be admitted under S 247 to the benefits of partnership, upon which their share becomes liable although they incur no personal liability. Such persons on attaining majority become ipso facto liable under S. 248 for all obligations incurred by the partnership from the date of their admission to the benefits, unless they publicly repudiate the partnership.

Such being the general effect of the Contract Act on the question, I will first consider the respondent's liability for the firm's debts incurred during his majority. In Nattukottai Chetty families there is ordinarily no distinction made between the trade assets and the family property vide *Chidambaram Chetti* v. *Ramasami Chettiar* (17) and *Arunachalam Chetty* v. *Vellaiappa Chetty* (18). It has not been shown that in this particular family any family fund was kept apart from the trading capital. No attempt has been made to prove that the respondent at any time repudiated the partnership. There is evidence that the respondent, both when a minor and when adult took an active part in the business of the shop, sitting by the safe, looking after the accounts, collecting money, and signing receipts for the delivery of bales of piece-goods. There were 4 or 5 gomastas in the shop, but the respondent, unlike them, received no salary for the work he did in his father's business. The practice of Nattukottai Chetty firms trading under trade initials has been frequently recognized in decisions of this Court. One of such decisions is that in *Mungumal Jessa Singh* v. *A. L. V. R. C. T. Firm* (23). The initials under which this family traded appear to have been V. P. L. R. M. The affidavit presented by the respondent to the Insolvency Court commenced thus:

> "I. V. P. L. R. M. Palaniappa Chetty, son of V. P. L. R. M. Ramasamy Chetty, a Hindu of the Nattukottai Chetty caste, aged about 19 years, ... do hereby solemnly and sincerely affirm, and say as follows,"

and was signed in Tamil by the respondent "V. P. L. R. M. Palaniappa Chetty", thus denoting his consciousness that he belonged to the V. P. L. R. M. firm of which his father, who prefixed the same initials to his name, was a partner. I think that the respondent's conduct in taking an active part in the business after becoming a major was such as to lead others to act on the belief that he was a partner. He was also, in the words of Melvill, J., in *Samalbai Nathu-*

(22) [1887] 11 Bom. 551=14 I. A. 89 (P. C.).

(23) [1908] 4 M. L. T. 309.

bai v. *Someshvar* (1), a

"joint owner of a trading business created through the operation of Hindu law between the members of an undivided Hindu family."

I accept the principle laid down by Chandavarkar, J., in *Vadilal* v. *Shah Khushal* (3) that mere co-parcenership does not give rise to a presumption that a business carried on by one of the coparceners in a joint family is a family business. It must also be shown that the business was set up with the aid of family funds. This follows in the present case from the fact that the respondent belongs to a Nattukottai Chetty trading family and that in such families the decisions in *Chidambaram Chetti* v. *Ramaswami Cheitiar* (17) and *Arunachalam Chetty* v. *Vellaiappa Chetty* (18) quoted above recognize of a certain custom. It has further been shown that the respondent took an active part in his father's business. The onus therefore would lie on him of proving that he was not a partner during his majority. I think that both under Hindu law and under the Contract Act the rosponden:t would be personally liable for partnership debts incurred after he came of age. It is however conceded that all the debts concerned in this adjudication were debts incurred during the respondent's minority.

The question of the respondent's personal liability for debts incurred during his minority is a more difficult one. His share is no doubt liable under Hindu law [*vide Raghunathji Tarachand* v. *Bank of Bombay* (6)]. If he was not a coparcener in a trading family, his share would still be liable if he was admitted while a minor to the benefits of partnership (S. 247, Contract Act), but not otherwise. But as I observed in *Gangayya* v. *Venkataramiah* (14), a definite and conscious act on the part of the other partners is needed for admitting a minor to the benefits of partnership. I do not find that it has been anywhere defined what are the acts which would constitute admission to the benefits of partnership. Abdur Rahim,J. considers that it implies some definite act such as the allotment of a share or the distribution of a part of the profits or something of an analogous character. In *Anant Ram* v. *Channu Lal* (12), there is an observation that admission to partnership can only be with the unanimous consent of those who are already partners. I am clearly of opinion that admission to the benefits of partnership means something more than the mere incident of birth in a particular family. The equivocal acts of the respondent during his minority would not have the effect of investing him with the resposibility of a partner. I think that Ss. 245 and 246, Contract Act can be applied only to the conduct of persons who are competent to contract, and not to minors. Mr. Mayne in his Hindu law says that one of the principles of partnership in England which is that a partner must be a person to whom the other partners are willing to delegate their authority and capable of binding them by their acts, is the same in India.

This would naturally exclude minors. Also no new persons can be introduced into the management without special agreement. A manager is chosen for his special aptitude for business. So also it would appear that not every minor born in a trading family would, as a matter of course, be admitted to the benefits of partnership, but that there must be some agreement on the part of the partners to admit him, some "consentient act," as Sale,J. calls it in *Lutchmanen Chetty* v. *Siva Prokasa Modeliar* (10).

In the present case, there being no proof of the respondent's admission to the benefits of partnership during his minority, he is not personally liable under S. 248, Contract Act for debts incurred by the firm during his minority now that he has attained majority.

Equally he is not personally liable under Hindu law for debts contracted by the manager of the firm during his minority, for it is settled law that a personal liability cannot be imposed on a minor by the covenant of his guardian and manager, *vide Waghela Rajsanji* v. *Shekh Masludin* (22), *Maharana Shri Ranmalsingji* v. *Vadilal Vakhatchand* (24) and *Sanka Krishnamurthi* v. *Bank of Burma* (16). In the result, I agree with the learned Chief Justice that the respondent could have been declared insolvent in respect of debts, if any, incurred during his majority, but that debts incurred before that event should not be taken into account in the adjudication proceedings.

S.N./R.K. *Appeal dismissed.*

(24) [1896] 20 Bom. 61.

A. I. R. 1919 Madras 698

ABDUR RAHIM AND BAKEWELL, JJ.

Nagappa and *others*—Defendants—Appellants.

v.

Siddalingappa and *others*—Plaintiff and—Defendants—Respondents.

Second Appeal No. 1962 of 1915, Decided on 18th April 1918, against decree of Dist. Judge, Bellary, in Appeal Suit No. 161 of 1913

(a) Civil P. C. (1908), O. 8, R. 5,—Guardian of minor defendant allowing case to proceed ex parte—Plaintiff must prove facts alleged in plaint which were not expressly denied in written statement.

The scope of O. 8, R. 5, is only this: that the omission to deny an allegation of fact in the plaint is not to be taken as an admission in the case of minor defendants, and the rule has nothing to do with the conduct of the suit afterwards. For instance, if at the framing of issues or at the trial the person representing a minor defendant admits certain allegations of fact, it cannot be said that R. 5 in any way affects such admission. What the legislature apparently contemplated by R. 5 was that if, for instance, the guardian of a minor defendant allowed a case to proceed ex parte, then the plaintiff must prove those facts alleged in the plaint which were not expressly denied in the written statement filed on behalf of the minor defendant. [P 698 C 2]

(b) Civil P.C., (1908), O. 14, R. 1—Courts are not bound to raise issues on questions of fact of their own motion—But on such questions of law as of jurisdiction or limitation Court is bound to frame issues.

Courts are not bound to raise issue on questions of fact of their own motion where parties do not ask for them. The omission to raise such issues implies an abandonment of such questions by the party interested. Where however the question is one purely of law, such as limitation or jurisdiction, it is incumbent on the Court to frame proper issues on such question. [P 699 C 1]

L. Venkataraghava Aiyar—for Appellants.

S. Desikachari—for Respondents.

Judgment.—The suit was instituted by respondent 1 in this appeal in order to recover a certain sum of money under a mortgage deed against the appellants, who are minors and who were represented in the suit by their guardian. The first question argued before us is that there was no proof as to the proper execution of the mortgage deed and its attestation according to law. But the defendants appeared by a pleader throughout the proceedings, the written statement did not raise any question as to the execution of the mortgage, there was no issue framed with reference to this point, and so far as we can gather from the record no objection on that score was taken at the time of the trial. The learned pleader for the appellants contends that, inasmuch as O. 8, R. 5, Civil P. C., says:

"Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability."

It made it incumbent upon the Court to require proof of the execution of the mortgage before there could be any decree given against the minors. But the scope of O. 8, R. 5, is only this: that the omission to deny an allegation of fact in the plaint is not to be taken as an admission in the case of minor defendants, and the rule has nothing to do with the conduct of the suit afterwards. For instance, if at the framing of issues or at the trial the person representing a minor defendant admits certain allegations of fact, it cannot be said that R. 5 in any way affects such admission What the legislature apparently contemplated by R. 5 was if for instance the guardian of a minor defendant allowed a case to proceed ex parte, then the plaintiff must prove those facts alleged in a plaint which were not expressly denied in the written statement filed on behalf of the minor defendant. In the case of a defendant who is a major, an ex parte decree could be based not only on facts expressly admitted in the written statement but also on those allegations of fact in the plaint which are not denied in the written statement. Here what happened was, the pleader appearing for the defendant stated that he did not want to adduce oral evidence in the case; so also did the pleader for the plaintiff. Then certain documents relevant to the issues raised were filed and apparently no objection was taken as to their admissibility and they were marked as exhibits, we may take it, by consent. The issues that were raised relate to questions of limitation and res judicata and those were the points apparently argued at the trial. We think that we should be perfectly justified in this case in saying that any question as to the execution of the document was waived at the time of the framing of issues and the trial of the suit.

Our attention has been drawn to certain rulings, notably to one of the Bombay High Court reported as *Ganoo* v. *Shri Dev Sidheswar* (1), where Fulton J.

(1) (1902) 26 Bom. 360.

at p. 362 lays down that it is the duty of the Court under the Civil Procedure Code to see that proper issues necessary for the decision of the case are framed. But there the question was as to whether the notice served by the landlord on the tenant in a suit for ejectment was a proper one, and as proper notice was a part of the cause of action it was held to be the duty of the Court to see whether in the plaint the cause of action was properly stated and that it was proved at the trial. The proposition however as to the duty of the Court to raise proper issues is laid down in broad terms. But we do not think that it was intended to lay down that upon questions of fact it is the duty of the Court, even though the party in whose interest it is to raise the necessary issue, does not choose to do so to frame such issues of its own motion. Any general proposition of that character would in our opinion, be subversive of proper conduct of cases and we are unable to assume that the learned Judges of the Bombay High Court intended to lay down any such rule. On the other hand we agree with the ruling of this Court reported as *Ponnusami Pillai* v. *Pasupathi Mudaliar*(2), where it is laid down that an omission to raise an issue on a question of fact implies an abandonment of that question by the party interested. No doubt where the question is one purely of law, such as limitation or jurisdiction it is incumbent on the Court to frame proper issues on such questions, but it would not be safe to extend any such rule to issues of fact. We therefore overrule this objection raised by the appellant's pleader.

The next contention in the appeal relates to the admissibility of Ex. D which is a deposition of the present guardian of the appellants in a former suit. The defendants' pleader apparently consented to Ex. D being admitted in evidence and the statement contained therein which amounts to an admission saving limitation that could have been proved if the guardian had been called. It was open to the pleader for the defendants to dispense with any such proof. We therefore do not think that there is any force in this objection. On the next question as regards the amount of interest which has been allowed in the decree, that is at the rate of Rs. 75 a year, it is difficult to ascertian from the records upon what material this sum was arrived at and it would be necessary to call for a further finding on this point, allowing the parties to adduce evidence with respect thereto. But the learned pleader for the appellants wants time to consider whether it would be desirable in the interest of his clients that a finding on this point should be called for. We therefore allow the case to stand over for two weeks.

Order.—The lower Court will submit a finding as to how much is payable on account of interest according to the terms of the bond Ex. A. Fresh evidence may be taken. The finding will be submitted in 8 weeks and the parties will be at liberty to file objections to the same within 10 days after notice of return of the same shall have been posted up in this Court.

Finding —The High Court has called for a finding as to how much is payable on account of interest under the bond Ex. A. Under the mortgage bond Ex. A one-fourth share of the grain produced on the mortgaged bond was to be given by way of interest on the amount of the mortgage loan. The amount of interest originally allowed is Rs. 300, at the rate of Rs. 75 per year for each of four years from 1908 to 1912. The only evidence on the subject is given on the side of the plaintiff and this has all been given after the remand. It is the plaintiff's case that the lands mortgaged under Ex. A form part of the lands since sold to him uuder Ex. B. The extent sold under Ex. B is 21-65 acres while the extent of land mortgaged under Ex. A is 5-16 acres (plus a small fraction), and so the yield on the mortgaged lands will be something under a fourth of the yield on the whole extent of the land sold. The calculation has to be made this way: as both plaintiff and P, W. 2 give the yield for the entire extent of the land sold under Ex. B, while it is not made quite clear to what P. W. 3 refers, but it is not a very satisfactory way of making it, as according to the plaintiff's evidence 3 acres of the whole extent are wet and the rest dry, the lands hypothecated being well-fed. The plaintiff's evidence as P. W. 1 shows that two crops of grain were being raised on the whole land and that each crop would yield 24 to 20 Pallas, while he also says that he was getting

(2) [1910] 5 I. C. 813.

20 or 25 pallas for his half-share. This statement would make out that the produce yielded about 50 Pallas of paddy a year and the plaintiff would be entitled to a fourth share or rather less than 1/4th of this: that is, to only about 3 pallas P. W. 2 says that the plaintiff's 1/4th share was about 6 tooms (=4 4/5th pallas) from each of the crops, and this is clearly with reference to the full extent of land sold and so according to this witness plaintiff's fourth share on the mortgaged lands would be hardly 2 1/2 pallas. P. W. 3 says that plaintiff was getting 6 or 7 tooms for each of two crops per year from the hypotheca, and by the hypotheca I take it that he means the whole extent of lands sold and not merely the lands mortgaged, as otherwise his reckoning would be very much at variance with what is spoken to by P Ws. 1 and 2. I would hold on this evidence that plaintiff for his fourth share of the mortgaged property is only entitled to 2 1/2 pallas of grain per year.

As to the value of this grain, plaintiff says now that it is worth Rs. 6 or Rs. 6-8-0 a palla; while P. W. 2 says that it fetches Rs. 5 or Rs. 5-8-0 a toom which comes to much the same thing. In a deposition (Ex. D) in a previous suit however when speaking as I understand of the year 1907, he has said that the price per palla was at that time Rs. 3-8-0 He has not been cross-examined as to this statement, and prices no doubt vary and tend to go up, but I do not think that they can have varied so much as to have nearly doubled since the date of Ex. D. On the other hand, it has to be remembered that the defendants (appellants) have set up no counter-evidence to that put forward by the plaintiff. On the whole I think that it may be taken that the price per palla for the four years has been on an average Rs. 5 and at this rate I find that the plaintiff is entitled to interest of Rs. 12 1/2 a year, representing 2 1/2 pallasa per year at Rs. 5 per palla. He is therefore entitled to Rs, 50 in all for the four years. After the return of the finding of the lower appellate Court upon the issue referred by this Court for trial the Court delivered the following:

Judgment. — The decree will be varied by allowing interest at Rs. 12-8-0 per annum on Rs. 200 from March 1908 till the time fixed for payment. Time for redemption will be extended to 18th August. In other respects the decree will be confirmed. There will be proportionate costs.

S.N./R.K. *Decree varied.*

A. I. R. 1919 Madras 700

SPENCER AND KRISHNAN, JJ.

Nadhamuni Ayyan and *another*—Defendants—Appellants.

v.

Appu Odayan and *others* — Plaintiffs and Defendants—Respondents.

Second Appeal No. 65 of 1916, Decided on 2nd April 1918, against decree of Dist. Judge, South Arcot, in Appeal Suit No. 38 of 1915.

Hindu Law—Joint family—Collusive decree against some co-parceners on sham transactions—Family property sold in execution—Co-parceners can sue to set aside and for recovery of shares—Partition can be effected in suit itself—Decree-holder purchaser is not entitled to equities.

A collusive decree obtained against some of the co-parceners in a joint family on a sham transaction is not binding on the other co-parceners. Where joint family property is sold in execution of such a decree, the co-parceners are entitled to get the sale set aside and to sue for the recovery of their shares. They are not however entitled to recover the whole property and the decree-holder is entitled to the shares of his judgment-debtors. [P 704 C 2; P 705 C 1, 2]

Where specific properties are sold in Court auction, it is not necessary that there should be a separate suit for partition for the allotment and ascertainment of the shares. Partition may be directed in the suit itself and the plaintiff may be given his share : (*Authorities reviewed.*) [P 705 C 1,2]

The decree-holder purchaser cannot claim against the plaintiffs, who were no parties to the collusive decree based on a non-existent debt an equitable remedy such as that implied by subrogation. [P 703 C 2]

T. R. Venkatrama Sastri and *M. S. Venkatrama Aiyar*—for Appellants.

C. Padmanabhaiyar—for Respondents.

Judgment.—The District Judge has based his decision largely on Court Exs. 1 and 2, which he admitted as evidence produced on the Court's own motion. He states that the documents are conclusive on the point of fact. O. 40, R. 27, Civil P. C., makes it imperative that an appellate Court should record its reasons for admitting additional evidence whenever additional evidence is allowed to be produced. Apart from the irregularity arising from the omission to comply with this rule we think that in fairness these documents should not have been relied on for the purpose of proving that the properties attached by defendant 3

(plaintiff in Original Suit No. 133 of 1909) were treated as the joint properties of defendants 1 and 2 in this case (defendants 1 and 2 in Original Suit No. 133 of 1909, without giving defendant 3, who was examined as D. W. 1 at the original trial, an opportunity of explaining the circumstances under which he made the application to attach those properties and his admission in the application. In considering the other evidence of joint dealing with the property the District Judge has not considered and met the possibility of the explanation suggested by the District Munsif for the joint execution of the mortgage deed to Abboy Chetti by plaintiff and defendants 1 and 2 being true ; and he also appears to have overlooked the point, which the District Munsif noticed, that the plaintiff's evidence as to the purchase of the plaint properties by sale of ancestral propertics must be hearsay, when he spoke to what occurred when he was only two years old.

We think that it is necessary to call for a fresh finding from the District Judge on the question whether the plaintiff has any interest in the properties. If he finds this question in the affirmative, he will also return a finding on issue 3 which is has left undetermined. Findings should be returned within two months from this date. Ten days will be allowed for filing objections.

Findings.—This is a case which has been remanded to me for findings on the the question, " Whether the plaintiff has any interest in the properties ; " and secondly, if the above issue is found in the affirmative, " If the sale is to be set aside, to what equities, if any, is defendant 3 entitled ? "

It has been pointed out by the High Court that I have fallen into an irregularity in not complying with O. 41, R. 27, Civil P. C., in replying on Court Exs. 1 and 2 which I admited as evidence produced on my own motion, in that I did not record the reasons for admitting this further evidence. It is also observed that there was great hardship on defendant 3 in admitting this in evidence,.because he was not given an opportunity of meeting this document which contradicted his evidence. It is brought to my notice by the learned vakil for the appellant that as a matter of fact the subject of these two Exs. 1and 2 was brought to the notice of defendant 3 when he gave his evidence in the Court and that he then had an opportunity of explaining the fact, which must have been present to his memory, that he attached the property as being the property of the defendants. However, the man is since dead and in view of the High Court's observation I do not think it advisable that I should rely on these documents nor record a reason at this stage why I should admit them, because in any case one obvious explanation and observation attaches to them, that the general conduct of the parties might have led defendant 3, who would not be intimately acquainted with family affairs, to believe the property to be joint family property and it is not the conduct or the admissions of a third party, as defendant 3 was, which can affect the nature of the ownership of any given bit of property. The learned vakil for the appellant brings it to my notice that the decisions in *Indar Sahai* v. *Shaim Bahadur* (1) and *Madhavaiya Chetty* v. *Damodaram Chetty* (2) are a clear basis for holding that, although there may be no nucleus of family property, where the family work together and live together and eat together and treat the property as joint property, they make a joint family even if there has been no original nucleus of family property.

As regards the observations of the District Munsif with reference to the joint execution of the mortgage deed to Abboy Chetti by the plaintiff and defendants 1 and 2, I have had my attention directed to it in argument and I have given my attention to it as directed by the order of reference of their Lordships of the High Court; and I think it is right to observe that this explanation by the District Munsif, that it was possible that the sons were also joined in the execution of this document as they were naturally required to do as a matter of safety by the mortgagee, is an explanation which was open to the parties and yet was not made by defendant 3. But as regards the explanation that the execution of the mortgage deeds Exs. 1 and 10 to Shroff Abboy Chetti might show that the plaint properties were thrown into the common stock and enjoyed by

(1) [1912] 17 I. C. 760 (P. C.).
(2) [1912] 17 I. C. 347

the family jointly though acquired by a single member, that does in fact appeal to me and that is in fact my final view. The decision in *Thyalambeal* v. *Krishna Pattar* (3) is an exact decision in point. As regards the Full Bench case in *Ethirajulu Naidu* v. *Govindarajulu Naidu* (4) I have to observe with great respect that it seems to me that a good deal would turn on the date of the will in question.

If after treating the property in every way as joint property, the acquirer at his very last gasp makes a will disposing of it as if it was still his sole self-acquired property, I think it would be open to the other members of the joint family to show that by his action in treating the property as joint property and thus keeping the family together they were prevented from going out in the world and setting upon their own account, and therefore it was not open to him, just before his death, to execute a will which reversed the tacit agreement among them. If, on the other hand, in such a series of circumstances as are detailed in *Ethirajulu Naidu* v. *Govindarajulu Naidu* (4) the acquirer of the property made and registered a will three or four years before his death, that would be a very different matter. However though I venture to express this proviso, my present finding is not given in opposition to the decision in *Ethirajulu Naidu* v. *Govindarajulu Naidu* (4), but because it seems to me. having regard to the provisions of Ex. 10, dated 1904, and Ex. 1 dated 1908, that after setting forth most clearly that it was self-acquired property it is stated with equal clearness and precision that the property is in the joint possession of all the members of the family. And this is exactly the course and conduct which, according to the ruling in *Madhaviya Chetty* v. *Damodaram Chetty* (2), where the family all live together, is enough to finally invest the property with the character of joint family property. The learned vakil for respondent 4 would wish to argue from *Ram Kishen Das* v. *Tanda Mal* (5) that there can be no joint family unless there is a nucleus of joint family property. But the decision in 1912 *M. W. N.* [*Madhavaiya Chetty* v. *Damodaram Chetty* (2)] is exactly opposed to such a view. It is perfectly true that the evidence as to the property having been acquired with the grandfather's own money is mere hearsay, as the High Court has been pleased to point out to me, and it is true that in certain cases, as set out in the decision in *Jangi Nath* v. *Janki Nath* (6), a single owner of a property may for certain reasons, and to avoid family quarrels, associate with himself persons who in reality have no joint title and may afterwards insist on his own full separate rights. Personally I incline to the view that this is not a line of conduct which should be encouraged or which in the end conduces to the peace and welfare of families [to quote the Privy Council in *Lala Muddun Gopal Lal* v. *Khikhinda Koer* (7)] because it seems to me that it is substituting for a temporary disagreement an inevitable, bitterly-contested law suit, which will certainly go as far as the Privy Council if the family funds or credit permit. However that may be, the present is not such a case. Here there has been a living together in one house ever since the family migrated to Sandaipittai on account of the great famine of 1876—77. A house was bought and eventually land; and this land is the subject of the present litigation. The oral evidence on the side of the plaintiff is indeed *meagre* and a great part of the evidence he gives as his own witness is false. But the learned District Munsif found as a fact that the plaintiff and defendants 1 and 2 have been living all along and messing together and the plaintiff's present statement to the contrary is a deliberate falsehood. This fact while leading great weight to the theory of collusion in the present suit, is also a very important one in deciding whether the family have been throwing all their income such as it is into one joint stock. Taken with the contents of Exs. 1 and 10, I am satisfied that the property was altered into joint family property with the full final consent of the father who acquired it and for this reason I find the issue in the affirmative that the plaintiff has an interest in the properties.

As regards issue 3 the learned vakil for the respondent wishes me to go

(3) [1916] 32 I. C. 955.
(4) [1916] 32 I. C. 12.
(5) [1911] 33 All. 677=10 I. C. 543.
(6) [1905] 2 A. L. J. 225.
(7) [1891] 18 Cal. 341=18 I. A. 9 (P. C.)

once more over the whole question of fraud and to show that on account of the fraud being non-existent and the pro-notes being executed with legitimate purposes, his client is entitled to repayment of the following sums of money: Rs. 600 for Ex. 1, Rs. 224 under Ex. C and Rs. 300 towards the discharge of Ex. 6. He argues from the decision in *Palamalai Mudaliyar* v. *South Indian Expori Co., Ltd.* (8) that defendant 3 is entitled in equity to have these sums made a charge on the property as there is no evidence to rebut the fact of payment; for, as he points out, P. W. 1 (defendant 2) admits in evidence that Rs. 40 is due from him on the pro-note for which Ex. C was substituted. On the other hand my attention has been drawn to the Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh* (9), by which it is said that the sale of joint family property by only one or two members excluding a person who is a common cosharer with them has no effect whatsoever and cannot bind the property at all.

Thus there is no equity for defendant 3 retaining his two-thirds of the suit property nor for his getting his money back. It seems to me that this is the decision which I must apply in the present case and that my finding on issue 3 in the same as the lower Court's, viz. that defendant 3 (who is now represented by respondent 4) is not entitled to any equities in this case. Although I base my decision on the ruling in the Privy Council cases noted above, and not on the finding as regards fraud—because it seems to me that I am not bound or justified in reviewing my finding on that point that there was fraud in the matter—if I take that finding as holding good, I will also say that on account of the fraud practised in the matter to which defendant 3 was necessarily a party he is not entitled to any equities in the case. But my finding as given above is independent of the finding on the question of fraud, which as it seems to me has been excluded from the scope of the reference. I am corrected by the learned vakil for the respondent as regards his arguments based on 33 *All.* [*Ram Kishen Das* v *Tanda Mal* (5)]. He points out that his argument was that there is no presumption as to the existence of joint family property and anyone who alleges it must prove it. This, of course, I concede, but he proceeded to argue as stated above that there must necessarily be a nucleus of joint family property before anything can be added to it, and this is not a correct statement of the law. Allowing, as I do, that all the burden of proof rests entirely on the plaintiff in such a case as this, it seems to me that he has discharged that burden and proved that he has an interest in the plaint properties.

(After return of the findings).

Spencer, J.—My learned brother has fully discussed the questions of law which have been raised in the arguments upon appellant 2's memorandum of objections and I have little to add to what he has written in the judgment he is about to deliver.

We must accept the learned District Judge's findings on the issues referred to him. I think that the plaintiff is not entitled to recover more than his one-third undefined share and that the decree in Original Suit No. 133 of 1909 is binding on defendants 1 and 2 who were parties to it.

I am further of opinion that on the District Judge's finding as to fraud, and on the principle that he who comes into equity must come with clean hands, defendant 3 having been a party to a collusive decree based upon a non-existent debt, cannot ask as against a person who was not a party to that decree for an equitable remedy such as that implied by subrogation: vide *Karuppan Ambalagaran* v. *Muhammad Sakuth Levvai* (10). The suit must be remanded to the lower Court for having a partition of the plaintiff's share effected by metes and bounds and for passing a final decree for the possession of the share allotted to the plaintiff. The plaintiff will get costs throughout proportionate to the value of his share. The defendants will bear their own costs throughout. The lower Court's decree will be modified accordingly.

Krishnan, J.—The learned District Judge has returned findings on the issues remitted to him, adversely to the appel- and he has filed a memorandum of objections to them. On issue, 1 the learned

(8) [1910] 33 Mad. 334=5 I. C. 39.
(9) A. I. R. 1917 P. C. 61=39 All. 437=33 I. C. 280=44 I. A. 126 (P. C.).
(10) A. I. R. 1914 Mad. 371=22 I. C. 253.

Judge finds that the plaint properties were treated as joint family property with the full consent of the father long before the decree in Original Suit No. 133 of 1909 and the sale in execution of it, and that therefore the plaintiff has a share in them. It is objected that this is a new case which had not been set up previously by the plaintiff and that defendant 3 has been prejudiced by such a new case being now made out against him. Plaintiff had stated in the plaint that the properties were "common family properties" without specifying how; on the other hand, defendant 3 had alleged that they were defendant 1's self acquisitions. Though there was no direct issue on this question, the parties treated the second part of issue 1 as raising it and evidence was given about it by both sides. The plaintiff's evidence was not only that they were purchased from family funds, but also that they were dealt with by his father and other members of the family as joint property. The District Judge has now accepted the latter portion of his case, though he had originally found that the properties were purchased with joint family funds. There is however no ground for saying that the present finding amounts to the setting up of a new case for the plaintiff. All the evidence was on record and the finding is on such evidence. I do not think defendant 3 can properly be said to be prejudiced, nor has he shown that any evidence was properly omitted by him from being adduced. As this is the only objection to the finding as to the joint character of the property, and as it fails, we must accept it.

The next question is what relief the plaintiff is entitled to on that finding. He claims the right to recover the whole property, whereas defendant 3 contends that he should be given only his one-third share. The District Judge has accepted the plaintiff's contention. The plaint items were attached and sold in execution of the decree in Original Suit No. 133 of 1909 obtained by defendant 3 against defendants 1 and 2, the father and brother of plaintiff; and they were purchased by defendant 3 himself. The Munsif has found that the promissory notes on which that decree was obtained were sham transactions and without consideration, and the decree was a collusive and fraudulent one probably intended to harass a creditor. On this finding plaintiff's rights in the property were clearly unaffected by the decree and sale, as he was no party to them. The District Judge has concurred in this finding of fraud. Defendants 1 and 2 had themselves brought Original Suit No. 965 of 1912 to set aside the decree and sale; but that suit failed for nonpayment of costs within the time fixed. They can no longer sue to avoid the sale; and being parties themselves to the fraudulent decree they would have even otherwise, no right to recover the plaint properties: see *Kama Row* v. *Nukamma* (11). So far therefore as their two-thirds share is concerned, it must thus be taken that defendant 3's sale certificate is valid against them and the title to their share has passed to him That being so it will not be right to allow the plaintiff to recover the whole property and thus enable defendants 1 and 2 to get their shares indirectly through him when they cannot get them directly, unless it is strictly necessary to allow plaintiff to do so to work out his own rights. It has not been attempted to be shown that plaintiff would in any way be prejudiced as to his own rights in the properties if partition should be directed in this suit itself and he given his share.

It was however urged that defendant 3 should be looked upon as a trespasser and that it was plaintiff's right as a member of the joint family to eject him altogether from the properties. This argument fails, as defendant 3 is not altogether a trespasser but has got the rights of defendants 1 and 2 in the properties. Then it was argued that even if we look upon defendant 3 as the Court auction-purchaser of the shares of defendants 1 and 2, he is still not entitled to resist the plaintiff's suit to recover the whole property, his right being only to bring a suit for partition. In support of this proposition the learned vakil relied on the Privy Council judgments in *Deendayal Lal* v. *Jugdeep Narain Singh* (12) and *Suraj Bunsi Koer* v. *Sheo Persad Singh* (13). *Ramanna* v. *Venkata* (14) and *Nanjaya Mudali* v. *Shanmuga Mudali* (15) Though the alienee of a

(11) [1908] 31 Mad. 485.
(12) [1877-78] 3 Cal. 198=4 I. A. 247 (P. C.).
(13) [1880] 5 Cal. 148=6 I A. 88 (P. C.)
(14) [1888] 11 Mad. 246.
(15) A. I. R. 1914 Mad. 440=38 Mad. 684=22 I. C. 555.

undivided co-parcener is not strictly entitled to possession of any property before suing for partition, he having only an equity to enforce a partition, still in a case like the present where he is in possession of specific properties, it is not necessary to eject him and drive him to a fresh partition suit, as the rights of the parties could be worked out in this suit itself without prejudice. In the case in *Deendyal Lal* v. *Jugdeep Narain Singh* (12) their Lordships of the Privy Council no doubt confirmed the decree giving the son possession of the whole property purchased by the holder of the decree against his father, but they added a declaration that the purchaser was entitled to have the share and interest purchased by him ascertained by partition. The case in *Suraj Bansi Koer* v. *Sheo Persad Singh* (13) takes a similar view. But neither of them is in my opinion against allowing the alienor's equity being worked out in the suit by the co-parcener, if it can be done without prejudice to the plaintiff. That question was not before their Lordships in the two cases cited. On the other hand they have themslves recognized that a partition may be directed in the co-parcener's suit itself; for in the case of *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (16) their Lordships, while holding that the co-parcener was not party to the alienation was not bound to sue for partition, expressly say

"that it may well be that it is open to the alienee to insist that he stands in the shoes of his alienor as to the latter's share on partition and that the Court then would itself at the alienee's instance direct partition in that suit."

The case in *Ramanna* v. *Venkata* (14) was one of a gift by a Hindu father which was found to be invalid and not binding on the son or on the father. The learned Judges, while giving effect to the power of interdiction by the son in those circumstances, recognized that in the case of a sale the alienation should be upheld to the extent of the alienor's share as a matter of equity, which however did not exist in that case. They did not consider how the alienor's equity was to be worked out; and moreover in the present case we have a Court auction sale binding on defendants 1 and 2, and therefore the observations in that case do not apply to this case. The decision in *Nanjaya Mudali* v. *Shanmuga Mudali* (15) is not in point here and the observations in it are not inconsistent with the view I am taking; in fact the observations in the case in *Ramkishor Kedarnath* v. *Jainarayan Ramrachpal* (16) above referred to is cited and followed. Where co-parceners alienate their shares in specific properties, the other co-parceners have a right to sue for partition and for recovery of their shares in those properties alone without suing for a general partition; the validity of such suits has now been settled by the Full Bench in *Ibhramsa Rowthan* v. *Thirurenkatasami Naick* (17). Though no doubt an alienee of a co-parcener's share in a specific property has to sue for general partition to work out his rights, still where, as in the present case, there do not seem to be any other properties to be divided than the suit ones, there is no object in making him bring a fresh suit. The District Judge has relied on the case in *Sahu Ram Chandra* v. *Bhup Singh* (9) for his view that defendant 3 has no "equity" to get a two-thirds share in the properties apparently he relies on the observation of Lord Shaw that

"any deed of gift, sale or mortgage granted by one coparcener on his own account of or over the joint family property is invalid; the estate is wholly unaffected by it and its entirety stands free of it."

The observation refers to private alienations and does not apply to the present case, which is one of a Court sale; the right to attach and sell a coparcener's share for his decree debt has been established by the decision of the Privy Council itself and has never been doubted. In our Presidency, even as regards private alienations it is settled law that one coparcener may dispose of the ancestral undivided estate to the extent of his own share by private conveyance whether for value or by gift; and this was recognized and laid down by the Judicial Committee itself in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (13) above referred to. That being so, an alienation of the joint family property by one coparcener will bind his share, though it may not bind the shares of the other coparceners. Their Lordships cannot well be taken to have overruled this view as they do not refer to it at all. The Madras cases referred to by their Lordships were all cases in which the question was whether the amount

(16) [1913] 40 Cal. 966=40 I. A. 213=20 I. C. 958 (P. C.).

(17) [1910] 34 Mad. 269=7 I. C. 559.

borrowed under a mortgage could itself be considered an antecedent debt justifying a Hindu father in mortgaging his son's share also in the joint property. As stated above, we have here a case of a court-sale but when the question is raised about a private alienation, the applicability of *Sahu Ram Chandra's* case (9), may be considered with reference to the observations of the learned Chief Justice and of Kumaraswami Sastri, J., with reference to another point dealt with by the same case, in *Peda Venkanna* v. *Sreenivasa Deekshatulu* (18). For the above reasons I am of opinion that the plaintiff should be given a decree only for his share in the plaint properties, which is admittedly one-third.

The next question is, whether there are any equities in favour of defendant 3. He states that Rs. 280 of the money he paid for the Court purchase was used to pay off two other decrees binding on the plaintiff and that he subsequently redeemed an othi binding on the property by paying Rs. 600. He claims that he should be paid one-third of these amounts by the plaintiff on his getting one-third of the property. Plaintiff on the other hand contends that defendant 3 is not entitled to any equities in his favour as against him, and both the lower Courts have accepted this view. Whatever the rights of defendant 3 may be as against defendants 1 and 2, we must take it on the findings in this case that the decree in Original Suit No. 133 of 1909 was a collusive one for a non-existent debt and that defendant 3 was a party to the fraud by which it was obtained. His Court auction purchase was in execution of that fraudulent decree and the payments he pleads were made as such purchaser. The very foundation of his present claim is thus tainted with fraud and it seems to me the lower Courts were therefore right in refusing to recognize any equity in his favour against plaintiff who was not involved in that fraud.

His payments have no doubt enured to the benefit of the plaintiff but that consideration by itself is not sufficient to give rise to any equity ; as for example in the case of volunteers where no equity is recognized as arising from such payments. The learned vakil for the appellant relied on the cases in *Chama Swami* v. *Padala Anandu* (19). *Palamalai Mudaliyar* v. *South Indian Export Co , Ltd.* (8) and *Ummachakutti* v. *Ummerkutti Haji* (16). The two last cases referred to payments by persons to whom real conveyances had been executed by owners of property for consideration paid and which were only set aside against creditors as being in fraud of them. Those cases are clearly distinguishable from the present case, as here there was fraud from the very beginning and there was no consideration paid by defendant 3 for the notes sued on by him. This is a stronger case against allowing any equity than the one in *Karuppan Ambalagaram* v. *Muhammed Sakuth Levvai* (10), where subrogation was disallowed. In the case in *Chama Swami* v. *Padala Anandu* (19), there was no fraud at all ; the sale to the person who paid off the prior mortgage failed because of a prior sale to another under whom some of the defendants claimed. I am therefore of opinion that the equitable doctrine of subrogation cannot be invoked here in defendant 3's favour against the plaintiff.

In the result I would give a decree for partition to plaintiff for his one third share in the plaint properties and dismiss the suit as to the balance. Plaintiff will receive proportionate costs throughout. The case will go back to the first Court for a final decree.

S.N./R.K. *Case remanded.*

(18) [1918] 41 Mad. 136=43 I. C. 225.

(19) [1908] 31 Mad. 439.

A. I. R. 1919 Madras 706

PHILLIPS AND KRISHNAN, JJ.

N. Ranga Row—Plaintiff—Appellant.

v.

Ranganayaki Ammal and *others*—Defendants—Respondents.

Second Appeal No. 767 of 1917, Decided on 22nd April 1918, against decree of Sub-Judge, Trichinopoly, in Appeal Suit No. 94 of 1916.

(a) Hindu Law—Widow — Reversioner impeaching alienation by widow need not prove actual transfer by widow.

A Hindu reversioner impeaching an alienation by a widow need not prove an actual transfer by the widow. It is enough if he proves that the widow had done an act which resulted in the transfer of the property : 19 *All.* 524, *Foll.* [P 707 C 2]

(b) Hindu Law — Widow — Mortgage by husband—Suit on — Withdrawal of defence by widow — Sale in execution of mortgage decree—In absence any collusive arrangement by widow, purchaser is not alienee from widow—Suit by reversioner to set aside

such sale is governed by Limitation Act (1908), Art. 120 and not by Art. 125.

The withdrawal by the widow of her defence to an action on a mortgage executed by her husband would not be tantamount to an alienation by her, and if a decree is passed in the suit and the mortgaged property is sold, the Court-sale cannot be treated as a private sale by the widow, unlsss it is shown that it was the necessary result of some collusive arrangement made by her to use the Court as a medium of transfer, i. e., that she intended to transfer the property by means of a Court-sale and took steps to bring it about: *Bandon* v. *Becher*, (1835) 3 *Cl. & Fin.* 479, *Cons*; 19 *All.* 524; 29 *All.* 239 and 30 *Mad.* 402, *Dist.* [P 708 C 1]

A suit by the reversioner to set aside such a sale is governed by Art. 120 and not by Art. 125, Lim Act. [P 708 C 1]

One *K* executed a mortgage in favour of *R R* in 1883. In a suit by *K's* widow the mortgage was recognized as valid and in another suit by a subsequent mortgagee it was held to be valid against the widow. In execution of a decree against *R R*, his mortgagee interest was sold and purchased by *R A*. *R A* brought a suit on the mortgage. The widow at first contested the suit but afterwards abandoned her defence. A decree was passed and the property was sold in Court auction and was purchased by defendant 2. In a suit by the plaintiff, the nearest reversioner to *K*, to set aside the sale, impleading the widow as defendant 1:

Held: (1) that the suit was not maintainable, as under the circumstances the Court-sale could not be treated as an alienation by the widow; (2) that as the suit was brought more than six years from the date of the sale, it was barred under Art. 120, Lim. Act. [P 708 C 2 P 709 C 1]

A. Krishnaswami Aiyar and *B. Somayya*—for Appellant.

R. Kuppuswami Aiyar — for Respondents.

Phillips, J.—Plaintiff's suit is brought to set aside an alienation made by defendant 1, widow of one Krishna Ayyar, plaintiff being the nearest reversioner. Krishna Ayyar sold the property in 1883 to his concubine and another and they executed a hypothecation deed in favour of one Rama Rao in 1885. In a suit by the widow this mortgage was recognized as valid and in another suit by a subsequent mortgagee it was again held to be valid against the widow. A decree was obtained against Rama Rao, and in execution his mortgage deed was sold and purchased by one Rama Ayyar, who brought a suit upon it. The widow at first contested the suit, but abandoned her defence. The mortgaged property was therefore brought to sale. and purchased by defendant 2 in October 1902. It is contended for the appellant that this sale in 1902 amounted to an alienation by the widow and that this suit brought in 1913 is within time. The only question that need be considered now is whether the facts of the case establish the fact that this sale amounted to an alienation by the widow. A statement by the widow (Ex. D) admitting the claim has been found by the Subordinate Judge not to have been presented by the widow herself, but in other portions of his judgment he finds that she confessed judgment from corrupt motives. It is alleged that she received Rs. 900 as consideration for not contesting the suit, but the Subordinate Judge only finds this to be probable and does not say it was proved.

It is sufficient for plaintiff's case to prove that the widow had done an act which necessarily resulted in the transfer of the property: vide *Sheo Singh* v. *Jeoni* (1). The question therefore for decision is whether the widow's withdrawal of her defence amounted to such an act. It must be remembered that the mortgage had already been held in judicial decisions to be valid and binding on the widow, and although the Subordinate Judge has now found that it is not valid, his decision is based on evidence given 30 years after the mortgage was executed, and his finding is merely that consideration has not been proved. Except for the allegation that the widow received Rs. 900, there is no evidence of collusion between her and the plaintiff in the suit on the mortgage bond. In view of the previous proceedings it was most unlikely that a defence by the widow would have been successful. That being so, the sale would, in all probability, have taken place without any act on her part and therefore I am unable to say that the widow's action had, as a necessary result, the transfer of the property, nor can it be said that she materially contributed by her action to the transfer. Her action in 1900, more than 12 years before suit, followed by the sale in 1902 cannot therefore be said to amount to an alienation. Art. 125, Lim. Act is therefore inapplicable and under Art. 120 the suit is barred by limitation. A number of other questions have been argued for respondents 2 and 3, which were decided against them by the Subordinate Judge, but it is unnecessary to discuss them in view of the above finding. The second appeal fails and is dismissed with costs.

(1) [1897] 19 All. 524.

Krishnan, J.—The judgment of the lower Court that this suit is barred by limitation under Art. 120, Lim. Act is, in my opinion, correct. The appellant's vakil has contended that Art. 125 applied but on the facts found the sale in question cannot, by any stretch of language, be considered as one "made" by the widow. The sale impugned is the Court sale in 1902 in which defendant 2 purchased the plaint property for Rs. 3,100. Ordinarily a Court sale cannot be treated as a sale by a private individual. But the appellant's vakil has relied on the case of *Bandon* v. *Becher* (2), to show that a Court-sale should be treated as a private sale where it is the result of a collusive suit or proceeding in Court. Assuming this argument is correct, to justify us in treating the Court-sale in this case as a private sale by the widow it must be shown that it was the necessary result of some collusive arrangement made by her to use the Court as a medium of transfer, or, in other words, that she intended to transfer the property by means of a Court-sale and took steps to bring it about. Any failure to defend on her part an action in which a decree was passed in execution of which the property was sold by the Court, is insufficient to make the Court-sale her sale, unless the decree and sale were the necessary result of her action and unless the failure to defend was itself part of the contrivance adopted by her to bring about the intended Court sale. The evidence in the present case falls far short of these requirements. The mortgage suit in which the sale took place was in no way a collusive suit.

The widow had nothing to do with the original mortgage deed itself. All that is proved is that, though the widow set up the defence in the mortgage suit that the mortgage sued upon was not valid and was without consideration, she subsequently did not appear and press her defence and that she acted thus from some "corrupt motive," because the Subordinate Judge says she probably received some Rs. 900 from the plaintiff in that suit to abstain from defending. It is not shown that her defence would have succeeded and would have led to the suit being dismissed and the property being saved. It may be noted that, in a previous suit by one Peruma Goundan, she did press her present defence to a decision, but the decision was against her and in favour of the mortgagee. It is true that the Subordinate Judge now finds that it is not proved by defendant 2, the auction-purchaser, that any money passed under the mortgage to Krishna Ayyar, the widow's husband and the original owner of the property. In the mortgage suit the burden was on the widow to establish that the mortgage had no consideration against the mortgagee's assignee, Rama Ayyar. It is one thing to find that an auction purchaser, in a Court sale, who is a stranger to the previous transactions, has failed to prove consideration in the suit and quite another thing to hold that the widow would have succeeded in establishing failure of consideration against the mortgagee's assignee, in the former suit, where the burden of proof was on her. The present finding therefore does not lead to any conclusion that the mortgage decree was the result of her failure to press her defence.

The plaintiff attempted to show that that decree was one passed on a confession of judgment by the widow and for the purpose he relied on a statement filed in Court, Ex. D. But the lower Court has found that it is not proved that the widow either signed or presented it to Court. This is in accordance with what appears in the judgment in that suit, which shows that Ex. D was neither noticed nor acted upon. In the above circumstances the lower Court was right in holding that the Court-sale could not be treated as an alienation by the widow. The cases quoted by the learned vakil for the appellant in *Sheo Singh* v. *Jeoni* (1) and *Ram Sarup* v. *Ram Dei* (3) are both clearly distinguishable as, in both of them, it was proved that the widow intended by the collusive proceedings, one being a decree for possession and the other an arbitration, to get her husband's property transferred to others and that she carried out her intentions by such means. In the present case the suit was not a collusive one and whatever collusion there might be in not pressing the defence, it is not shown that it was intended to, and did in fact, bring about the Court sale now sought to be avoided.

There being thus no alienation by the widow Art. 125, Lim. Act, cannot apply, and the suit being a declaratory one the

(2) [1835] 3 Cl. & Fin. 479=6 E. R. 1517.

(3) [1907] 29 All. 239.

only article applicable is Art. 120 ; and under it the suit is clearly barred, being more than six years from the date of sale. The case mainly relied on by the Subordinate Judge, *Tallaparagada Sundarappa* v. *Boorugapalli Sreeramulu* (4), is not in point, as there was no alienation at all in that case as the propsrty had only been attached and not sold, as appears from the statement of facts in the report. But apart from this his view of the law is correct and I accept it. He has discussed various other questions and given findings on them ; and though the learned vakil for the respondents has attacked those findings, it is quite unnecessary to consider them as the suit fails on the ground of limitation. I agree with my learned brother that the second appeal should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(4) [1907] 30 Mad. 402.

A. I. R. 1919 Madras 709

SPENCER AND KRISHNAN, JJ.

Subbalakshmi Ammal — Defendant — Appellant.

v.

Ramalinga Chetty and *others*—Plaintiffs and Defendants—Respondents.

Miscellaneous Second Appeal No. 123 of 1917, Decided on 6th August 1918, against order of Tempy. Sub-Judge, Vellore, in Appeal Suit No. 22 of 1917.

(a) Civil P. C. (1908), Ss. 2, 47 and 96—Mortgage decree—Dismissal of application for final decree for sale is decree—Order is not under S. 47, but is appealable under S. 96.

An order of Court dismissing an application for a final decree for sale in a mortgage suit is a "decree" within the meaning of S. 2. Such an order cannot be treated as one under S. 47, in execution of the preliminary decree, but is an order in the suit itself and is appealable as a decree under S. 96, Civil P. C.: 34 *I. C.* 372, *Appl.*; *A. I. R.* 1915 *All.* 336, *Foll.* [P 709 C 2]

(b) Limitation Act (1908), Art. 181—Civil P. C. (1908), O. 34, R. 6 (2).

Article 181, Lim. Act, applies to an application under O. 34, R. 6 (2), Civil P. C. [P 710 C 1]

(c) Limitation Act (1908), S. 19—Mortgage decree—Application for final decree—Acknowledgment of amount due under mortgage decree is sufficient to save limitation.

An acknowledgment by a judgment-debtor of the amount due by him under a mortgage decree is sufficient, under S. 19, Lim. Act, to save limitation for the purpose of making an application for a final decree for sale. The right to take legal steps for enforcing a right need not be expressly acknowledged if the right itself is acknowledged. [P 710 C 1, 2]

M. Patanjali Sastri—for Appellant.

C. V. Ananthakrishna Aiyar—for Respondents.

Judgment.—The two questions raised for our decision in this case are: (1) Whether an appeal lay to the lower appellate Court, and (2) whether Miscellaneous Petition No. 178 of 1912, contains a sufficient acknowledgment under S. 19, Lim. Act, to give a fresh starting point for respondent 1's application. Plaintiff 1 sued to recover the amount due to him under a simple mortgage bond by sale of the property mortgaged. On 27th October 1910 a preliminary mortgage decree was passed in his favour giving defendants time till 27th April 1911, to pay the amount found due. Money was not so paid, and the present application, out of which the civil miscellaneous second appeal before us arises was, filed by respondent 1 on 16th September 1914 under O. 34, R. 5, Cl. (2), for a final decree for sale. The first Court dismissed the application as barred by limitation under Art. 181, Lim. Act. On appeal the lower appellate Court reversed that order and has passed a final decree. Defendant 1 has appealed to us against that decision. On the first question raised, the appellant is right in his contention that the order cannot be treated as one under S. 47, Civil P. C., in execution of the preliminary decree. It is an order in the suit itself. The effect of the order is to dismiss the plaintiff's suit so far as it prayed for the realization of the mortgage money by sale of the mortgaged property. It is a final adjudication on that part of the plaintiff's case so far as the Munsif's Court is concerned, and therefore falls within the definition of decree under S. 2, Civil P. C. A formal decree was drawn up by the Munsif dismissing the petition, but it did not expressly dismiss the suit for sale. This however seems immaterial as the effect of the order was to so dismiss. In *Suppu Nayakan* v. *Perumal Chetty* (1), this Court held that an order declaring that a suit had abated because the legal representative of the deceased defendant had not been brought on record in time was a decree and appealable as such, though no formal decree dismissing the suit had been drawn up.

The principle of that decision applied to the present case. If the plaintiff's ap-

(1) [1916] 34 I. C. 372.

plication had been allowed by the Munsif and a final decree passed, there can be no doubt that an appeal would have lain against it. It would be an anomalous position if we were to hold that an appeal does not lie where the application is refused. The ruling of the Full Bench in *Madho Ram* v. *Nihal Singh* (2), shows that appeals are allowed in that Province from such orders as appeals from decrees in suits. We think that is the right view and that the appeal to the lower appellate Court was a competent one under S. 96, Civil P. C. On the question of limitation it is now settled that Art. 181 applies to an application under O. 34, R. 6, Cl. (2): see *Nimmala Mahankali* v. *Kallakuri Subba Rao* (3), and it is clear that S. 19, Lim. Act, also applies. The question then to be decided is whether there is a sufficient acknowledgment in the present case. Miscellaneous Petition No. 178 of 1912, relied on by the plaintiffs as containing the necessary acknowledgment, was put in by the mortgagor for obtaining an adjournment of the sale of the mortgaged properties in Court auction. It should be explained that, at one stage of the proceedings in this suit, the Court had treated the first decree as an executable decree and had ordered sale of the properties. It was during the time that this view was in force that Miscellaneous Petition No. 178 of 1912 was filed. Subsequently the Court ruled that a final decree should be obtained before execution and that order has now become final between the parties, so that no question about the executability of the first decree itself having become res judicata arises. In Miscellaneous Petition No. 178 of 1912 defendant 1 says:

"The date of sale in auction has been fixed for the 17th of this month. I have applied for extension of time till the reopening of the Court to pay the plaintiff the decree amount. Plaintiff has also consented. I pray that the Court may be pleased to pass orders directing that the auction to be held on the 17th instant may be stopped and the sale may be adjourned till the reopening of the Court without issuing any further sale proclamation."

There can be no doubt that the mortgagor clearly acknowledges by it plaintiffs' right to the decree amount and their right to realize it by sale of the suit properties. Appellants' vakil however urges that such an acknowledgment is not sufficient to save the present application and that the acknowledgment must expressly be of the right to apply for a final decree, and he relies on *Andiappa Chetty* v. *Devarajulu Naidoo* (4). Under S. 19 the acknowledgment of liability must be "in respect of the right" in respect of which the application is made. What then is that right in the present case? Is it the right to apply for a final decree as appellant contends, or the right to realize the decree amount by sale of the mortgaged properties through Court as the respondent argues? The substantial right the plaintiff has is the latter; his application to Court is only for obtaining a final decree to enable him to enforce that right. The Privy Council has laid down in *Sukhamoni Chowdhrani* v. *Ishan Chunder Roy* (5), that it is not required that an acknowledgment within the statute shall specify every legal consequence of the thing acknowledged. Similarly the right to take legal steps for enforcing the right itself need not be expressly acknowledged, if the right itself is acknowledged.

The language of S. 19 is clear on the point that the right itself should be acknowledged, and not the right to apply. In *Venkatrav Bapu* v. *Bijesing Vithalsing* (6) an application for the postponement of the sale under a mortgage decree, which said the mortgagor would pay the amount of the decree, was held to contain a sufficient acknowledgment to give a fresh starting point for the plaintiff's subsequent application to execute the decree. The only difference between that case and the present one is that here the application is to get a final decree before applying for execution; this does not seem to be a material difference in this connexion. The acknowledgment of plaintiffs' right to sell the properties in Court auction involves an acknowledgment of their right to get the final decree for the purpose. We think the Subordinate Judge is right in holding that there was a sufficient acknowledgment in this case. The respondents' vakil has not attempted to support the Subordinate Judge's view on the question of waiver and on the question of previous execution applications giving fresh starting points for limitation under Art. 181, which are

(2) A. I. R. 1915 All. 336=38 All. 21=30 I. C. 494.
(3) [1917] 41 I. C. 268.
(4) [1911] 36 Mad. 68=12 I. C. 378.
(5) [1893] 25 Cal. 844=25 I. A. 95 (P.C.).
(6) [1886] 10 Bom. 108.

obviously wrong. His decree is however right and this appeal must be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 711

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Putti Sesha Aiyar and *others*—Defendants—Appellants.

v.

Kuppachar and *others* — Plaintiffs—Respondents.

Civil Appeal No. 332 of 1916, Decided on 8th October 1918, against decree of Dist. Judge, Trichinopoly, in Original Suit No. 14 of 1916.

(a) Evidence Act (1 of 1872), S. 94—Sale deed—Contemporaneous unregistered agreement to reconvey to prove it as mortgage is inadmissible—Intention of parties cannot be proved by extrinsic evidence.

Extrinsic evidence of the intention of the parties to a document that what on the face of it is an absolute sale should operate only as a mortgage is inadmissible in India. [P 712 C 1]

Where a document purports to be an absolute sale, a contemporaneous unregistered agreement by the vendee to reconvey is inadmissible to prove that the deed of sale is in reality a mortgage by conditional sale: 11 *I. C.* 398 (*P.C.*), *Expl.* [P 714 C 1]

(b) Transfer of Property Act (4 of 1882), Ss. 58 and 59—Mortgage purporting out and out conveyance—Unregistered agreement to reconvey is not admissible — Registration Act, S. 49.

Per *Wallis, C. J.*—A mortgage by conditional sale consists of an out and out conveyance and a defeasance clause and an unregistered agreement to reconvey cannot be tendered as evidence of a defeasance clause affecting immovable property under S. 49. [P 711 C 2; P 712 1]

Per *Seshagiri Aiyar, J.*—In order that what purports to be an absolute sale may be regarded as a mortgage by conditional sale, the condition as to redemption must be sought within the terms of the document or in a document of the same high character. That is to say the document which is relied upon to derogate from the absolute conveyance must be of the same character as the conveyance itself. [P 713 C 2]

S. Srinivasa Aiyangar and *K. Bhashyam Iyengar*—for Appellants.

K. Srinivasa Aiyangar, N. Rajagopala Chariar and *A. V. Gopala Chariar*—for Respondents.

Wallis, C. J.—I see no reason to differ from the conclusion of the District Judge in this case that the sale deed, Ex. F, executed by the defendants in favour of the plaintiffs was not a benami transaction. The evidence shows that it was executed pursuant to an agreement Ex. G, by which the suit properties were to be sold to the plaintiff for Rs. 6,000 of which Rs. 5,000 was to be paid into Court by the plaintiff, as was actually done, to set aside the Court sale of the properties. It is also the defendants' own case, and has been found to be true, that there was a contemporaneous unregistered agreement for reconveyance, Ex. 13, executed by the plaintiffs in favour of the defendants on the same day. These and other facts in the case sufficiently negative the defendants' case that the transaction was benami.

A suit for specific performance of the contract to reconvey was barred at the date of the present suit, and in these circumstances the defendants raised the contention in the lower Court and again before us that the effect of the sale deed Ex. F, by the defendants to the plaintiffs, read with the contemporaneous unregistered agreement to reconvey by the plaintiffs in favour of the defendants, Ex. 13, was to create a mortgage by conditional sale. There is express authority in this Court that an unregistered agreement to reconvey cannot have that effect: *Achutaramaraju* v. *Subbaraju* (1); *Mutha Venkatachelapati* v. *Pyanda Venkatachelapati* (2) and *Rao Sahib Pydah Venkatachalapathi Garu* v. *Muthu Venkatachalapathi* (3), which was a decision of three Judges. As observed in the last case, the party setting up that the transaction amounted to a mortgage by conditional sale has to show that by virtue of the unregistered instrument (Ex. 13 here) the sale deed (Ex. F here) did not affect the immovable property which is comprised both in the sale deed and the unregistered letter, in the way in which the sale deed purports to affect the property, and would affect the property if the unregistered letter had never been written. That being so the Court held in that case that the unregistered document was relied on as evidence of a transaction affecting immovable property and being unregistered was inadmissible in evidence.

A mortgage by conditional sale consists of an out and out conveyance and a defeasance clause, and as Mr. K. Srinivasa Aiyangar has pointed out the unregistered agreement, Ex 13, is tendered as evidence of the defeasance clause affecting immovable property. It is therefore a document which requires registration

(1) [1902] 25 Mad. 7.
(2) [1904] 27 Mad. 348.
(3) A. I. R. 1914 Mad. 639=23 I. C. 409.

under S. 17, Registration Act and is inadmissibls for the purpose tendered under S. 49. Further S. 59, T. P. Act, provides that a mortgage can be effected only by a registered instrument signed by a mortgagor. The registered instrument signed by the mortgagor, the sale deed Ex. F, does not effect a mortgage, and it would be contrary to this section also to allow it to be effected by a registered sale deed and an unregistered agreement to reconvey.

Nor can it be used as evidence that the intention of the parties to Ex. F was to create a mortgage. Ex. F is on the face of it a sale deed, and it is now well settled that extrinsic evidence of the intention of the parties that it should only be a mortgage is inadmissible in India as again expressly ruled by the Judicial Committee in *Maung Kyin* v. *Ma Shewe La* (4). The appeal fails and is dismissed with costs.

Seshagiri Aiyar, J.—The properties in suit belonged originally to the defendants. In execution of a decree against them they were sold in Court auction and purchased by a Nattukotti Chetty. An application to set aside the sale was dismissed by the Court of first instance. Thereupon an appeal was preferred to the High Court. While the civil miscellaneous appeal was pending the parties agreed that if the judgment-debtors paid into Court a certain sum of money, the auction purchasers should consent to set the sale aside. The High Court was therefore moved to permit the judgment-debtors to sell the property privately. The agreement (Ex. C), dated 26th March 1908, was executed by the judgment-debtors, the present defendants, to plaintiff 1. It stipulated that, as soon as the Court-sale was set aside, the properties should be conveyed to the latter for Rupees 5,000, which was practically the amount which he advanced for payment into Court in the civil miscellaneous appeal. The sale was set aside. On 2nd April 1908, Ex. F, the sale deed, was executed in Madras by the defendants t plaintiff 1. On the same date Ex. 13 was executed by plaintiff 1 to the defendants agreeing to reconvey the property.

This suit is to recover possession of the properties conveyed. There are two defences. One is that the sale was benami and (2) Exs. F and 13 read together amount to a mortgage by conditional sale and that defendants are entitled to redeem the properties. The Subordinate Judge has found both the points against the defendants. On the first question I am clear that in law the admitted facts are not sufficient to establish the plea of benami. At the same time, I feel very little doubt that, when Ex. F was executed, plaintiff 1 did not intend to lay claim to all the items of property as vendee. The facts are these: (a) Plaintiff and defendants are near relations. (b) The defendants had been for some time in involved circumstances. Some years earlier a deed of trust was executed by the defendants (Ex. 5) in which it was stipulated that the properties should be handed over to plaintiff 1, that he should sell portions of them and discharge the liabilities and return the remaining properties to them. For some reason or other this arrangement fell through. A number of attachment upon the properties followed, one of which led to the Court-sale and to the litigation which I have already referred to. (c) It is clear from the evidence in this case that even on the date of Ex. F the properties were worth nearly thrice the amount for which they were sold. (d) The major portion of the properties continued to be in the possession of the defendants. (e) They spent moneys in advancing claims when third parties attached them. (f) They paid the sirkar kist. It is also noteworthy that the plaintiffs even denied having executed Ex. 13 although in appeal the finding of the Subordinate Judge about its genuineness has not been questioned. On these facts the learned Advocate-General pressed strongly before us that the transaction must be treated as benami.

Unfortunately three prominent circumstances render it impossible to give such a complexion to the transaction; namely, (1) the payment of consideration; (2) the agreement to re-sell; and (3) partial possession. These show that there was an intention to convey property. It may be that the intention was as in the trust deed (Ex. 5), that plaintiff 1 should retain only so much of the property as would cover the money advanced by him. But such a contract if it ever existed has not been reduced to writing and there is no reliable evidence about it.

(4) A. I. R. 1917 P. C. 207=45 Cal. 320=42 I. C. 642=44 I. A. 236 (P.C.).

I do feel strongly that the plaintiffs have not behaved honestiy towards the defendants. But the ordinary characteristics of a benami transaction are wanting in this case, and I do not think it desirable to bring into existence a new species of such transactions as was done in *Rajah of Karvetnagar* v. *Echampadi Saravana Pillai* (5). It is a great pity that Courts should ever have given their sanction to such pseudo transfers. They have demoralized litigants. For what do we find? One man circumvents the rule which probibits public servants from acquiring property in certain cases. Another resorts to the subterfuge of placing his property beyond the reach of creditors; a third wants to prevent his coparceners from laying claim to acquisitions. Other instances may be multiplied. What follows? The biter is bit in almost every one of the cases. These transactions offer a premium to breach of faith and speculation. For the benamidar often sells the properties to third parties for very inadequate prices to enable the latter to set up the plea of bona fide purchase for value without notice. Whatever may have been the motive which induced the Courts to recognize these transactions in the early period of the British administration, I think the time has come for dealing stringently with these transfers. It may be that Courts were anxious to protect the too trusting transferors from dishonest transferees. But modern instances of benami transactions point to initial dishonesty on the part of the transferor himself. I therefore think that there is no need to lending a helping hand to such persons. I have made these remarks because transactions of this kind show a tendency to increase. I agree with my Lord that the plea of benami has not been made out.

On the second question also I agree with the judgment just pronounced. Under S. 94, Evidence Act, evidence is not admissible where a document is plain and applies accurately to existing facts. These essentials are satisfied by Ex. F and therefore prima facie Ex. 13 is not admissible to prove that Ex. F was intended to be a mortgage. The judgment of Lord Macnaghten in *Hanifunnissa* v. *Faizunnisa* (6) is not inconsistent with this view. In that case the question was whether what was apparently a sale deed can be construed as a deed of gift. Evidence was admitted to show that the recital about consideration in the document was not true It has always been held by the Judicial Committee, vide *Balkishen Das* v. *Legge* (7), that the recital as to consideration in a document can be shown to have been either false or inaccurate; because such a recital is not a term of the document. Therefore what the Judicial Committee laid dawn in *Hnifunnisa* v. *Faizunnisa* (6) was that so long as the terms of a document are not varied or contradicted, etc., evidence can be given to show that what in name was a sale deed was in reality a deed of gift. This was the construction placed upon 33 *I. L. R. All* in *Challa Venkata Reddy* v. *Derabaktynni* (8), and I agree with it. In the present case by attacking the recital as to consideration alone it is not possible to bring about the result contended for by the defendants.

As was pointed out by Mr. K. Srinivasa Ayyangar, in order that Ex. F may be regarded as a mortgage by a conditional sale, it must be shown in the present instance that it was agreed that on repayment the buyer should transfer the property to the seller. Such a condition must be sought within the terms of the document or in a document "of the same high character." That is to say, the document which is relied upon to derogate from the absolute conveyance must be of the same character as the conveyance itself. The legislature, after having in S. 58, Cl. (c), T. P. Act, defined a mortgage by conditional sale, has provided in S. 59 that such a document should be registered, meaning thereby that the essential terms of the document should be embodied in one or two registered documents. This was the view taken in this Court in *Atchutaramaraju* v. *Subbaraju* (1), *Muthu Venkatachelapati* v. *Pyauda Venkatacheelapati* (2) and *Rao Sahib Pydah Venkatachelapati Garu* v. *Muthu Venkatachelapathi* (3) and I see no ground for not following them. Looking at the case from another point of view the same result seems to follow. Ex. F, which has been registered, conveys an absolute estate. Ex. 13 seeks to cut down that estate. It therefore comes

(5) [1916] 35 I. C. 893.
(6) [1911] 33 All. 340=38 I. A. 85=11 I. C. 398 (P. C.).
(7) [1900] 22 All. 149=27 I. A. 58 (P. C.).
(8) [1912] 14 I. C. 65.

under S. 17, Cl. (1) (b), Registration Act, and if evidence of it is to be admitted, its effect will be to affect the immovable property referred to in it. Consequently, unless it is registered, it is not receivable in evidence under S. 49, Registration Act, because the effect of the contention is not only to curtail the rights granted to the plaintiff, but also to give the defendants the right of redemption, which is a right which affects immovable property. For this reason also the document is inadmissible to show that Ex. F is in reality a mortgage. For all these reasons I am of opinion that the second contention also fails. I agree with the learned Chief Justice that the appeal should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 714

OLDFIELD AND BAKEWELL, JJ.

A. V. Ramachandra Ayyar—Plaintiff—Petitioner.

v.

Raju and *another*—Defendants—Opposite Parties.

Civil Misc. Petns. Nos. 627 and 628 of 1918 converted into Civil Revn. Petns. Nos. 398 and 399 of 1918, Decided on 18th April 1918.

Civil P. C. (1908), S. 115—Refusal of Court to help receiver to discharge his duties is refusal to exercise jurisdiction.

A Court is bound to assist the Receiver appointed in a suit in the execution of his duties by issue of all necessary orders to the parties and by enforcing them, if necessary, by contempt proceedings, and its refusal to take action or postponement of it is a refusal to exercise jurisdiction within the meaning of S. 115, Civil P. C. [P 714 C 2]

Where therefore a receiver was appointed in a suit to have custody of certain jewels and on his representing to the Court that the jewels were with the respondent, the Court directed him to sue the latter, and when the receiver filed the suit the Court postponed the trial of the suit.

Held: that the Court failed to exercise a jurisdiction vested in it by law within the meaning of S. 115. [P 714 C 2]

K.S. Jayarama Aiyar—for Petitioner.

N. Chandrasekhara Aiyar and *E. Vinayaka Row*—for Opposite Parties.

Judgment.— In Civil Miscellaneous Petition No. 627 of 1918 we are asked to direct the lower Court to take steps for the recovery from the second conter-petitioner of certain jewels in order to their delivery to plaintiff, a receiver appointed, inter alia, to have the custody of them pending disposal of Original Suit No. 1 of 1916 on the lower Court's file. A preliminary objection has been taken to the form of the petition, on the ground that this Court's order appointing plaintiff receiver provided that he should work under the lower Court's direction and that this Court consequently cannot itself issue directions to him or the lower Court in the matter and can interfere with the directions given by the lower Court only by way of revision and within the limits prescribed by S. 115, Civil P. C. It is true that, although the judgment directing appointment was passed in appeal against the lower Court's order refusing to appoint, the formal order drawn up contained the provision relating to the receiver working under the lower Court's direction, as though the receiver had been appointed as this Court's receiver in a proceeding pending before it. There was however nothing corresponding with that provision in the judgment and, since, strictly read, it would clearly have been inappropriate, we think that it must be construed as entailing nothing beyond what would follow from the appointment which we made in appeal, the receiver's subordination to the lower Court. So reading it, we think ourselves at liberty to deal with the petitions before us as presented in revision and to consider them with reference to S. 115, Civil P. C.

The petitioner was appointed receiver to take charge of certain jewels. His allegations are that he could not get possession of them, though respondent 2 had them, and that when he moved the lower Court to inquire into those allegations, it told him, he could sue and on his suing postponed inquiry until the trial of the suit, in which the appointment was made. Authority is clear that the lower Court was bound to assist the petitioner in the execution of his duties by issue of all necessary orders to the parties to the litigation and by enforcing them, if necessary, by contempt proceedings, and its refusal to take action or postponement of it was therefore a clear refusal to exercise jurisdiction such as S. 115 contemplates. This is not disputed. The object of the receiver's appointment was that he should have custody of the jewels pending the trial, and unless he obtains them his appointment will be useless. In these circumstances we set aside the lower Court's order

dated 6th November 1917, and direct it to restore petitioner's petition to file and proceed to inquire into it and dispose of it according to law in the light of the foregoing without further delay. Respondent will pay petitioner's costs in Civil Miscellaneous Petition No. 627 of 1918 (Civil Revision Petition No. 398 of 1918) in this Court. His costs to date in the lower Court will follow the result of his petition.

Civil Miscellaneous Petition No. 628 of 1918 (Civil Revision Petition No. 399 of 1918) is for a direction to the lower Court to take proceedings against respondent 2 for contempt and is premature at present. It is dismissed.

S.N./R.K. *Order accordingly.*

A. I. R. 1919 Madras 715

COUTTS-TROTTER, J.

Best and Co., Ltd.—Plaintiffs.

v.

Collector of Madras—Defendant.

Civil Suit No. 379 of 1917, Decided on 15th March 1918.

Government of India Act (1915), S 106 (2) —Composition of income tax — Repudiation of agreement for composition by Collector under provisions of Act 5 of 1916—Suit to declare agreement binding on Collector does not lie on original side of High Court—High Court has no jurisdiction to determine whether Collector was right in his view of law in absence of averment that he used statute to commit act of aggression—Income-tax (Amendment) Act (5 of 1916).

A suit to declare that an agreement for composition of income-tax under the provisions of S. 31, Act 2 of 1886 which was repudiated by the Collector after the enactment of Act 5 of 1916 is binding on the Collector, does not lie on the original side of the High Court and is exempted from its jurisdiction by S. 106 (2), Government of India Act.

In the absence of an averment that the Collector was mala fide using the statute to commit an act of aggression, the High Court has no jurisdiction to make an inquiry on the merits to determine whether the Collector was right in his view of the law. [P 716 C 2]

Nugent Grant—for Plaintiffs.

S. Srinivasa Aiyangar—for Defendant.

Judgment—This was a suit brought by Messrs. Best & Co., Ltd., a firm of merchants carrying on business in this city, for a declaration that an agreement dated 4th October 1915 entered into by them with the Collector of Madras of the day was binding on the parties. The action is brought because, on 22nd May 1917 the Collector purporting to act in consequence of the Income tax Act 5 of 1916, declared that the agreement was no longer binding on him and repudiated it. The plaintiffs tendered the sum that they said to be due under the agreement and brought this action to safeguard their rights under it. The agreement is one made with the Collector of Madras under the provisions of the former Income-tax Statute 2 of 1886, S. 31, which enables persons, instead of being re-assessed every year, to arrange with the Collector for a definite sum to be assessed for a fixed period, and in this case the period agreed upon was five years from 1st April 1915. The plaintiffs originally sued the Secretary of State for India. At one time the point was taken on behalf of the Government that the proper person to be sued was not the Secretary of State but the Collector of Madras, but, on a suggestion made at the time of the settling of issues, that difficulty, which was purely a technical one, was obviated by adding the Collector of Madras as a party, so that the relief being in the alternative against one or other of those officials, it is really immaterial to decide as to which of them is actually liable. Of course we all know it really comes to the same thing, the Collector being the revenue authority.

By way of preliminary objection, another point was taken by the learned Advocate-General which is embodied in issue 1 in the case and that was that I, sitting as a Judge on the original side of the High Court of judicature at Madras, had no jurisdiction under S. 106 (2), Government of India Act, 1915, to try the suit. The words of the section seem to be quite explicit and are as follows:

"The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

As I say, on the face of it, it appeared to me that that entirely precluded me from entertaining the suit on the merits or from entertaining it at all. Mr. Grant took two points in answer to that contention. The first point was this: that by the decision in *Collector of Sea Customs* v. *Punniar Chidambaram* (1), which of course, if the situation were unchanged would be binding upon me, I was compelled to hold that the prohi-

(1) [1876-78] 1 Mad. 89 (F. B.).

bition against the High Court on the original side trying revenue suits had disappeared, because one of the learned Judges, Kernan J., held that the prohibition contained in the section of Act 39 & 40 Geo. 3, C. 79, otherwise known as the Government of India Act, 1800, was repealed by 53 Geo. 3, C. 155, Ss. 99 and 100, and the other learned Judges apparently held that the prohibition contained in 39 & 40 Geo. 3, C. 79, was by necessary implication repealed by the Charter Act and the Letters Patent of this Court. What Mr. Grant says is, as I follow it, here in 1874 at the date of the judgment of that Bench, there was in existence the Act 39 & 40 Geo. 3, C. 79, but the learned Judges still held that the effect of later legislation had been to abrogate that section of the Act.

Then he says the Government of India Act, 1915, sub-S. 1, S. 106 re-enacts the Letters Patent and therefore I must hold just the same as the learned Judges did 1874, viz. that the effect of re-enacting the Letters Patent is to overrule the prohibition contained originally in 39 & 40 Geo. 3, C. 79, and now in the Act of 1915. I do not think that is a possible construction for me to adopt. It is very unfortunate that the section of the Act 39 & 40 Geo. 3, C. 79, should have been re-enacted in S. 106, of the Government of India Act. 1915, because the conflict between the King's Courts and the Sudder Courts, which was the only reason for the introduction of the section in the old Act of 1800, has entirely passed away and there is no rhyme or reason in prohibiting the original side of this Court from trying revenue cases. But I am not concerned with the wisdom or the policy of the legislation. The legislature has thought fit to re-enact the section in circumstances which do not, in my opinion, require it. It has done so and I cannot hold where an express prohibition has been re-enacted in 1915, that I can act on the view formed by a Bench of this Court in 1874 as to the effect on the original section of subsequent statutes, all of course prior to 1874, long prior to the Government of India Act, 1915. I am of opinion that the prohibition is absolute and that I have no jurisdiction to entertain this suit. Mr. Grant took the further point that the fetter on my jurisdiction was only with regard to

"acts ordered or done in the collection of the revenue according to the usage and practice of the country or the law for the time being in force,"

and he says:

"If you go into the facts, on the merits you will find that my contention is well founded, that this was an illegal repudiation of the agreement."

That contention I think was disposed of as long ago as 1848 in a judgment of their Lordships of the Privy Council in the case of *Richard Spooner* v. *Juddow* (2). In that case the Court put a construction on a protective statute of this kind which, so far as I know, has never been departed from, and it is put in much clearer words than I can put it by Lord Campbell in giving their Lordships' opinion at p. 379 of the report. What he says is this:

"The point therefore is whether the exception of jurisdiction only arises where the defendants have acted strictly according to the usage and practice of the country and the regulations of the Governor and Council. But upon this supposition the proviso is wholly nugatory: for, if the Supreme Court is to inquire whether the defendants in this matter concerning the public revenues where right in the demand made, and to decide in their favour only if they acted in entire conformity to the regulations of the Governor and Council of Bombay, they would equally be entitled to succeed, if the statutes and the the Charters contained no exception or proviso for their protection. Our books actually swarm with decisions putting a contrary construction upon such enactments, and there can be no rule more firmly established, than that if parties bona fide and not absurdly believe that they are acting in pursuance of statutes, and according to law, they are entitled to the special protection which the legislature intended for them, although they have done an illegal act."

It is not suggested in this case that the Collector of Madras or the Secretary of State acted mala fide or purported to seek the protection of the statute with the full knowledge that all that was being done was to commit a mere act of aggression. Whether they were right or wrong, they thought clearly and honestly that they were taking advantage of the provisions which the statute allowed them to take advantage of in terminating this agreement. I am therefore compelled to hold that this Court has no jurisdiction to entertain this suit. I may add that I asked the parties if they wanted me to go into the other questions in the suit and save them from further trouble in case I should be held to be wrong in holding that I have no jurisdiction. I am not asked to do that but only to decide the preliminary point, and on that I hold

(2) [1846-50] 4 M. I. A. 353=6 Moo. P. C. 257.

that I have no jurisdiction. I dismiss the suit with costs (one set) of the Secretary of State.

S.N./R.K. *Suit dismissed.*

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* * A. I. R. 1919 Madras 717

SESHAGIRI AIYAR AND PHILLIPS, JJ.

N. Sethuramaswami Nayanivaru — Petitioner—Appellant.

v.

Mir. Hussain Sahin and *another*— Respondents.

Appeal No. 55 of 1918, Decided on 6th December 1918, against order of Sub-Judge., North Arcot, in Civil Misc. Petn. No. 293 of 1917.

*** * Civil P. C. (1908), O. 21, R. 89—Execution sale—Judgment-debtor making application under R. 89—Prior unregistered sale deed to third party does not take away right to have sale set aside — Judgment-debtor is person owning property till date of registration—Fresh registered sale deed before order setting saide sale deed does not divest him of right under R. 89.**

A judgment-debtor has the right, under O. 21, R. 89, to apply to set aside an execution sale even after he has executed a private unregistered conveyance of the property in favour of a third party. He is a person "owning the property" within the meaning of the rule and his rights as owner subsist till the date of registration : *A. I. R.* 1914 *Mad.* 46; 13 *I. C.* 134; 8 *M L. J.* 266 and 38 *I. C.* 107, *Dist.* [P 717 C 2]

The execution of a fresh registered sale deed in favour of the same vendee before the final order of Court on the judgment-debtor's application does not divest him of the right to maintain the application: 24 *Bom.* 400; *not Appr.* [P 718 C 1]

Ordinarily the rights of parties should be adjudicated with reference to matters that existed on the date of suit or application and not with reference to what transpired subsequently. [P 718 C 1]

T. Narasimha Aiyangar and *N. S. Rangaswami Aiyangar*—for Appellant.

T. R. Venkatarama Sastri and *B. C. Seshachella Aiyar*—for Respondents.

Judgment.—This is an appeal against the order of the Subordinate Judge of Chittoor rejecting an application by the judgment-debtor under O. 21, R. 89, Civil P. C. (5 of 1908). The facts are these: The properties of the judgment-debtor were sold in Court auction on 16th April 1917. On 22nd June 1917 the judgment-debtor executed a sale deed to a third party. On 25th June he applied to the Court to set aside the sale and deposited the requisite amount. The conveyance of 22nd June was not registered. A fresh sale deed was executed to the same third party on 20th August 1917. The Subordinate Judge disposed of the application on 11th January 1918. He held that as the conveyance of 22nd June was capable of being registered and as when registered it would confer title as on the date of the sale, the judgment-debtor had no locus standi on 25th June to present the application. He has relied upon *Subbarayudu* v. *Lakshminarasamma* (1) and *Ishar Das* v. *Asaf Ali Khan* (2). In those cases there was a completed registered conveyance and it was held that, by virtue of those conveyances, the judgment-debtor was divested of his right to present an application under O. 21, R. 89, Civil P. C (5 of 1908). Other High Courts have taken a different view. They have held that the judgment-debtor would always have the right of getting the sale set aside and that the execution of a conveyance to a third party would not interfere with his right. It is not necessary, in the view we are taking of the case, to express any opinion on this vexed question. In our opinion the judgment-debtor was a person "owning the property" on the date of his application. The fact that the sale could have been perfected and was capable of passing a complete title should not affect his locus standi. It was held in this Court by a Full Bench in *Kurri Veerareddi* v. *Kurri Bapireddi* (3) that notwithstanding the execution of an unregistered conveyance and the passing of possession thereunder, the vendor of the property was entitled to sue for possession against the vendee. That view has been confirmed in *Ramanathan Chetty* v. *Ranganathan Chetty* (4). Consequently the mere execution of a conveyance does not deprive the owner of his right in the property until registration. The rule of law which dates back the title when registered to the date of the conveyance does not affect this principle. The right is in the vendor, although it can be divested by the registration of the conveyance.

The decisions to which the learned vakil for the respondent drew our attention, namely, *Savithri Ammal* v. *Ramasami* (5), and *Rebala Venkata Reddi* v. *Mangadu Yellappa Chetty* (6), do not

(1) A. I. R. 1914 Mad. 46=38 Mad. 375=22 I. C. 193.
(2) [1912] 34 All. 186=13 I. C. 134.
(3) [1906] 29 Mad. 336.
(4) [1918] 40 Mad. 1134=43 I. C. 138.
(5) [1898] 8 M. L. J. 266.
(6) [1917] 38 I. C. 107.

affect the present case. The Subordinate Judge says that the conduct of the judgment-debtor and of his vendee was fraudulent. We fail to understand this. On the facts the utmost that can be said is that the vendor and the vendee, realizing that if the document of 22nd June was registered it might affect the application of the judgment-debtor agreed, not to get it registered and made up their mind that a new sale deed should be executed. There is nothing illegal or wrong in such a procedure. The judgment-debtor had the right under O. 21, R. 89, to enforce his rights. His vendee, who was anxious to get a valid sale, agreed in his own interest, not to press for the registration of the earlier document. Such an attitude is quite reasonable and has no element of fraud in it.

We are therefore, of opinion that the judgment debtor had a right to make the application on the date he made it. It was next argued, relying mainly upon *Karalia Nanubhai Mahomedbhai* v. *Mansukhram Vakhatchand* (7), that as a new sale deed was executed before the final order was passed, the judgment-debtor had lost his right. We are unable to accept this contention. The new conveyance was executed pendente lite and the vendee would be affected by all the equities enforceable against his vendor. It is a well-recognzied rule of law that the rights of the parties should be considered as on the date of suit or application and not with reference to what transpired subsequently. It is true that Courts have power under certain circumstances to grant relief to the plaintiff with reference to what has happened since the institution of the suit or application. But that is an indulgence which the Court may or may not grant. The ordinary right of the party is that his claim should be adjudicated with reference to the matters that existed on the date of his suit or application. If *Karalia Nanubhai Mahomedbhai* v. *Mansukhram Vakhatchand* (7), is inconsistent with this view, we are respectfully unable to accept it as good law. We must, therefore reverse the order of the Subordinate Judge and set aside the Court sale made on 16th April 1917. Appellant is entitled to his costs here and in the Court below against respondent 2.

S.N./R.K. *Appeal allowed.*

(7) [1900] 24 Bom. 400.

* A. I. R. 1919 Madras 718

AYLING AND SESHAGIRI AIYAR, JJ.

Pusapati Venkatapathiraju Garu and *others*—Defendants—Appellants.

v.

Vatsavaya Venkata Subhadrayyamma Jagapati—Plaintiff—Respondent.

Civil Appeal No. 177 of 1916, Decided on 21st March 1918, against decree of Temporary Sub-Judge, Vizagapatam, in Original Suit No. 10 of 1913.

(a) Contract Act (1872), S. 64 — Person agreeing to advance money up to certain limit to finance litigation—Refusal to pay full amount—He is entitled to refund of amount actually advanced.

Where a person agrees to advance moneys to another from time to time up to a certain limit with the object of financing a litigation by the latter, but fails or refuses to pay the full amount, he is, nevertheless, entitled, under S. 64, to a refund of the amount actually advanced by him: 17 *I. C.* 894 and *H. Dakin & Co.* v. *Lee*, (1916) 1 *K. B.* 566, *Foll.*; *Underwood* v. *Lewis* (1894) 2 *Q. B.* 306 and *Sumpter* v. *Hedges*, (1898) 1 *Q. B.* 673, *Dist.* [P 728 C 1]

*** (b) Contract Act (1872), S. 23—Champerty—Agreement to finance litigation—Person financing to get share of property in case of success—No provision made for refund in case of failure — Transaction cannot be treated as loan—Contract is champertous but promisee is entitled to recover what he advanced in case of success in litigation.**

It depends on the terms of the document whether the subject of it is to be treated as a loan.

Where the agreement is to finance a litigation against a person in possession of a certain property and in favour of persons who are themselves unable to find the necessary funds, and the person financing is to get a share of the property in the event of the success of the litigation as if the full amount was paid and no provision is made for the refund of the amount in the event of failure, the transaction cannot be treated as a loan.

Such a contract is champertous, but the promisee is entitled to recover what he has advanced in the event of the litigation ending successfully to the promisor. [P 724 C 2]

(c) Contract — Liability — Third person, though benefited by contract, cannot be charged with liability.

A person cannot be charged with liability merely on the ground that he has benefited by a contract entered into by another. [P 728 C 1,2]

(d) Transfer of Property Act (1882), S. 6—Assignment of future property is not invalid in India—S. 6 is only exception to general rule in favour of transfers present and future.

An assignment of future property is not invalid in India. S. 6 does not contain a total prohibition against the assignment of all future property, but must be construed as an exception to the general rule in favour of transfers of property, present and future.

[P 725 C 2; P 726 C 1]

(e) Transfer of Property Act (1882). S. 6 (a)—"Of like nature" in Cl. (a) indicates

that "possibility" referred to in it should be of same category as chance of heir apparent or chance of relation obtaining legacy.

Portions of a section should be construed ejusdem generis with the rest of the section.

The words "of a like nature" in Cl. (a), S. 6 indicate that the "possibility" referred to therein must belong to the same category as the chance of an heir-apparent or the chance of a relation obtaining a legacy. [P 726 C 1]

(f) Transfer of Property Act (1882), S. 58—Property if identifiable is specific though it may not be in existence.

Under S. 58, a property can be specific so long as it is identifiable, though it may not be in existence on the date of the transfer. A transfer therefore if otherwise valid, is not rendered inefficacious by reason of the subject-matter not having been in existence on the date of the agreement. [P 726 C 1]

(g) Transfer of Property Act (1882), S. 58—Lender not paying full amount of charge—He is not deprived of lien in respect of money actually advanced.

Where a loan is charged on a property a mere default of the lender to pay the full amount of the charge would not deprive him of his lien in respect of the money actually advanced. There will be a lien pro tanto. [P 727 C 1]

(h) Contract — Construction — Loan advanced with object of financing litigation—Loan charged on amount which may be secured by compromise in suit to be effected in particular manner—Compromise effected in different manner—Lien will not attach itself to substituted property especially where parties put an end to contract before compromise.

Where a loan advanced with the object of financing a litigation is charged on an amount which may be secured by a compromise in the suit to be effected in a particular manner, and the compromise is effected in a different manner, the lien will not attach itself to the substituted property, especially where the parties put an end to the contract be before the compromise.

Plaintiff's husband, agreed on 25th May 1903 to advance moneys up to a limit of Rs. 1,50,000 to defendants 2, 3 and 4 with the object of financing a suit by the latter to recover a zamindari, in consideration whereof the latter agreed to convey to plaintiff a 3/16ths share in the property in the event of their succeeding in the litigation. It was stipulated that the defendants should not compromise the suit with their adversaries without the lender's consent. This agreement was varied in 1903 by another, whereunder the lender was to advance two lakhs of rupees and get a fourth share, and no compromise was to be entered into by the defendants without the consent of the lender or of his vakil. The amount advanced was charged on the amount which might be secured under the compromise. Plaintiff's husband, after advancing about Rs. 70,000, declined to advance any further sum as there were misunderstandings between himself and his debtors. The suit by defendants was compromised, but not in the manner specified in the agreement. Plaintiff's husband having died, plaintiff sued to recover the amounts actually advanced and interest thereon and to have it charged on the amount of the compromise:

Held: (1) that plaintiff was entitled to a personal decree for refund: (2) that the lien created on property to come into existence in future was valid; (3) but that the lien could not be fastened on the amount of the compromise as plaintiff's husband had, prior thereto, broken the contract and the compromise effected was not in accordance with the agreement. [P 727 C 1, 2; P 728 C 1]

(i) Registration Act (1908), S. 49 — Charge on moveable and immovable properties blended together—Charge not registered—Promisee's rights to moveable property will not be affected.

Where there is a blend of moveable and immovable properties in respect of which a charge is created, if the document creating the charge is not registered, it will only deprive the promisee of his right in the immovable property and will not affect his rights in the moveable property: 1 *I. C.* 1, *Foll.* [P 727 C 1, 2]

Srinivasa Aiyangar —for Appellants.

K. Srinivasa Aiyangar—for Respondent.

Judgment.—This is an offshoot of the suit for the Vizianagaram zamindari, namely Original Suit No. 18 of 1903, on the file of the District Court, Vizagapatam. The present defendants were the the plaintiffs in that suit, and it was instituted to recover the zamindari of Vizianagaram. That suit was dismissed by the Court of first instance in 1908. An appeal was preferred to the High Court which was disposed of by a compromise in March 1913. The present suit is by the widow of the Zamindar of Tuni, who financed that litigation on behalf of the plaintiffs (the present defendants), for a sum of nearly two lakhs of rupees. The Subordinate Judge decreed the claim.

The negotiations which led to the contract need not be gone into in any detail. Up to May 1906 the expenses of the litigation were borne by the present defendants from their own pocket. On 22nd May 1906 the first agreement Ex. A was executed by defendant 2 and his sons, defendants 3 and 4, to the then Zamindar of Tuni, by which in consideration of the latter agreeing to assist the defendants with money for the expenses of the litigation, they undertook to give him a certain share in the zamindari. Ex. A-1 was also executed on the same day to sell a share of the estate. On 14th August 1907 Exs. B and B-1 were executed, which altered the original agreement in some material particulars. We shall have to refer to these agreements at some

length later on. After arguments had begun to be addressed by the pleaders engaged in the Vizianagaram case, the Zamindar of Tuni complained that the funds supplied by him were being misspent by the defendants. This led to angry correspondence between the parties, and ultimately the Zamindar of Tuni refused to advance any further sums. This was about the end of February 1908. The suit was proceeded with the help of others and judgment was pronounced against the present defendants on 25th July 1908. It is common ground that the Zamindar of Tuni did not supply any funds for the appeal filed in the High Court, nor was he asked to do so. The amount advanced by the plaintiff's husband before February 1908 amounted to about Rs. 93,000. The Zamindar of Tuni died in 1911.

The plaint in this suit, as originally framed, alleged that the defendants broke the contract and that the plaintiff was entitled to be paid out of the moneys secured under the compromise the amount of principal and interest due to her for the money actually lent, and that she was also entitled to a 3/32nds share in the balance of the compromise amount and in the annuities secured under the compromise. The plaint was subsequently amended by alleging in the alternative, that it having become impossible for the plaintiff's husband to be a party to the compromise owing to his death, and also because of the fact that Mr. V. Krishnaswami Aiyar on whose assent the compromise was to be effected died on 22nd December 1911, the contract between the parties became void, and that under S. 65, Contract Act, the plaintiff is entitled to a refund of the moneys actually advanced by her husband, although she may not be entitled to specific performance of the contract to give a share in the balance of the compromise amount and in the annuities. These new allegations are contained in para. 29 (a), (b) and (c) of the plaint and in prayer (e) of para. 38. Defendant 2's plea is that the plaintiff's husband broke the contract, and as the agreement was champertous she is not entitled to any relief whatsoever. He also pleads the bar of limitation. Defendants 1, 5 and 6 contend that they were not parties to the arrangement entered into by defendant 2 with the Zamindar of Tuni and that their share in the compromise amount is not liable for the plaintiff's claim. A large number of issues were framed by the Subordinate Judge. With most of them it is not necessary to deal in this appeal. His main conclusions are that the second agreement superseded the first; that the plaintiff's husband was justified in breaking the contract between him and defendant 2; that the suit is not barred by limitation; that the share of defendants 1, 5 and 6 is also bound by the contract of defendant 2. On the additional issues framed regarding S. 65, Contract Act, his finding is that S. 65 applies to the case and that the plaintiff is entitled to a refund of the amount actually advanced by her husband with interest thereon.

A number of interesting questions of law have been argued before us by the Advocate-General on one side and by Mr. K. Srinivasa Aiyangar on the other. Before dealing with the legal questions, we shall first consider the question as to who broke the contract. The Subordinate Judge's judgment is by no means full or clear. We have been obliged to deal with the facts of the case as if we were hearing the case as the Court of first instance.

The main features of the two agreements should be set out before proceeding to examine the other documents bearing on the question of the breach of contract. Under Ex. A the arrangement was that the Zamindar of Tuni should advance Rs. 1,50,000 for the expenses of the suit, and that 3/16ths of the property in suit, namely the Zamindari of Vizianagaram, should be conveyed to the lender for that consideration. The sub-paragraphs of para. 1 refer to the mode of application of the money to be advanced. Para. 2, sub-paras. (a) and (b), deal with the mode of conveying 3/16ths share. 2 (c) says that if the lender was unwilling to take either a sale-deed or a permanent lease of the zemindari, the debtor shall pay the amount with interest at 3 per cent per mensem thereon on the security of the zamindari. There is a penal provision in 2 (d) which we need not refer to. Para. 3 is important. It provides for the creditor advancing not less than Rs. 50,000 and that if he was unwilling to lend further sums certain modified terms should be substituted. Cl. 3 of that paragraph says :

"If you should yourself give up the conduct of the abovesaid suit in the lower Court without spending the Rs. 50,000 as abovesaid, you shall forfeit all expenses incurred till then."

Clause 5 of the same paragraph says that no compromise should be entered into without the consent of the creditor. Ex. A-1 is merely an agreement to convey the 3/16th share in case the Rs 1,50,000 was advanced by the creditor. A and A-1 were in May 1906. Apparently after the suit had proceeded for some months it was found that more money would be required than was agreed upon in Ex A, and apparently also the parties intended to change the terms of the contract in some particulars. As a result of further negotiations, Exs. B and B-1 were executed on 14th August 1907. Ex. B corresponds to Ex. A-1 and B-1 to A. We are mainly concerned with Ex B-1. The material changes introduced in the new agreement may be thus stated: (a) Instead of Rs. 1,50,000 the lender agreed to advance two lakhs of rupees if these were required. (b) Instead of getting only a 3/16th share the lender secured a fourth share and also an additional property which was the summer residence of the zamindar. (c) The stipulation as to forfeiture was omitted. (d) The old provision that there should be no compromise without the consent of the lender was re-inserted with a proviso that if Mr. V. Krishnaswami Aiyar advised that a compromise was beneficial, it should be agreed to. These are the main differences between the first and second agreements. At the time of the second agreement the plaintiff's husband had lent Rs. 66,000. In para. 2, Ex. B-1 it is stated that Rs. 66,000 plus a sum of Rs. 5,500 spent by the lender himself had been advanced up to that date; and that a further sum of Rs. 16,000 would be paid almost immediately. The same paragraph says:

"It is also agreed that we should be rendering accounts as stated above and you should be again giving money within a week after being asked for."

There is a dispute as to whether the last portion of para. 1 and para. 2 have been correctly translated. So far as para 1 is concerned, a fresh translation has been made which has been accepted by the learned vakils as fairly accurate. As regards para. 2 the Chief Interpreter admitted that the language is so ambiguous that he is unable to say whether the parties intended to say that no further accounts regarding the Rupees 66,000 should be asked for or whether they stipulated for a fresh scrutiny of the accounts in respect of the sums already expended. Having regard to the fact that full accounts had not been furnished by this time, we are inclined to agree with the learned vakil for the respondent, though not without some hesitation, that the parties did not understand by para. 2 that there should be no scrutiny of the accounts in respect of moneys already advanced. The Rs 16,000 agreed to be lent immediately under the new agreement was given within three months of that agreement. Admittedly before the second agreement, Ex. G was sent by defendant 2 to the plaintiff's husband. That accounted for an expenditure of Rs. 49,117 and gave credit to a sum of Rs 38,000 received. It showed a balance of Rs. 11,117-10-7 as being still due. This was on 11th January 1907. Ex. G-1 is dated 31st August 1907. Although it covers a period before the second agreement was entered into, it is clear that this account was not in the hands of the plaintiff's husband when Ex. B-1 was signed. G-2, dated 6th January 1908, gives particulars of expenditure aggregating to Rs. 36.141-10-8 and acknowledges receipt of Rs. 27,000, leaving a balance of Rs. 9,141-10-8 to be paid by the creditor. Between the date of the second agreement and January 1908 the parties seem to have been working harmoniously. On 19th January 1908 the first note of discord appears. Ex. F written on that date by the Diwan of the Zamindar of Tuni to defendant 2 complains:

"Contrary to the original agreement the amount of Rs. 10,450 for the day-fees of M. R. Ry., B. Venkatapatiraju Garu and Rs. 2,165 for the fees of the said Venkatapatiraju Garu's younger brother are entered therein. These items were read out to Sri Maharajahvaru. He was pleased to say that settlement was not made to pay fees to these persons and that Rs. 12,615 specified as fees payable to those persons should be recovered from them, and expended for the costs of the suit in future."

At the end of the letter it is stated:

"In your credit and debit accounts, particulars of some items are not written. I shall write the letter soon about them. Immediately after this credit and debit are settled, I shall send the money required."

By this time Ex. G was in the hands of the zamindar and his Dewan. Neither at the time of the second agreement nor

until this date was any complaint made that out of the moneys advanced by the Zamindar of Tuni the two vakils referred to in Ex. F should not have been paid. It was conceded that there is no writing to show that these two gentlemen were not to be remunerated from the funds supplied just like other vakils engaged in the case. We are referred to some evidence regarding an oral agreement between the Zamindar of Tuni and defendant 2. We have not the least hesitation in saying that we do not believe this evidence. The reply to Ex. F is Ex. 9. It is dated 27th January 1908. It draws attention to the fact that accounts had been sent containing entries of payments to the two vakils and that those entries had not been objected to at the time of the second agreement; it also contains a denial of the suggestion that the two vakils agreed to work gratis. One statement in that letter was somewhat shaply criticized by Mr. K. Srinivasa Aiyangar. About the end of this long letter defendant 2 says:

"Moreover, I have sold some portion out of the land I am entitled to in the Vizianagaram Samasthanam and have deposited the said sale amount with you on account of the expenses of the suit, settling that you will give the money whenever asked by me. While so you cannot raise such objections as these."

It is true that this is a rather extravagant way of stating that the indebtedness is on the side of the plaintiff. But if we look at Ex. B. the language does not appear to be altogether irrelevant. This is what Ex. says:

"We further hereby declare to have received from you the abovesaid amount, Rs. 2,00,000, and its interest as above said for the necessary suit expenses as consideration of the abovesaid sale-deed as per this second agreement, dated this day, and therefore execute to you the same.',

Apparently the parties agreed to regard it on paper as if one-fourth of the zamindari was sold to the plaintiff's husband and that he was to treat himself as being in possession of the two lakhs of rupees, the consideration amount, as a depository from whom the money for the expenses was to be drawn from time to time. Apart from this sentence no objection can be taken to the tone of the latter, Ex. 9. We do not think the suggestion is in any way grotesque, having regard to the language of Ex. B. After Ex. 9 was received, Ex. F-2 was sent by the plaintiff's husband to defendant 2. Here again objection is taken to the payment of the two vakils:

"Besides, some of your officials have told in person that no fees need be given to them."

It then proceeds to say:

"As the debit and credit accounts sent by you have not been examined previously, they have now been got examined. . . . . At the time when you first submitted credit and debit accounts we have not only said in a definite manner in the presence of many persons that fees should not be given to Sree Venkatapatiraju Garu and Sree Narasimharaju Garu, but your men also have told us from the very beginning that as they are persons connected with you they will work in connexion with this suit without taking fees."

The two statements are somewhat inconsistent, one statement saying that no accounts were looked into, the other that the accounts were looked into and that the defendants' men were told that these entries regarding payments to the two vakils were objectionable. The letter winds up by saying:

"If before this you spend this money (referring apparently to the money to be got back from the two vakils), you give proper particulars for such of the items as regards which no details were given or with regard to which there are disputes, and also send receipts and vouchers for the remaining items, namely fees for Madras vakils, etc., we shall compare them, and if we find them correct and proper we shall send money if any more money is still wanted for purposes of this suit."

Here again for the first time we find objection is being taken to vouchers for payments made not being sent. *Before* considering the reply to this *letter it* must be mentioned that on the same day as Ex. F-2, F-1 was sent in which objection was taken to the expenditure on out fees and other miscellaneous charges and also to the failure to furnish details, vouchers and receipts for sums debited. The sums objected to do not amount to any large figure. To these two letters Ex. 8 was the reply. It is dated 14th February 1908 and it says:

"The necessary particulars and the credit and debit accounts, as well as the receipts with my signatures, were given already. There is no necessity for your asking again regarding the settled credit and debit accounts and they are not wanted. Without raising any objection at that time, you are now raising objections, keeping something in your mind. I have no objection whatever to your ascertaining the particulars hereof if you want to know them. They might have been ascertained correctly from the account sent already. When credit and debit accounts were sent with my responsibility and signature, there will be no proper grounds for the stoppage of the business."

Apparently defendant 2 thought that some frivolous excuses were being offered

to keep back the supply of money and that he was being unjustly suspected. That accounts for the tone of this letter. It is the letter of a man who felt that he was not in the wrong, and that the creditor was trying to find some excuse for breaking off the agreement. We do not understand this letter as a refusal to give the vouchers and receipts asked for in Ex. F-1. It naturally complains that the objections taken to the accounts already sent are not bona fide. The dewan in the witness-box stated that although he was appointed at the time the second agreement was entered into, he had not looked into Ex. G-1 before writing Ex. F. It is impossible to accept this story. It may be that zamindars are not in the habit of examining accounts sent to them, but to ask us to believe that the dewan of the lender did not satisfy himself that the entries in the accounts sent before the new agreement was entered into were proper, is something which we cannot agree to. To Ex. 8, Ex. M was the final rejoinder. That is 21st February 1908. The burden of that letter is that the money paid to the two local vakils was improperly spent. It ends by saying:

"If you do not give a proper reply for this and as we consider that according to the terms of agreement without affecting our rights that the disputed terms are not properly debited under the suit costs, we shall take proceedings in the Court according to law for the recovery of the above sums from you and from those who have received the same from you."

There can be no doubt that this letter was intended to finally break off the relationship between the parties. In our opinion there was no justification for such conduct on the part of the plaintiff's husband. The attempt to prove that there was no agreement to remunerate the local vakils from the funds supplied by the lender has miserably failed. On the other hand we have the evidence of defendant 2, who has deposed straightforwardly that it was part of the original agreement that the local vakils should be remunerated from the borrowed money. We have the fact that Ex. G was sent containing various entries relating to payments to these two vakils; it was in the hands of the plaintiff's husband and his dewan long before the second agreement was entered into. We totally disbelieve the suggestion that the plaintiff's husband and his dewan did not examine these accounts before Ex. B-1 was entered into. At the time of B-1 at any rate a new dewan had taken charge of the plaintiff's husband's estate. We cannot accept his evidence that he did not examine Ex. G before the second agreement was entered into. There is no reason for presuming that the local vakils were expected to work gratis. Mr. Srinivasa Aiyangar referred to the fact that the two vakils were related to the defendants, and he also made a faint suggestion that the vakils obtained a share of the money secured by the compromise. There is absolutely no reliable evidence for this latter suggestion.

The fact that these vakils were related is not a ground for holding that they agreed to work gratis in the suit. It seems to us that the objection to the payments made to these vakils was only a pretext for breaking off from the contract. We can only conjecture the reasons, as the parties have not adduced all the evidence on the question of the motive which led the plaintiff's husband to refuse to finance the litigation any further. But we feel no hesitation in holding that the payment to these two local vakils was not a good ground for refusing to carry out the terms of the contract. Mr. K. Srinivasa Aiyangar commented upon the entries contained in Exs. G and G-1 and argued that they are lacking in definiteness and that the creditor would be justified in objecting to the bald entries regarding large sums of money said to have been paid to vakils. They may have furnished good grounds for asking for particulars and for objecting to make further payments unless these particulars were furnished. But it was not on these grounds that Tuni refused to advance further sums. We are therefore unable to accept these post facto comments as having influenced the plaintiff's husband's conduct in the step he took. Apparently until the time of Ex. F the plaintiff's husband trusted to the honesty of defendant 2 and never doubted that any payments made by him were otherwise than honestly spent. There is no evidence that defendant 2 ever refused to give particulars. We must therefore hold that the contract was broken by the plaintiff's husband and not by defendant 2.

It was argued by the learned vakil for the respondent that it was only a term

of the contract that was broken and not the contract itself. Our reading of the correspondence does not lead to this result. Exs. F series and M leave no room for doubt in our mind that the plaintiff's husband intended to break off further connexion with defendant 2 and that he did convey that idea to him. This being our view on the most important question of fact in the case, we now proceed to consider whether, even though the plaintiff's husband may have broken the contract, the plaintiff is not entitled to recover the moneys actually advanced.

It is not easy to understand on what basis the Subordinate Judge has given the decree in favour of the plaintiff. Mr. K. Srinivasa Aiyangar who appeared in support of the judgment contended that the money advanced by his client's husband was a loan, and that it was a charge upon the amount of the compromise. It may be that some such idea was present to the mind of the Subordinate Judge, as in paras. 2, 16 and 17 there is a reference to a lien. However we have now to examine Ex. B-1 to ascertain whether the money advanced by the plaintiff's husband was regarded as a loan and whether it was made a charge upon the sum secured by the compromise. The learned vakil for the respondent referred us to paras 1, 4, 8 and 12 in support of his contention. In para. 1 in more than one place the money to be advanced by the lender is spoken of as a loan. At the same time it must be mentioned that the vernacular expression used in the document is usually rendered as "giving" or "to give." This is not seriously disputed. Therefore too much importance cannot be attached to the use of the word "loan" by the translator. The same observation applies to para. 4, In para. 8 the amount advanced is spoken of as "principal and interest found due to you." Again in para, 12 the expression is,

"the principal money advanced by you together with interest at 1 per cent."

If the document stood by itself, there would be great force in the contention for the respondent that the money advanced was a loan, but we have to take into account the fact that the avowed object of the transaction was to finance a litigation against a person in possescion and in favour of persons who were themselves unable to find the necessary funds. There is the further fact that the document provides that, even though less than Rs. 2,00,000 was advanced for the purpose, the lender was entitled to the sale of the share as if the full amount was paid There is the additional circumstance that no provision is made for the refund of the amount in case the suit is dismissed. As against these considerations Mr. K. Srinivasa Aiyangar pointed to the fact that the Zamindar of Tuni, though not a relation of the defendants, belonged to their caste, and that it was considered a meritorious act to help that caste in getting possession of the property which the late Raja of Vizanagaram had resolved upon giving to a person who did not belong to the family. Taking all these various elements into consideration, we are not satisfied that the object of the undertaking was to give a loan. The transaction is on the face of it champertous, although as has been laid down by the Judicial Committee, that would not prevent the promisee from recovering what he has advanced in case the litigation proved successful.

The agreement between the parties partakes of the character of the contracts commented upon by the Judicial Committee in *Ranee Bhobosoonduree Dossee* v. *Issur Chunder Dutt* (1) and *Kalka Singh* v. *Paras Ram* (2), to which our attention was drawn by the learned Advocate-General, as contingent *contracts* whose enforcibility depended upon the happening of a particular event, namely the success of the litigation. However as the construction of the document is not altogether free from doubt, we do not propose to base our judgment on our surmise that the contract is not a loan. Now we shall proceed to deal with the other arguments in the case on the basis that the plaintiff's husband advanced a loan to defendant 2. The next question is whether a lien was created on the compromise amount by Ex. B-1. There was an interesting discussion by the learned vakils on the question whether in India a charge can be created upon property which was not in existence on the date of the document. Mr. K. Srinivasa Aiyangar for the respondent relied upon the observations of Lord Watson in *Tailby* v. *Official Receiver* (3), for the proposi-

(1) [1872] 18 W.R 140=11 B.L.R. 36 (P.C.).
(2) [1895] 22 Cal. 434=22 I. A. 68 (P.C.).
(3) [1888] 13 A. C. 523=58 L.J.Q.B. 75.

tion that an assignment of after-acquired property will be valid, provided it is identifiable. In the same case Lord Macnaghten points out:

"It was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done, that which ought to be done and in accordance with the maxim which Lord Thurlow said he took to be universal 'that whenever persons agree concerning any particular subject, that in a Court of equity, as against the party himself, and any claiming under him voluntarily or with notice, raises a trust.'"

The general trend of the views enunciated by the other noble Lords who took part in the case is in favour of holding that a transfer of property to come into existence at some future time is nothing more than an agreement to convey that property when it does come into being. This and other cases were considered very recently by the Court of appeal in *Industrials Finance Syndicate Ltd.* v *Lind* (4). The question there was whether mortgage of an expectant share as one of the next of kin of a living person was good as against the trustee in bankruptcy. Warrington, J., held that it was *Industrials Finance Syndicate Ltd.* v. *Lind* (5). In the appeal against learned Judge's judgment, Phillimore, L.J., states the law thus:

"Assignments of property not then in existence pass, as such, nothing. 'A man cannot in equity, any more than at law, assign what has no existence.' see per Jessel, M. R., in *Collyer* v. *Isaacs* (6)."

The assignment does however operate as a contract to assign if and when the property comes into existence, and to use the words of the same great Judge,

"when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property and the contract to assign thus becomes a complete assignment."

This is in effect what Lord Macnaghten said in *Tailby* v. *Official Receiver* (3). Swinfen Eady, L. J., says the same thing in *Hardy* v. *Fothergill* (7). Bankes, L. J., while affirming the above view, says at p. 373 in *Industrials Finance Syndicate Ltd.* v *Lind* (4):

"It appears to me to be manifest from these statements of the law that equity regarded an assignment for value of future acquired property as containing an enforceable security as against the property assigned, quite independent of the personal obligation of the assignor arising out of his imported covenant to assign."

It was argued that an assignment of future property does not merely amount to an agreement to convey when the property comes into existence, but it is a right in rem. There are observations in the judgment of Warrington, J., which lend support to this broader contention. But it is unnecessary to pursue this subject any further, because in either view, as pointed out by Phlilimore, L. J., the right will not attach to the property if, when the property comes into existence, the contract had ceased to be enforceable. This is what the learned Lord Justice says at p. 368:

"I do not understand an assignment which at the time only operates as a contract, but when the property comes into possession operates without more as an actual assurance; and even if this were intelligible, I do not understand why in its chrysalis state it is not subject to the laws of a chrysalis, why, being still only a contract, it is not discharged by a discharge of contracts."

The applicability of this doctrine to Indian conditions was hotly debated at the Bar. In the Transfer of Property Act, S. 6 enunciates how far and to what extent properties can be transferred. In S. 5 the expression "transfer of property" has been defined as:

"an act by which a living person conveys property, in present or in future, to one or more other living persons," etc.

As pointed out by the learned Advocate-General, the existence of a comma after "property" and before the words "in present or in future" shows that these words "in present or in future" govern the word "conveys," and not the word "property." Therefore there is nothing in S. 5 to indicate that future property can be conveyed. The learned Advocate-General further argued that Cls. (a) to (i), S. 6 are only illustrative of the general principle that future property should not be conveyed at all. There is great force in this contention. At the same time it must not be forgotten that the framers of the Act were aware of the pronouncement in *Tailby* v. *Official Receiver* (3), wherein it was held that there can be a valid assignment of future property. It is more reasonable to hold that the legislature imposed restrictions upon the extent to which future property can be assigned. In other words, S. 6 must be read as an exception to the rule that future property can be conveyed, and not as con-

(4) [1915] 2 Ch. 345=84 L. J. Ch. 884.
(5) [1915] 1 Ch. 744=84 L.J.Ch. 884.
(6) [1882] 19 Ch. D. 342.
(7) [1888] 13 A.C 351.

taining a total prohibition against all future assignments. We have in the Contract Act provisions for transferring future property. As Mr. K. Srinivasa Aiyangar pointed out, the Companies Act seems to contemplate the transfer of future property. Therefore we incline to the view that S. 6 must be construed as an exception to the general rule in favour of transfers of property, present and future.

It is true, as the learned Advocate-General contended, the observations in *Sumsuddin* v. *Abdul Husein* (8), on this question are obiter, but having regard to the high authority of Sir Lawrence Jenkins who pronounced the judgment, and having regard to the other reasons indicated by us, we think that S. 6 does not contain a total prohibition against the assignment of all future property. Nor are we prepared to agree with the contention that the words in Cl. (a), S. 6, "any other mere possibility of a like nature," would cover cases like the present. Apart from the general rule that portions of the same section must be construed ejusdem generis with the rest of the section there is a clear indication in the words "of a like nature" that the possibility must belong to the same category as the chance of an heir-apparent or the chance of a relation obtaining a legacy. We are therefore unable to find any restriction against a transfer of the kind now in dispute in S. 6, T. P. Act. On the question whether an immediate charge was created our attention was drawn to the decision in *Palaniappa* v. *Lakshmanan* (9) which seems to lay down the proposition too broadly. *Navagee* v. *Administrator-General of Madras* (10) expresses the law more guardedly and we are inclined to agree with the latter decision. As regards the contention that S. 58, T. P. Act in speaking of mortgages uses the expression "specific immovable property" it is enough to say that property can be specific so long as it is identifiable though it may not be in existence on the date of the transfer. Therefore on this part of the argument we are inclined to agree with the contention of Mr. K. Srinivasa Aiyangar that the transfer if otherwise valid is not rendered inefficacious by reason of the subject-matter not having been in existence on the date of the agreement.

The real difficulty arises from the use of the words "moveable and immovable properties obtained by such compromise" in Cl. 12, Ex. B-1. In Cl. 9 a right is given to a twelfth of the property in case the whole of the expense for the litigation in the first Court is borne by the lender. The clause says:

"It has been agreed that you should without fail meet all the expenses incurred in the original Court."

Then comes Cl. 10, which prohibits any compromise without the consent of the lender. Cl. 14 stipulates for an enforceable compromise in case Mr. Krishnaswami Aiyar gave his assent to it. Then follows the expression in Cl. 12 which we have quoted. The words "such compromise" can only refer to a compromise to which either the plaintiff's husband consented or which was brought about on the advice of Mr. Krishnaswami Aiyar. It is not disputed that in the present case the compromise which came into existence was not due to either of these two contingencies. The argument that although a compromise may be otherwise brought about, it was open to the plaintiff's husband to have accepted such a compromise because the provision for his assent and for Mr. Krishnaswami Aiyar's advice was for his benefit does not meet the difficulty. The lien which is claimed is in respect of a property got under a particular compromise. Whatever may be the personal rights against the debtor, treating the money advanced as a loan in order that the lien may fasten upon the compromise amount it must have relation to the contingencies provided for in the agreement. The specific property or the identifiable property on which the lien is sought to be attached is not the property which the parties contemplated by the agreement. We may state at once that we are in entire agreement with the contention of the learned vakil for the respondent that the mere fact that only Rs. 93,000 out of the contemplated Rs. 2 lakhs was advanced would not derogate from the lien if it otherwise existed. It is settled law that a mere default on the part of the lender to pay the full amount of the charge would not deprive him of his lien in res-

(8) [1907] 31 Bom. 165.
(9) [1893] 16 Mad. 429.
(10) A. I. R. 1914 Mad. 281=38 Mad. 500=22 I. C. 556.

A. I. R. 1919 Madras 731

WALLIS, C. J., SADASIVA AIYAR AND SPENCER, JJ.

Yegnarama Dikshadar and *others* — Appellants.

v.

Gopala Pattar and *others* — Respondents.

Letters Patent Appeal No. 97 of 1917, Decided on 23rd April 1918, against judgment and decree of Abdur Rahim and Napier, JJ., in Second Appeal No. 273 of 1915.

Civil P. C. (1908), Sch. 2, Paras. 20 and 21 —Decree embodying terms of award settling scheme of management for private endowment cannot be altered or varied by consent but only by suit—Decree would act as res judicata against parties—Civil P. C. (1908), S. 11.

A consent decree cannot be set aside by the consent of the parties. A decree embodying the terms of an award settling a scheme of management for a private endowment cannot be varied or altered by consent of parties where the scheme does not provide for such alteration. Alterations in such a scheme can be secured only by a suit filed for the purpose. [P 731 C 2, P 732 C 1, 2]

Per *Wallis, C. J.* — Where a decree which settles a scheme for a temple proceeds on the basis that it is private endowment, the Court should not interfere with such decree by raising an issue in any subsequent proceeding whether the endowment is public. The rights of the public, if any, will not be jeopardized by the decree or any subsequent order made in proceedings between parties to the decree. [P 732 C 1]

Per *Spencer, J.*—As against the parties themselves, the decree will operate as res judicata in subsequent proceedings except when one of the issues before the Court raises the question whether the scheme, owing to a change of circumstances or for other good reasons, needs to be altered by the Court. [P 732 C 2]

T. R. Ramachandra Aiyar—for Appellants.

C. V. Anantha Krishna Aiyar — for Respondents.

Wallis, C. J.—The case made in the plaint was that the villagers, including the plaintiffs and defendants, are the owners and Urallars or managers of the suit temple situated in their village, that is to say that it was a private endowment; and this was not contested on the other side. Dealing with the case on this footing we agree with the lower Courts and the learned Judges in holding that the villagers, acting by a majority, were entitled to make the reference to arbitration, Ex. A, for the purpose of settling a scheme of management and that the award made by the arbitrators, Ex. B, was afterwards properly filed under S. 526, Civil P. C., the 116 Urallars who joined in the petition being entered as plaintiffs and the 16 counter-petitioners being entered as defendants, and thereupon became enforceable as a decree. The order, Ex. C, recites that some of the counter-petitioners had withdrawn their objections and that some had been removed from the record so that the petition was not opposed. Assuming that this is to be treated as a consent decree by virtue of the original agreement to refer to arbitration, the next question, as to which the learned Judges have differed is whether the villagers, acting by a majority, validly set aside the provisions of the award as regards the management of the temple. Mr. Ramachandra Aiyar contended that they could not relying on the decision of the Privy Council in *Ramanathan Chetti* v. *Muruga ppa Chetti* (1), which does not appear to have been cited before the learned Judges. It was held in that case that an agreement between several branches of a family as to the management by the various branches of a private endowment belonging to the family must hold good until altered by the Court or superseded by a new scheme effected with the concurrence of all parties interested. In this case there is the further objection that the award has acquired the force of a decree. The scheme of the management sanctioned by the decree does not provide for any alterations being made by the majority of the villagers, and I do not think that any such provision can be read into it. It is now well settled that a consent decree cannot be set aside by the consent of the parties. In *The Bellcairn* (2) Lord Esher, M. R., observed:

"When at a trial, the Court gives judgment by consent of the parties, it is a binding judgment of the Court and cannot be set aside by a subsequent agreement between the solicitors, or the parties even though it be placed in the form of an order by consent on a summons and taken to a Registrar or Master and by him made as a matter of course. It is only the Court, with full knowledge of all the facts on which it is called on to act, which can set aside the first judgment."

And in *Huddersfield Banking Company* v. *Lister* (3), in which the grounds on which the Court would set aside a consent decree or order were considered, Lindley, L. J., observed:

(1) [1906] 29 Mad. 288=33 I. A. 139=10 C. W. N. 825=3 A. L. J. 707=8 Bom. L. R. 498 (P. C.).
(2) [1885] 10 P. D. 161=55 L. J P. 3.
(3) [1895] 2 Ch. 273=64 L. J. Ch. 523.

"A consent order, I agree, is an order, and, so long as it stands, it must be treated as such and so long as it stands . . . it is as good an estoppel as any other order. I have not the slightest doubt on it."

In the present case the respondents, if they wished to modify the scheme in the award, should have filed a suit for that purpose. I therefore would allow the appeal and remand the case to the lower Court for disposal according to law. Costs to abide. I have already said that it is not the case of any of the parties to the suit that this is a public endowment. In *Appu Pattar* v. *Kurumba Bhagavati* (4), where such a case was not raised in the pleadings or issues, but the lower Courts went into it and the lower appellate Court found that the endowment was a public one this Court set aside the finding as at variance with the case disclosed by the plaint. I think this was the proper course to take, and that we should not be justified in raising such an issue now. The public are in no way represented in this suit; there is no one on the record to assert their rights, and those rights cannot be in any way affected by the decision in this case.

Sadasiva Aiyar, J.—I agree with my Lord. I was at first inclined to hold that, on the pleadings themselves, the temple in question might be held to be a public religious trust and hence the hold decree settling a scheme on the award passed on a private reference was a nullity and that the plaintiffs, who rely upon that decree, ought to be nonsuited on that ground. It is significant that neither side would unhesitatingly assert that it is not a public temple. In *Muthia Chetti* v. *Periannan Chetti* (5) my Lord the Chief Justice says see pp. 232 and 233 (of 4 *M. L. W.*).

"It may be that a caste or a section of a caste can own a temple as it has been held in *Pragji Kalan* v. *Govind Gopal* (6), that they can own vessels for cooking and dining, but in *Thackersey Dewraj* v. *Hurbhum Nursey* (7) . . . it was held that a temple which was managed by a certain caste was the subject of a public charitable trust and that a scheme could be framed for it under S. 539, Civil P. C. . . . Even if it had been shown that the temple was founded for the use of the particular section of the caste (Ilavathakudi Kovil Nagarathar sub-section of the Nagarathar caste), which consists of several families not shown to be otherwise than very distantly related to one another, we should as at present advised, be inclined to hold that they are a section of the public and that S. 92 is applicable. Serious inconveniences would arise from holding that a temple of this kind was the private property of such a large body of persons as the Ilayathakudi Kovil Nagarathars, and we think that such private ownership should be strictly proved"

To hold that a temple alleged to belong to the fluctuating residents of four large streets is a private temple is rather extraordinary, even though it is not expressly admitted by either side that other Hindu worshippers have been worshipping in the temple. However as the case seems to have been argued all along on the footing that the old decree was a valid decree and as my Lord has, in his judgment, sufficiently indicated that the interests of those members of the public who would be interested in the temple, if it was a public temple, would not be jeopardized by the decision in this suit, I concur with my Lord in the decision in this suit just now pronounced by him in favour of the plaintiffs.

Spencer, J.—I am satisfied, on the pleadings, that no case has been put forward as to this being a public charitable trust and that no such plea should be allowed to be raised now. I also feel no doubt that a scheme for the management of a private endowment such as the village temple or devaswom which has been the subject of an award and has further become embodied in a decree, cannot be altered merely by the will of the majority of the persons interested, unless in the scheme itself there is a provision for such alteration. Against those defendants among the villagers who were themselves parties to the decree, the decree would operate as res judicata in subsequent proceedings, except where one of the issues before the Court raised the question whether the scheme owing to a change of circumstances or for other good reasons needed to be altered by the Court. One of the learned Judges, who heard the second appeal (Abdur Rahim, J..) considered it reasonable to treat the award as intended to be only a temporary arrangement. There is nothing in the award, so far as I have been able to discover, to limit the duration of the scheme and therefore it must be treated as remaining in force until set aside or altered by a competent authority, that is by a Court having jurisdiction in the matter. I agree that the appeal should be allowed that the plaintiffs should be given a decree

(4) [1911] 11 I. C. 633.
(5) [1916] 34 I. C. 551.
(6) [1887] 11 Bom. 534.
(7) [1884] 8 Bom. 432.

declaring the proceedings of 25th September 1910, invalid so far as they purported to contravene the decree in Original Suit No. 292 of 1898. I think the suit must be remanded to the Subordinate Judge for deciding what reliefs the plaintiffs are entitled to out of those claimed in the plaint upon our decision on this point of law.

S.N./R.K. *Case remanded.*

A. I. R. 1919 Madras 733

PHILLIPS AND KUMARASWAMI SASTRI, JJ.

Panangipalli Suranna — Plaintiff — Appellant.

v.

Katta Venakata Suryanarayana Jagapathiraju and *others*—Defendants—Respondents.

Second Appeal No. 1493 of 1916, Decided on 13th August 1918, against the decree of Sub-Judge, Cocanda, in Appeal No. 72 of 1915.

Madras Estates Land Act (1908), Ss. 5, 77, 125 and 132—Rent decree by Revenue Court—Execution sale passes title free of incumbrances except those specified in S. 125—Charge for arrears of rent is not charge within meaning of Transfer of Property Act (4 of 1882), S. 100—Civil Procedure Code (5 of 1908), O 34. R. 14—Bengal Tenancy Act (8 B. C. of 1885), S 65.

A sale in execution of a decree for rent in a Revenue Court passes the property to the purchaser free of all encumbrances except those specified in S. 125, Madras Estates Land Act. The statutory charges on a land for arrears of rent is not a charge within the meaning of S. 100 T. P. Act: 33 *Cal.* 985: *I. C.* 35 and 15 *Cal.* 492, *Foll*; 25 *Mad.* 220 (*F. B*), *Expl.*; 17 *Cal.* 301, *not Foll.*; 31 *Cal.* 680, *Cons.*

Per *Phillips, J.*—The Madras Estates Land Act treats the charge for arrears of rent on a holding as being of the same nature in all cases and creates no distinction between the charge where rent is payable in kind and the charge where rent is payable in money. [P 734 C 1]

Though S. 65 Bengal Tenancy Act, is not specifically re-enacted in the Madras Estates Land Act, S. 132 of the latter Act leads to the same result. [P 734 C 1]

Per *Kumaraswami Sastri, J.*—The absence of any separate section in the Madras Estates Land Act like S. 65, Ben. Ten. Act, makes no difference in the scheme of the former Act, as it contains provisions in different sections which, in effect, reproduce the provisions of S. 65, Ben. Ten. Act. [P 736 C 1]

C. Rama Rao for P. Narayanamurthi —for Appellant.

P. Nagabhushanam—for Respondents.

Phillips, J.—The plaint properties were sold to defendant 7 in execution of a decree for rent due upon them, and the sole question for decision is whether the purchase by defendant 7 is subject to plaintiff's mortgage on the properties or not. The two lower Courts have taken opposite views, the District Munsif holding, on the strength of the ruling in *Tariniprosad Roy* v. *Narayan Kumari* (1), that a sale in execution of a decree for rent did not affect a prior mortgage, while the Subordinate Judge, following the opinion of the Calcutta High Court in *Royzuddin Sheik* v. *Kali Nath Mookerjee* (2), that the statutory charge upon the land for arrears of rent was not a charge within the meaning of S. 100, T. P. Act, held that the sale transferred the property free of encumbrance.

Under S. 5, Madras Estates Land Act, a first charge is created upon the land for rent, but the provision in S. 65 Ben. Ten. Act, that the land can be sold in execution of a decree for rent finds no place in the Madras Act, under which a landlord may sue for his rent or distrain moveable property (S. 77) or sell the land through the Collector (S 111). The question is whether having obtained a money decree, the property can be brought to sale in execution with the same result as would follow from a sale effected by the Collector. If the charge upon the land is a charge within the meaning of S. 100, T. P. Act, the provisions of O. 34, R. 14, Civil P. C., clearly forbid the sale of the property except by instituting a suit for sale in enforcement of the charge. Under S. 100, T. P. Act:

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property and all the provisions hereinbefore contained as to a mortgagor, shall, so far as may be, apply to the owner of such property."

If we apply this section, the owner of the property, i. e. the tenant whose holding is security for the rent, is treated as being in the position of a mortgagor, and has the rights of a mortgagor, under Ss. 60 and 61, to redeem the charge, but under the Estates Land Act a tenant cannot get rid of the charge upon his holding by paying the rent for the charge continues as security for rent to be paid hereafter. It may also be noted that, where rent is payable in kind, the charge for arrears of rent cannot come within the definition in S. 100 which refers only to payment of money, and it would be

(1) [1890] 17 Cal. 301.
(2) [1906] 33 Cal. 985.

most anomalous that a charge created by statute should be a charge within the meaning of S. 100 in some cases, but not so in others. The Estates Land Act treats the charge as being of the same nature in all cases, and creates no distinction between the charge where rent is payable in kind and the charge where rent is payable in money. S., 73 T. P. Act, would also seem to indicate that a charge for rent is not of the nature contemplated in S. 100. I would therefore accept the view of the Calcutta High Court expressed in *Fotick Chunder Dey Sircar* v. *E. G. Foley* (3) and in *Rhozuddi Sheikh* v. *Kali Nath Mookerjee* (2) that a charge for rent is not within the meaning of S. 100, T. P. Act. In this view O. 34, R. 14 is inapplicable to the present case.

There is however another aspect of the case which has to be considered. Under the decree for rent the property can be brought to sale, but if the decree were merely for money due on a debt, the sale would not have the effect of passing the property free of encumbrance, and it is difficult to see how the fact that the debt is a debt for rent can affect the case when the decree is passed by a civil Court. In the present case however we are not concerned with a civil Court's decree, because the rent decree was obtained in a Revenue Court and under S. 132, Estates Land Act the provisions of Ch. 6 relating to sale by a Collector for arrears of rent are made applicable to the execution of a decree of a Revenue Court for arrears of rent. A sale by a Collector under Ch. 6 passes the property free of all encumbrances except those specified in S. 125, and consequently by virtue of S. 132 a sale in execution must do the same. This view is also supported by the fact that under S. 133 the Collector has certain powers given to him both in executing a decree for arrears by sale and in holding a sale for default under Ch. 6, no distinction being drawn between the two sales. Although S. 65, Ben. Ten. Act is not specifically re-enacted in the Madras Act, S. 132 of the latter leads to the same result, and I must hold that a sale in execution of a decree for rent in a Revenue Court passes the property to the purchaser free of all encumbrances except those specified in S. 125. This second appeal is accordingly dismissed with costs.

Kumaraswami Sastri, J.—The plaintiff is the appellant. Defendants 1 and 2 filed a suit in the Revenue Court against defendant 3 for arrears of rent, got a money-decree and in execution sold the holding. The plaintiff who claimed to be a mortgagee under a registered deed of mortgage, dated 6th May 1910, sued for a declaration that the sale in execution was subject to his mortgage. The District Munsif was of opinion that inasmuch as the sale was in execution of a simple money decree, the decree-holders must be presumed to have given up their lien on the holding conferred by S. 5, Estates Land Act, and passed a decree in favour of the plaintiff. On appeal the Subordinate Judge reversed the decree and held that the charge was not affected by the form of the decree. It is argued for the appellant that the charge created by S. 5 Estates Land Act, is a charge within the meaning of S.100, T. P. Act. so as to attract to it the provisions of O. 34, Civil P. C., and that consequently the sale of the property charged in execution of a simple money decree will not bind a mortgagee or prevent him from redeeming. It is also argued on the strength of the observations of Petheram, C. J., in *Tariniprosad Roy* v. *Narayan Kumari* (1) that the sale in execution of a simple money-decree for rent would have no higher effect than any other sale in execution of a money-decree. As regards the first contention I do not think that rent due by a tenant to his landlord which may be payable either in kind or in money can be said to be a charge within the meaning of S. 100, T. P. Act, which expressly refers to the security being only for the payment of money. It is extremely unlikely that the legislature intended that landlords who receive their rent in kind should be on a different footing from those who receive the rent in money and that while the former are untrammelled by the provisions of O. 34, Civil P. C., the latter are bound by them.

In *Srimati Maharanee Dasya* v. *Harendra Lal Roy* (4) it was pointed out that there was no strict analogy between a charge for rent and a mortgage. In *Fotick Chunder Dey Sircar* v. *E. G. Foley* (3) it was held that rent due by a

(3)[1888] 15 Cal. 492.

(4) [1897] 1 C. W. N. 458.

tenant, which by virtue of S. 65, Bengal Tenancy Act, was a charge on the holding, was not a charge within the meaning of S. 100, T. P. Act. And a similar view was taken by Mookerjee, J., in *Royzuddi Sheik* v. *Kali Nath Mookerjee* (2). In *Gopi Nath Mahapatra* v. *Kashi Nath Beg* (5) the purchaser in execution of a rent-decree was held to have priority over a purchaser in execution of a mortgage decree; and reference was made to S. 73, T. P. Act, which enacts that where property is sold for arrears of rent, the mortgagee is entitled to enforce his mortgage against the surplus sale proceeds. Reliance has been placed by the appellant's vakil on the observations in *Narayana Ayyar* v. *Venkataramana Ayyar* (6), to the effect that in construing the words "mortgage" and "charge" for the purpose of the Limitation Act, the definitions of the Transfer of Property Act should be applied in the absence of any definition in the Limitation Act. These observations do not lay down an imperative rule of construction, but only indicate that in the absence of any repugnancy, Courts will adopt the definition in a substantive enactment, when they have to construe other Acts where the same words are used. The fact that rent is not necessarily payable in money renders the definition of a charge in S. 100, T. P. Act, inapplicable. I think the view taken by the Calcutta High Court is sound and see no reason to differ from the decisions above referred to.

On the second question I am of opinion that a sale in execution of a money-decree for rent in a suit under S. 77, Estates Land Act, passes title free from all encumbrances, except when the encumbrance falls within S. 125 of the Act. S. 5 declares that the rent of raiyati land together with any interest which may be due in respect thereof shall be a first charge on the holding. Under the Act the landlord can recover the rent due in these ways: (1) by distraint and sale of moveable property; (2) by a sale through the Collector; and (3) by a suit under S. 77 of the Act in a Revenue Court and sale in execution of the decree passed therein. So far as distraint and sale by the Collector are concerned, there can be little doubt that the sale would confer a title on the purchaser free from all encumbrances except such as are contemplated in S. 125, and there seems to be no reason why the intervention of a decree for rent should make any difference if the provisions of O. 34, Civil P. C., do not apply. The following observations of Mr. Ameer Ali in his commentaries on S. 65, Bengal Tenancy Act, when dealing with *Tariniprosad Roy* v. *Narayan Kumari* (1) are in point:

"There is no warrant in the provisions of the Act for holding that a difference in the form of the action would alter the rights of the landlord relating to the enforcement of his decree for arrears of rent. If the suit is for rent and the decree is for rent, the absence of a declaration in the ordering part of the decree that the decretal amount is a charge on the tenure or holding would not, it is submitted, alter the character of the decree, the effect of which under the law is to make the rent a first charge on the tenure or holding in respect of which the arrears are claimed."

The observations of Petheram, C. J., in *Tariniprosad Roy* v. *Narayan Kumari* (1) are dissented from in *Surbo Lal* v. *Wilson* (7) and in *Royzuddi Sheik* v. *Kali Nath Mookerjee* (8). Mookerjee, J., was of opinion that the consequence which follows from the provision that rent is a first charge upon an under-tenure is that a sale held in execution of a decree for arrears of rent produces the effect described in Ch. 14, Bengal Tenancy Act, which refers to sales for arrears under a decree and which provides for a title free from all except certain specified encumbrances to the purchaser.

It has been argued for the appellant that, as there is no section in the Estates Land Act similar to S. 65, Bengal Tenancy Act, the decisions above referred to have no application. S. 65 provides that where a tenant is a permanent tenure-holder or a raiyat, holding at fixed rates or an occupancy raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon. As observed by the Privy Council in *Arthur Henry Forbes* v. *Maharaja Bahadur Singh* (8) S. 65 is not a happily worded section and the clause refers to "rent being a first charge" and the words

" seem from their collocation to have been inserted as an after-thought without sufficient con-

(5) [1909] 1 I. C. 35.
(6) [1902] 25 Mad. 220 (F.B.).
(7) [1905] 32 Cal. 680.
(8) A. I. R. 1914 P. C. 111=41 Cal, 926=23 I. C. 632=41 I. A. 91 (P. C.).

sideration of their applicability to the rest of the provisions contained in the section."

The Estates Land Act contains provisions in different sections which, in effect, reproduce all the provisions of S. 65, Bengal Tenancy Act. S. 5, Estates Land Act, provides that rent due by a raiyat shall be a first charge. S. 6 gives a raiyat rights of permanent occupancy. S. 77 gives the landlord the right to recover arrears of rent in a Revenue Court, and S. 132 provides that the provisions of Ch. 6 shall be applicable, so far as may be, to the execution by a Revenue Court of any decree for arrears of rent. It will thus be seen that the absence of any separate section like S. 65, Bengal Tenancy Act, makes really no difference in the scheme of the Estates Land Act and does not render the reasoning adopted by the learned Judges of the Calcutta High Court inapplicable.

Sections 111 to 131 relate to sales by the Collector on the application of the landlord to whom rent is due, and S. 125 enacts that the purchaser will only take the holding subject to:

"any right or interest which the raiyat has created therein with the landlord's permission in writing registered and subject to any encumbrances created before the passing of the Act."

It seems to me that the combined effect of Ss. 125 and 132 is to give the same rights to a purchaser in execution of a decree for rent, there being nothing in the Act repugnant to such a construction. I am therefore of opinion that the purchaser in execution of a decree for rent gets the properties free from encumbrances, except such as are specially reserved by the provisions of the Estates Land Act. The second appeal fails and is dismissed with costs.

S.N/R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 736

OLDFIELD AND BAKEWELL, JJ.

Adhikari Vishnumurthiayya—Defendant—Appellant.

v.

Authaiya and *others* — Plaintiffs and Defendants—Respondents.

Second Appeal No. 371 of 1917, Decided on 14th March 1918, against decree of Dist. Judge, South Canara, in Appeal Suit No. 55 of 1916.

Hindu Law—Alienation—Widow—Suit by one reversioner—Other reversioner made defendant—Latter offering to pay court-fee in case plaintiff would succeed—No decree could be passed in favour of reversioner-defendant—Procedure applicable to partition suits where co-owner seeks joint declaration by which all co owners can benefit cannot be applied to tenants-in-common.

Where a tenant-in-common sues in ejectment for his share alone of the property, the co-tenants who are impleaded as defendants and who did not ask to be made co-plaintiffs cannot, on the plaintiff obtaining a decree, be given a decree for their shares on payment of the requisite court-fee [P 737 C 1, 2]

The procedure applicable to partition suits where one co owner seeks a joint declaration by which all co-owners can benefit, cannot be resorted to in the above class of cases: 28 *Mad.* 457; and 14 *M. L. J.* 404, *Dist.* [P 737 C 1, 2]

Plaintiff sued for recovery of his share of property from defendant 1 who was an alienee from a Hindu widow. The plaintiff was a reversioner next after the widow, as also was defendant 2. Defendant 2 offered to pay court-fee for his share, in the event of the plaintiff succeeding in the suit. The plaintiff obtained a decree for possession of his share, and defendants 3 to 5, legal representatives of defendant 2, claimed a decree for their share:

Held: that no decree could be passed in favour of defendants 3 to 5 for their shares. [P 736 C 2]

B. Sitarama Row—for Appellant.

K. Y. Adiga and *K. P. Lakshmana Row*—for Respondents.

Judgment —In this case the plaintiff sued defendant 1, here appellant, to recover the half-share of property alienated to the latter by a widow, whose husband's reversioners plaintiff and defendant 2 are; defendants 3 to 5 are defendant 2's legal representatives. The lower appellate Court's judgment is concerned with the validity of this alienation; and defendant 1 has not disputed the correctness of its conclusion in plaintiff's favour before us. The appeal therefore, so far as it relates to plaintiff's claim, must be dismissed with costs as between him and defendant 1. As between defendant 1 and defendants 3 to 5 the facts are that although the suit was brought in ejectment by plaintiff as a co-owner and defendant 2 made no attempt to disclaim his position as a defendant, he offered in his written statement to pay the necessary court-fee in case a decree should be given him for his share, proposing apparently to follow the procedure which is undoubtedly open to a defendant in a suit for partition of joint property; and the question is whether this procedure is open to a tenant-in-common, when his co-tenant has sued for possession of the common property or a part of it.

Before however dealing with this question, we refer to another argument: that he took this course without objection

being made to his doing so at any stage of the litigation, that it may now be too late for his legal representatives to sue separately and that they should not be prejudiced by defendant 1's acquiescence with the possibility that they may suffer if defendant 1's contention is allowed now. We are not impressed by this argument. It was open to defendant 2 to have himself made a plaintiff and pay duty on his claim in the ordinary way. He chose at his own risk to adopt a procedure which enabled him to postpone payment of duty until he could tell whether it would be worthwhile to pay it; and, if he was wrong in supposing that the benefit of that procedure was open to him, he risked and his legal representatives must take the consequences. But in fact defendant 1 did not acquiesce in his conduct. The suit was first tried before one District Munsif and afterwards on remand by another; and at each trial a distinct issue as to defendant 1's right to recover was framed and decided; and, although the grounds of appeal to the lower appellate Court are badly worded, we are not prepared to hold that Nos. 4 and 19 did not raise defendant 1's present contention.

On the merits defendants 3 to 5 rely on the analogy of the procedure in suits for partition and ascertainment and possession of a share in joint or common property, in which relief was sought against an alienee thereof, and the fact, recognized in *Raghuraj Singh* v. *Bishen Tewary* (1), that a suit is maintainable by one co-owner on behalf of all against a trespasser, the inference suggested being that all suits by one co-owner, whether for the whole or of his share in the property in question, must be regarded as so brought and as terminable by a decree in favour of any or all of those on behalf of whom the plaintiff is regarded as suing. This is unsustainable. For it neglects the distinction drawn in *Hikmat Ali* v. *Waliunnissa* (2) between suits in which the plaintiff (as here) only claims his share and those in which a comprehensive partition between him and his joint owners or co-owners is asked and in which he desires to obtain a joint declaration by which all interested in the property can benefit: *Dost Muhammad Khan* v. *Said Begam* (3) and *Assan* v. *Pathuma* (4). In *Somasundara Mudali* v. *Kulandavelu Pillai* (5) the plaintiffs, although they purported to sue on behalf of the co-owners, were not regarded as doing so; and the conclusion was that a co-owner defendant could not take advantage of the decision as res judicata. The fact that the defendant then in question was ex parte makes no difference to the principle involved, since it was held sufficient that in the suit, as framed, for the plaintiff's share, he could not have been joined as a co-plaintiff, and it may be added, he did not, in order to be so joined obtain an amendment in respect of the additional share he claimed. When, as in the present case, the plaintiff sues for his own share alone and not as representing co-owners, nothing regarding the latter's shares is or can legitimately be decided. The right of a defendant to execution of a decree, which does not grant him relief explicitly, has been recognized only in certain well defined cases, of which this has not been shown to be one. *Tricomdas Cooverji Bhoja* v. *Gopinathji Thakur* (6) is relied on; but in it the defendant concerned had asked to be made a plaintiff and the High Court in appeal merely gave him the decree, which would have been given at the trial if this prayer had not been erroneously disregarded. In these circumstances we hold that defendants 3 to 5 were entitled to no decree in the present case.

The result is that the appeal is allowed to the extent that the decree, so far as is is in favour of defendants 3 to 5, is set aside, but that it is confirmed in other respects. Defendant 1 will pay the plaintiff's costs in this Court. The District Munsif gave no costs to defendants 3 to 5 and the lower appellate Court gave costs only to defendant 4, who alone of them appeared before it. Defendants 3 to 5 will pay half of defendant 1's costs here and in the lower appellate Court.

S.N./R.K. *Decree modified.*

(1) [1917] 37 I. C. 384.
(2) [1890] 12 All. 506.
(3) [1898] 20 All. 81.
(4) [1899] 22 Mad. 494.
(5) [1905] 28 Mad 457.
(6) A. I. R. 1916 P. C. 182=44 Cal. 759=39 I. C. 156=44 I. A. 65 (P. C.).

* * A. I. R. 1919 Madras 738

Full Bench

WALLIS, C. J., OLDFIELD AND SESHAGIRI AIYAR, JJ.

Machi Raju Venkatarathnam—Defendant—Appellant.

v.

Vadrevu Ranganayakamma and *others*—Plaintiffs—Respondents.

Second Appeal No. 672 of 1917 Decided on 23rd July 1918, against the decree of District Judge, Godavari, in A. S. No. 32 of 1916.

*(a) **Civil P. C. (1908), O. 21, R. 58—Refusal to investigate claim — Order comes within Limitation Act (1908), Art. 11.**

Where a Court purports to make an order under the proviso to O. 21, R. 58, Civil P. C. i. e. an order refusing to investigate, the order comes within the mischief of O 21, R. 63, Civil P. C., and Art 11, Sch. 1, Lim. Act. 27 *I. C.*, 944 and 38 *I. C.* 937, *Foll.* [P 742 C 2]

(b) Limitation Act (1908), Art. 11—Order directing that claim be notified to bidders—Suit by claimant to establish title is governed by Art. 11.

An order on a claim petition which expresses no final judgment upon the right put forward but simply directs the sale after notifying the claim, is an order against the claimant and his suit to establish his title is governed by Art. 11. [P 743 C 1]

(c) Practice—Procedure—Practice of notifying claims to intending bidders is not warranted by Civil P. C. (1908), O. 21, R. 51.

Per *Seshagiri Aiyar, J.*—The practice of notifying claims to intending bidders is not warranted by anything contained in Civil P. C. It often leads to the depreciation in value of the property to be sold and is not calculated to advance the right of the claimant in any way. [P 743 C 1]

P. Narayanamurti—for Appellant.

A. Krishnaswami Aiyar and *Gopaladesikachariar*—for Respondents.

Order of Reference.

Napier, J.—One of the points taken in this appeal was whether the suit is barred by limitation by reason of the provisions of O. 21, Rr. 58 to 63, and Art. 11, Lim. Act. The claim was put in before the District Munsif under R. 58 and the District Munsif dealt with it, as appears in Ex. 5. He first passed an order as follows: "As this petition was filed late, this claim is ordered to be notified to the intending bidders." A fresh petition was put in before him and he passed another order as follows:

"The allegations of the Zamindarini will be notified to the bidders with the remark that the Zamindarini did not take steps for her claim being inquired into during the last ten months."

On the face of it, this order appears to me to be one passed under the proviso to R. 58, O. 21:

"Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed."

It is argued before us that even if it is a case covered by the proviso, still R. 63 applies and that rule, together with the operation of Art. 11, Lim. Act, bars any suit on the same subject-matter after one year from the date of the order. The question as to the construction of R. 63 had been before this Court and it was decided in a case reported as *Narasimha Chetti* v. *Vijiapala Nainar* (1) that

"O. 21, R. 63 of the new Code, is much wider in its scope than the corresponding S. 283 of the Code of 1882, and unlike the latter section covers cases in which there has been no investigation."

This case was followed by a Bench of this Court in a case reported as *Ponnusami Pillai* v. *Samu Ammal* (2). There the order was passed by the District Munsif in the following terms: "Application comes late and is rejected." It was held by the Bench that

"the language of Art. 11 in the new Act is more comprehensive than that of the previous Act and that has been construed in this Court as covering orders after full investigation as well as orders passed on default;"

and with that view, the learned Judges in this case were in entire agreement. The matter again came before another Bench of this Court in Second Appeal No. 1986 of 1916, a case to which my learned brother was a party. In that case an objection had been filed and the order passed by the Munsif was as follows: "The petitioner's objection will be noted in the proclamation." The learned Judges say:

"Here there was nothing except an order passed, so far as we can see, after no investigation in any ordinary sense of the term, since it is not shown that anything was considered which could justify a decision as to the validity of the claim, and eventually no decision regarding it was reached. In fact the case resembles *Baboo Jodonauth Chowdry* v. *Radhamonee Dossee* (3), and agreeing with the judgment in that case we set aside the lower appellate Court's decision."

These decisions are, in my opinion, irreconcilable and I think that it is necessary to refer the matter to a Full Bench for decision, as the question is not one of procidure only. The result of holding that Art. 11 applies is to reduce the period of limitation from 12 years to one

(1) [1915] 27 I. C. 944.
(2) [1917] 38 I. C. 937.
(3) [1867] 7 W. R. 256.

year without any decision of a Court on the merits and without allowing the claimant or objector to prove his right. It appears that the history of this provision is as follows: In the Code of 1859 there was a provision for a refusal to investigate in certain circumstances, and there are decisions of the High Court of Calcutta on the language of the Code of 1859, namely *Baboo Jodoonauth Chowdry* v. *Radhamonee Dossee* (3), *Raghoonath Doss Mohapattur* v. *Bydonath Doss Maharatha* (4) and *Jugobundhoo Bose* v. *Sachya Bibee* (5), to the effect that a refusal to investigate was not an order which gave rise to the shortened period of limitation mentioned in the section of the Code. This view receives some support from the language of the Privy Council in a case reported as *Sah Mukhun Lall Panday* v. *Sah Koondun Lall* (6). Then coming to the Code of 1877, we have Ss. 278 to 283. All these sections, with the exception of S. 283, are practically in the same words as in the present Code, but the language of S. 283 is

"that the party against whom an order under Ss. 280, 281 or 282 is passed, may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive."

It was held by this Court in *Sarala Subba Rau* v. *Kamsala Timmayya* (7) that where a Court had, under the proviso to S. 278, not made an investigation, it was clear on the face of it that S. 283 did not apply because S. 278 was not one of those sections mentioned in S. 283. That is clear, but it is important to bear in mind that this omission is intentional, the object being to preserve the law as it existed under the Act of 1859, the principle being that in a case where there has been a refusal to investigate, (the Court having full discretion whether to investigate or not) it would not be proper to attribute to such an order a degree of finality as would justify the legislature in depriving a party of the longer period of limitation given to him in the Code and limit it to the one year provided for by Art. 11. That seems to have been the policy of both the Codes. We now come to the present Code and it is of course to be noted, as has been pointed out in the cases, that the words "in Ss. 280, 281 and 282" have disappeared. They must disappear because the scheme of the Code is different, in that these sections re-appear in the form of rules in O. 21, and it is certainly open to argument that the reason for the omission of the definite rule or order was not for the purpose of extending the operation of R. 63, but because of the altered scheme of the Code. Bearing in mind the reason why the order under S. 278 was not incorporated in S. 283, it is a little difficult to see why the Code of 1908 should introduce a provision of this very drastic nature which had not been in the Codes of 1815 and 1882. Of course, if the language is such that it leads to no other interpretation, then that meaning must be ascribed to the words Reliance is placed on the general nature of the language in R. 63:

"Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

Certainly, the language is more comprehensive. First of all, we get the general words "where a claim or an objection is preferred" which were not in S. 283, and then we get the simple use of the words "the party against whom the order is made." Now it is of some importance to look at the latter words of the section because if a party is to institute a suit to establish the right which he claims within a year and in default of that, the order is conclusive, one would expect that the order referred to would be one which definitely disposes of the claim or the petition. But it is clear that the order which is passed under S. 278, is a simple refusal of the Court to take any proceedings which are provided for under those clauses, for it neither accepts nor rejects, nor does it decide anything. The clauses are headed "investigation of claims and objections" and the proviso in R. 58, is one under which a Court has an option, whether to take the matter on its file or not. On principle, it would seem that where a Court has refused to take the procedure laid down by the section and which it has an option to refuse, an order which is passed refusing to entertain the petition or claim and investigate it is not one which can be said to be *conclusive with regard to the*

(4) [1870] 14 W. R. 364.
(5) [1871] 16 W. R 22.
(6) [1874-75] 2 I. A. 210=15 B. L. R. 228 (P. C.)
(7) [1908] 31 Mad. 5.

S. N. DAR, B. A. LL. B.
Vakil High Court,
SRINAGAR (Kashmir)

right to the property in dispute, Suppose an order framed as follows,

"I refrain from expressing any opinion on the claim and decline to investigate it as the claim is made at the last moment before sale. What will be sold is the right, title and interest of the debtor, whatever that is; petition for investigation is dismissed,"

could it be said that such an order is an order "against a party on a claim preferred" within the meaning of Art. 11 or an order "against a party" within the meaning of R. 63? It seems to me that the proper interpretation of R. 63, is that it only applies to investigations and not to refusals and that being so, it would be an unnecessary extension to give Art. 11, any wider scope. In this view and on conflict of the authorities, I think it is advisable to refer to the Full Bench the following questions: (1) Where a Court purports to make an order under the proviso to R. 58, O. 21, that is to say, an order refusing to investigate, does such an order come within the mischief of O. 21, R. 63, and Art. 11, Lim. Act? (2) Is Ex. 5 an order covered by Art. 11, Lim. Act?

Sadasiva Aiyar, J.—I agree that the questions mentioned in the judgment just now pronounced by my learned brother should be referred to a Full Bench. There was a claim petition filed by the present plaintiff, when the plaint properties were attached in execution of decree passed against the present defendant 2 in favour of the present defendant 1. That petition, so far as it relates to the plaint lands, alleged that the judgment-debtor, the present defendant 2, had no saleable interest whatever in the land and that it was the petitioner's private land which had been granted on service tenure to defendant 2's father. She (the petitioner) prayed for the release of the property from attachment. That claim petition was E. A. No. 3307 of 1910, and was filed on 23rd December 1910. The property had been proclaimed for sale and so the Munsif seems to have at once passed an order that as the petition was filed late it should be notified to the intending bidders. The sale seems to have been afterwards adjourned from time to time and the sale itself seems to have finally taken place only in January 1912. Meanwhile, the claimant, the present plaintiff, put in a fresh petition (evidently as supplementary to the claim petition No. 3307 of 1910), requesring the Court to make an inquiry into the claim petition in respect of the alleged non-saleability of the plaint land.

Then the District Munsif, holding his first order of December 1910 as not a final order, passed a final order on the 16th October 1911 on that same claim petition No. 3307 of 1910 as follows:

"The allegations of the Zamidarini" (that is petitioner.) "will be notified to the bidders with remark that the Zamindarini did not take steps for her claim being inquired into during the last 10 months"

Neither in his first incomplete order nor in his final order did he use the word "rejected" or "dismissed" as regards the disposal of the petition. Now the question is whether the failure of the petitioner to file a suit within one year of October 1911 under O. 21, R. 63, to establish the right which she claims to the property in dispute precludes her by the bar of limitation from establishing the same right in this suit filed in January 1913. Under S. 247, Civil P. C. of 1859, it was enacted :

"No such investigation" 'that is, into claim or objection) "shall be made if it appear that the making of the claim or objection was designedly or unnecessarily delayed, with a view to obstruct the ends of justice. The order disallowing the investigation shall not be subject to appeal, and the claimant shall be left to prosecute his claim by a regular suit."

In the previous S. 246, investigation was directed as a general rule on claim petitions, and the last sentence of that section is,

"The order which may passed by the Court under this section shall not be subject to appeal but the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order."

Thus a clear distinction was made between an order passed after investigation (in favour of one party and against another party) and an order passed disallowing investigation (I shall not use the expression "without investigation," because that phrase may include cases where the Court was ready and prepared to investigate but through the default of the petitioner to pay batta or to put in appearance or to adduce evidence, the claim petition was decided against him.) Even in cases of dismissal for default, [*Kallu Mal* v. *Brown* (8) and *Sarala Subba Rau* v. *Kamsala Timmayya* (7)] held that the plaintiff was not precluded under the old Code by limitation bar of one year. Then the Code of 1877 by the proviso to S. 278

(8) [1881] 3 All. 504.

gave the Court the same power to decline investigation when it considered the claim unnecessarily delayed and then under Ss. 280, 281 and 282, provided for orders being passed on investigation, that is, in cases in which it did not refuse to embark on investigation under the powers given to it by the proviso to S. 278. Then S. 283 enacted that "the party against whom an order under Ss. 280, 281 or 282" that is where it has not refused to investigate

"is passed, may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive."

Art. 11, Lim. Act, provides one year's limitation for the suit. The present Code of 1908 under O 21, R. 63, omits reference to Rr. 60, 61 and 62, O. 21, which correspond to old Ss. 280 to 282 and uses the expression "the party against whom an order is made" (on the claim preferred). The question is whether, where a Court has refused investigation under the proviso to R. 58 it can be said that an order has been made against that party on the claim petition preferred by him. I think no order has been made on the claim preferred under those circumstances, but only an order refusing to make any order on that claim petition either for or against the petitioner: In *Subba Aiyar* v. *Subba Aiyar* (9) decided by my learned brother and myself, we thought it unnecessary to consider whether the provisions of the new Civil Procedure Code and the new Limitation Act were intended to and could take away the right of suit under the general law which the plaintiff had till 31st December 1908, where the Court refused to investigate the claim petition which he had preferred on an attachment. In *Narasimha Chetti* v. *Vijiapala Nainar* (1) the order which was held to have become conclusive after one year was as follows:

"The claim is based on a sale deed dated a fortnight before the attachment. I find that the claim has been unnecessarily delayed and dismiss it without investigation. O. 21. R. 58 (1) proviso."

In *Ponnusami Pillai* v. *Samu Ammal* (2) the order was, "application comes late and is rejected." The learned Judges Seshagiri Aiyar and Bakewell, JJ., refused to accept Mr. Devadoss's contention that as there was no investigation, the one year rule did not apply. The learned Judges remarked that "the contention came too late in the day" and they quoted *Narasimha Chetti* v. *Vijiapala Nainar* (1) and *Subba Aiyar* v. *Subba Aiyar* (9) in support. But, as I have said already, *Subba Aiyar* v. *Subba Aiyar* (9) did not decide the question as it was considered unnecessary to decide it for the purpose of that case. In Second Appeal No. 1986 of 1916, the order on the claim petition was that the claim would be referred to in the sale proclamation. The claim was neither rejected nor dismissed expressly in that case. Oldfield, J., and myself held that there was no order passed against the claimant under those circumstances as 'no decision regarding the claim was reached." I think the presence or absence of the words "rejected or dismissed" is immaterial, provided that it is clear that what the Court substantially intended to do was to refuse to investigate the claim under the powers given to it by the proviso to R. 58, O. 21. I am inclined to hold that in this case there was no order on the claim against the claimant but only an order refusing to pass any order on his petition either for or against the claimant and that therefore O. 21, R. 63, does not apply to such an order. But seeing that the decisions in *Narasimha Chetti* v. *Vijapala Nainar* (1) and *Ponnusami Pillai* v. *Samu Ammal* (2) seem to be against that view and that there are numerous decisions of the Calcutta High Court all of which (if I may be permitted to say with respect) cannot be reconciled with one another, I think that the question whether the order Ex. 5 in this case was an order passed on his claim petition against the plaintiff so as to preclude him from bringing a suit after one year to establish the rights which he sought to have investigated by the Court in the claim petition should be considered by a Full Bench and I agree to the reference proposed by my learned brother. I do not think that the mention in the order of a direction to the ministerial department of the Court to proclaim the fact of the making of the claim to intending bidders is relevant in the consideration of this question.

(9) [1915] 31 I. C. 250.

Opinion

Wallis, C. J.—The general policy of these provisions of the Code, as explained by the Judicial Committee in *Sardhari*

Lal v. Ambika Pershad (10), is to secure the speedy settlement of questions of title raised at execution sales. S. 283 of the Codes of 1877 and 1882 only gave a right of suit to the party against whom an order had been passed under Ss. 280. 281 or 282, and did not provide for the case where the Court under S. 278 refused to investigate the claim on the ground that it had been designedly or unnecessarily delayed. In such cases, S. 283 failed to provide for the speedy settlement of the questions of title raised by the claim.

The legislature would appear to have intended to supply this omission when in R. 63, O. 21 of the present Code it conferred the right of suit in general terms "where a claim or an objection is preferred" upon "the party against whom an order is made", instead of limiting it, as in S. 283, to cases in which an order had been passed under Rr. 60, 61 and 62 (Ss. 280, 281 and 282 of the old Code). Where a claim or objection is preferred under R. 58 (formerly S. 278), and the Court rejects it under the proviso to that rule on the ground that it was designedly or unnecessarily delayed, the unsuccessful claimant or objector, in my opinion, clearly comes within the words "the party against whom the order is made." R. 63 does not speak of any party but of the party against whom an order has been made, and assumes that, where a claim or objection is preferred under R. 58 (S. 278), there must always be a party against whom an order is made within the meaning of the rule. I cannot agree with the suggestion in Napier, J.'s Order of Reference that the change in the language of R. 63 was due merely to the altered scheme of the Code. If no change had been intended, Rr. 60, 61 and 62 would simply have been substituted in R. 63 for Ss. 280, 281 and 282 in the corresponding S. 283 of the former Cede. We are bound, I think, to give effect to the clear intention of the legislature to widen the scope of the rule in accordance with the general policy of this legislation as explained by the highest Tribunal. A claimant, who comes forward too late in the day to entitle him to have his claim investigated having regard to the proviso in R. 58, nonetheless raises a question of title with regard to the attached property; and there is nothing unfair in depriving him owing to his laches of the chance of getting a provision decision in his favour on his claim petition and requiring him to proceed to assert his title by suit within the shorter period of limitation prescribed when questions of title are raised with regard to attached property. I accordingly agree with *Narasimha Chetti* v. *Vijiapala Nainar* (1) and *Ponnusami Pillai* v. *Samu Ammal* (2). As regards Second Appeal No. 1986 of 1916 the attention of the Court was not called in that case to the alteration in the language of R. 63, on which my opinion is based. Our answer to the first question is that the case comes within the terms of O. 21, R. 63. As regards the second question, assuming, as Sadasiva Aiyar, J., appears to hold in his Order of Reference, that the zamindarini's claim in Execution Appeal No. 3307 of 1910 was not finally rejected by the order passed on it on 23rd December 1910, we think that the subsequent order, Ex. 5, was an order made against the zamindarini within the meaning of R. 63, and was consequently an order covered by Art. 11 (1), Lim. Act of 1908. Though the order only was that the allegations of the zamindarini would be notified to bidders, we think it amounted, and was understood to amount, to a rejection of the claim on the ground that it was filed too late.

Oldfield, J.—I agree.

Seshagiri Aiyar, J.—I entirely agree. The language of O. 21, R. 63, leaves little room for doubt that all orders which negative the right set up by the claimant or the decree-holder are within the rule. Prima facie the decree-holder attaches or gets attached the property in dispute as that of the judgment debtor. The law compels him to give certain information to the Court before the proceedings in attachment are taken. When this requirement is satisfied, unless a third party intervenes, the sale would be effected as if the property belonged to the judgment-debtor. When a claim is preferred, the usual prayer is that the attachment should be raised as the property does not belong to the judgment-debtor but belongs to the claimant. On the presentation of such a petition, if the order is not that the property be released from attachment, it must be taken to be an order against the claimant.

(10) [1888] 15 Cal. 521=15 I. A. 123 (P. C.).

The practice of notifying claims to intending bidders is not warranted by anything contained in the Code of Civil Procedure. It often leads to the depreciation in value of the property to be sold and is not calculated to advance the right of the claimant in any way. Consequently it seems to me that the procedure adopted by some of the subordinate Courts of notifying objection by claimants at the time of the sale without expressing any decision upon those objections should be discouraged. Although the practice is not a salutary one, I fail to see how this procedure can be construed as not having the force of giving a decision against the claimant. His right to raise the attachment must be deemed to have been negatived when the property was ordered to be sold without releasing it from attachment. Therefore in my opinion, an order on a claim petition which expresses no final judgment upon the right put forward but simply directs the sale after notifying the claim, is an order against the claimant and he is bound to institute a suit under Art. 11, Lim. Act. The history of the legislation has been reviewed in the judgment of the learned Chief Justice and I do not propose to deal with that question. I agree with the answers proposed.

S.N. R.K. *Answered in the affirmative.*

A. I. R. 1919 Madras 743

SADASIVA AIYAR AND SPENCER, JJ.

Mangalathammal — Defendant — Appellant.

v.

Veerappa Goundan — Plaintiff—Respondent.

Appeal No. 178 of 1918, Decided on 5th December 1918, against order of Temporary Sub-Judge, Madura, in Appeal Suit No. 16 of 1918.

Civil P. C (5 of 1908), S. 11 and O. 2, R. 2 —Suit for possession as landlord does not bar like suit as reversionery heir as titles are different and causes of action also differ.

The dismissal of a suit for possession of property wherein the plaintiff claims to be the defendant's landlord does not bar a subsequent suit by the plaintiff against the same party for possession as the reversionary heir of the last male owner, either under S. 11 or under O. 11, R. 2, Civil P. C., as the title put forward in the first suit based on the contractual relationship of landlord and tenant and the title put forward in the second suit as one of the heirs of the last male owner constitute different causes of action: 26 *Mad.* 760; 28 *Mad.* 406 *and* 8 *Mad.* 520 (*P. C.*); *Foll.* [P 745 C 1,2]

Per *Sadasiva Aiyar, J.*—One of the considerations to be kept in mind when considering the question what ground of attack ought to have been advanced in the first suit is whether under O. 2, R. 1, it was "practicable" to have framed the first suit by alleging the facts put forward in the second suit without the evidence respectively adduceable on the two sets of facts becoming mutually destructive. [P 746 C 2]

T. M. Krishnaswamy Aiyar for *K. Rajah Aiyar*—for Appellant.

K. V. Krishnaswamy Aiyar—for Respondent.

Spencer, J.—The question raised in this appeal is one of res judicata. The contesting parties are the plaintiff and his sister, defendant 3. The District Munsif dismissed the suit, holding that it was barred by reason of the decision in Original Suit No. 129 of 1913 by the appellate Court. The Subordinate Judge, who was the same Judge who decided the appeal in the other suit, held that his decision did not operate as res judicata in this suit and sent the case back to the District Munsif for deciding the other issues. In Original Suit No. 129 of 1913 (587 of 1912) the plaintiff sued as lessor to recover rent and to obtain possession of the suit house from defendant 3, setting up: (1) an arrangement whereby his own mother Nagammal and his two aunts Almelu and Mariayee, being unable to discharge the debts of their mother Chellayee and aunt Minakshi, agreed to let plaintiff 1 have the exclusive possession of the suit property on condition of his discharging those debts (2) a lease of the house from month to month to defendant 3. He alleged in the plaint a single cause of action which was the date of default in the payment of rent, 1st April 1912.

The District Munsif found for the plaintiff on the issue as to letting and against the defendant upon the independent title sent up by her. He did not decide the question as to the plaintiff's title, as he considered the issue unnecessary. He gave the plaintiff a decree for rent and possession. The Subordinate Judge found against the plaintiff both on the lease and on the exclusive title set up by him and dismissed the suit. In Original Suit No. 129 of 1916 the plaintiff sued as reversionary heir of his great grandfather, Thandavamurthi Goundan, to obtain (1) a declaration of his own and his cousin Palani Goundan's

(defendant 2's) title as reversioners, (2) possession of the house marked A in the plan together with mesne profits. He repeated in his plaint with some variations as to time and persons concerned the story about the family arrangement under which he was to discharge the debts of Chellayee and Minakshi. He alleged a partition in March 1910 (that is, prior to the institution of his prior suit but not mentioned in his plaint in that suit), whereby the family arrangement referred to above was re-opened and the family houses were divided into three shares and the house marked A was allotted to his share. He stated his causes of action for this suit as arising on three different dates, viz. 7th December 1908, when his grandmother's sister, Minakshi, who had a daughter's estate died, March 1910, when the alleged partition took place, and 2nd February 1916 when on appeal he lost his suit in the Subordinate Judge's Court.

As an alternative relief, he asked that if the partition alleged were found against, the family houses might now be divided and the one marked A might be given to him and put in his possession as his exclusive share.

The question whether the plaintiff is to be debarred from proceeding with the present suit must now be viewed from two different standpoints, namely, that of S. 11 and that of O. 2, R. 2, Civil P. C. While it may be confidently asserted that the plaintiff's right as a reversioner has never hitherto been "directly and substantially in issue" in any former suit, it may be argued contra with some reason that public policy does not permit a defendant to be harassed with a multiplicity of suits with all the ingenuity that may be employed in so framing a plaint as to dress up a stale claim in new colours. It may be urged that defendant 3 has successfully defeated an attempt to deprive her of possession of the property that she enjoys, only to find herself subjected to a renewed attack on the same property at the instance of the same party (her brother) who has already once failed on the verdict of three Courts. Expl. 4, S. 11, Civil P. C., lays down that any matter which might and ought to have been made a ground of defence or attack in a former suit shall be deemed to have been a matter substantially in issue in such suit. No doubt the plaintiff might in Original Suit No. 387 of 1912 have taken his stand upon his right to succeed to his great-grandfather's property upon the death of Minakshi, seeing that the woman died in 1908 and her sister Chellayee died in 1905. There would have been no objection under O. 2, R. 3, to such a joinder of the causes of action in the two suits. He might also have mentioned the partition of properties in March 1910 which he now puts forward. But can it be said that he ought to have done so?

To answer this question we must turn to O. 2, R. 2, which says that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. Now the Privy Council so long ago as 1885 had occasion in *Pittapur Raja* v *Suriya Row* (1) to construe the words of the corresponding section of the Code of 1859, which declared that "every suit shall include the whole of the claim arising out of the cause of action." They then observed that this did not mean that every suit should include every cause of action of every claim which the party had; and they applied the test cited from *Moonshee Buzloor Ruheem* v. *Shumshoonnissa Begum* (2) of seeing whether the claim in a new suit was in fact founded on a cause of action distinct from that which was the foundation of the former suit. The wording of the Code of 1908 upon this point is a little different from that of 1859, as it substitutes the words "whole of the claim which the plaintiff is entitled to make in respect of the cause of action" for the words "whole of the claim arising out of the cause of action." But O. 2, R. 2, Cl. (1), is identical in language with S. 43 of the Code of 1882, and in *Ramaswami Ayyar* v. *Vaythinatha Ayyar* (3) this Court adopted the interpretation of the Privy Council and applied it to S. 43 which was the law then in force. The learned Judges (Benson and Bashyam Aiyangar, JJ.) also dealt with S. 42, which was worded in practically the same language as O. 2, R. 1, of the present Code, and ran thus:

"Every suit shall, as far as practicable, be framed so as to afford ground for a final decision upon the subjects in dispute and so to prevent further litigation concerning them."

(1) [1885] 8 Mad. 520=12 I. A. 116 (P. C.)
(2) [1866 67] 11 M. I. A. 551=8 W. R. 3 (P. C.)
(3) [1903] 26 Mad. 760.

They observed that the object of this section was not to require the plaintiff to unite all the causes of action which he might have against the defendant in respect of the corpus or object matter of the suit, but merely to require him to bring forward his whole case as to the matter of litigation on the question of right involved in the suit. They explained the expression "the subjects in dispute" as signifying the jural relation between the parties to the suit, for the determination of which the suit is brought. If we take this decision to be good law (and I see no reason why we should dissent from it), it may be said that the jural relation of lessor and lessee, on which Original Suit No. 587 of 1912 was based, in respect of the house comprised in the present suit was quite different from the jural relation of owner by right of succession and trespasser which governs the suit of 1916. The dates when the causes of action arose in the two suits are also different. Of course a finding upon a certain issue or issues in one suit may be res judicata in a later suit between the same parties without the whole of the later suit being barred by res judicata.

I am therefore of opinion that the learned Subordinate Judge was right in remanding the suit for disposal on the issues other than issue 3, which was upon the question of res judicata. This appeal should be dismissed, and each party should be directed to bear his own costs in the appeal.

Sadasiva Aiyar, J.—I agree but I wish to express in my own words my opinion on the legal question involved. Those questions are of great difficulty and were argued strenuously on both sides. In the plaint in the Suit No. 129 of 1913 of the Additional District Munsif's Court of Madura (587 of 1912 of the Principal District Munsif's Court) the plaintiff stated that his grandaunt Minakshi died "two yeurs ago" (see para. 5, Ex. 1, dated 21st October 1912. That means that she died about October 1910. Para. 7 of that plaint states that the plaintiff's mother and her two sisters entered into some arrangement with the plaintiff (ignoring evidently defendants 1 and 2 and the plaintiff's brother Pachaimuthu) about paying the debts of the plaintiff's grandaunt Minakshi and his grandmother Chellayee. This implies that agreement was after Minakshi's death in about October 1910 and that she was not a party to it.

In the plaint in the present Suit No. 129 of 1916 the plaintiff does not state when his grandaunt Minakshi died but says (paras. 7 and 8 of the plaint) that, after the death of Minakshi and in March 1910, a division took place between defendant 1, defendant 2 and the plaintiff re-opening a previous arrangement between defendants 1 and 2 and the plaintiff and Minakshi. Thus Minakshi, according to the present plaint, had died before March 1910 and the family arrangement set up in this suit was between her and the plaintiff and defendants 1 and 2 during her lifetime (and not as between the plaintiff and the plaintiff's mother and the plaintiff's two aunts as set up in the former suit). The cause of action in the former suit was substantially based on the contractual relationship of landlord and tenant between the plaintiff and defendant 3 whereas in the present case, it is based on the alleged joint title of the plaintiff and of defendants 1 and 2 and on a division between them in March 1910. Having regard to the preponderance of the weight of authority among the many decisions of this Court, of which only *Ramaswami Ayyar* v. *Vythinatha Ayyar* (3) and *Prambath Manakkal* v. *Puthengattil Moosamu* (4) need be quoted, the former dissenting from *Guddappa* v. *Tirkappa* (5) and both overruling *Rangasami Pillai* v. *Krishna Pillai* (6) in favour of the view that the explanation to the res judicata section as regards "grounds of attack" does not affect a plaintiff where he sues on a different cause of action and that a suit based on the contractual relationship of tenancy is based on a different cause of action from that based on title, I am constrained with reluctance to hold that the present suit not barred by res judicata by the decision in the former suit.

As regards the question whether the expression "cause of action" will include the facts which were available to the plaintiff to put forward on the date of the previous suit, which however he so omitted to put forward in the first suit and which he had put forward for the first time in the second suit in order to estab-

(4) [1905] 28 Mad. 466.
(5) [1901] 25 Bom. 189.
(6) [1899] 22 Mad. 259

lish substantially the same title on which the first suit was brought, the better opinion is that the expression will generally include such facts. But the decided cases disclose that considerable difference of opinion frequently results when learned Judges proceed to consider whether the title set up in the second suit and sought to be established by a particular set of facts is substantially the same as the title set up in the first which was sought to be established by another set of facts and whether hence the cause of action in the two suits is the same. For instance in *Arunachalam Chetty* v. *Meyyappa Chetty* (7) (decided by Subramania Aiyar and Davies, JJ.), a minor who failed in the first suit to set aside a compromise decree passed during his minority on the allegation of fraud on the part of his guardian, was held precluded from bringing a second suit on the new allegation that the decree was passed without obtaining the consent of the Court. But in *Ramaswami Ayyar* v. *Vythinatha Ayyar* (3) the learned Judges, Benson and Bashyam Aiyangar, JJ., disapprove of the decision in *Arunachalam Chetty* v. *Meyyappa Chetty* (7): see p. 774 (of *I. L. R. 26 Mad.*) In *Masilamania Pillai* v. *Tiruvengadam Pillai* (8), Sir Arnold White, C. J., and Miller, J., differed on the question whether the second suit based on a claim to be the next reversioner, on the allegation that the plaintiff was the sister's son's son of the last male owner, was barred by the dismissal of a former suit in which also the plaintiff had claimed to be the next reversioner but traced his title as the alleged adopted son of the brother of the last male owner. Owing to such difference of opinion, the case went before the present learned Chief Justice (then Wallis, J.) and he held that the title as reversioner was the substantial cause of action in both suits and he decided that the second suit was barred. I shall quote some instructive observations from that judgment:

"Apart altogether from authority, it appears to me that, in a suit to establish a claim as reversioner, that claim should be held to be the subject in dispute within the meaning of the section. I should not omit to observe that the provisions of S. 42 as to the framing of suits are only to be applied 'as far as practicable,' and if the plaintiff would have been embarrassed in the former suit by relying not only on his alleged adoption by the divided brother of the deceased but also on his descent from the sister of the deceased, it may well be that he would not have been bound to rely on both grounds. This would I think be the case if the evidence in support of one ground might be destructive of the other grounds. But there could be nothing of this kind in the present case, and I do not think there is anything unreasonable in holding that the plaintiff in the former suit ought to have relied upon his descent from the deceased's sister as well as upon the adoption, so that if proof of the adoption failed, he might still establish his right as reversioner on the ground of this descent and prevent further litigation regarding it. The judgments of the learned Judges who made the reference do not expressly refer to S. 42, Civil P. C., and although *Ramaswami Ayyar* v. *Vythinatha Ayyar* (3) is cited it is, I think, possible that the attention of the learned Judges was not specially directed to the observations as to the scope of S. 42 which are to be found in different parts of a very lengthy judgment. If I had been obliged to form a conclusion upon the earlier authorities, and apart from S. 42, I should have found the task one of great difficulty."

Section 42 of the old Civil P. C. corresponds to the present O. 2, R. 1. One of the considerations then to be kept in mind when considering the question what grounds of attack ought to have been advanced in the first suit seems to be whether under O. 2, R. 1, it was "practicable" to have framed the first suit by alleging the facts put forward in the second suit without the evidence respectively adduceable on the two sets of facts being mutually destructive.

Mr. T. M Krishnaswami Aiyar for the appellant (if I understood him aright on his subtle points) argued that even where the facts newly alleged in the second suit may be destructive of the facts alleged in the first suit, if the title can be grasped by the judicial mind as substantially the same in both suits, the second suit would be barred as res judicata and prohibited under O. 2, R. 1. He put forward the following or a similar illustration: *A* has two sale deeds (say dated respectively in May and June 1910) conveying to him the same property. One was executed by *B* and the other by *C*; *A* was doubtful whether *B* or *C* was the owner and so he got sale deeds from both. He then sued trespasser *D* on the strength of his sale deed from *B*. That suit was dismissed as *B's* title was found against. Can *A* then sue *D* again on the strength of his sale deed from *C*? Mr. Krishnaswami Aiyar argued that *A* cannot do so and that he ought to have put forward his case under both the sale deeds in the

(7) [1898] 21 Mad. 91.
(8) [1908] 31 Mad. 385.

first suit, though the title of *B* rested on proof of facts inconsistent with those on whose proof *C's* title had to be established. I think that I need only say that the balance of the authorities seems to be in favour of the view that the second suit is maintainable in the above illustration (by Mr. T. M. Krishnaswami Aiyar), though in one sense the jural relation in the two suits between the two parties is the same, namely, the plaintiff as owner and defendant as trespasser. I do not however consider it necessary to consider the question in detail because in the present case the title put forward in the first suit (based on the contractual relationship of landlord and tenant) and the title put forward in the present suit (the title as one of the three heirs of the last male owner) constitute different causes of action, according to several precedents of this Court binding upon me,

Having thus expressed my concurrence with the conclusion of the lower appellate Court on issue 3 in the suit, namely, whether the suit itself is barred by res judicata, I wish to point out before getting rid of this appeal that at least one other issue ought to have been framed by the District Munsif, namely, whether the finding in the former suit against the plaintiff in respect of his exclusive title to the ownership of house site A (see para. 4, Ex. 4) is res judicata as between the plaintiff and defendant 3 and against the plaintiff in the present suit. The distinction between a finding on an issue being res judicata and the suit itself being barred as res judicata must be clearly kept in mind, and this new issue must also be decided in the remand hearing before the District Munsif. I do not wish to express any opinion on this new issue at this stage. In the result I agree that the appeal ought to be dismissed. The parties will bear their respective costs of this appeal.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 747

SPENCER AND KRISHNAN, JJ.

Badagala Jogi Naidu—Plaintiff—Appellant.

v.

Bendalam Papiah Naidu and *others*—Defendants—Respondents.

Second Appeal No. 845 of 1916, Decided on 22nd April 1918.

(a) Hindu Law—Alienation—Father—Antecedent debt—Mortgage of joint property by father—Subsequent mortgage in renewal of prior one—Sons are not liable.

A prior mortgage over joint family property created by a Hindu father cannot be treated as an antecedent debt for the purpose of binding his sons' interest in co-parcenary property under a subsequent mortgage between the same parties.

[P 749 C 2]

(b) Hindu Law—Alienation—Father—Antecedent debt—Meaning explained.

A debt contracted by the father on the security of the joint family estate cannot be treated as a debt of the father within the meaning of the doctrine as to antecedent debts. The doctrine must be restricted to cases of antecedent debts borrowed on the father's sole responsibility with no obligation on the joint family or its properties: *A. I. R.* 1917 *P. C.* 61, *Foll.*, and 43 *I. C.* 225, *Cons.* [P 751 C 1]

P. Somasundaram and *V. Subramanya Pantulu*—for Appellant.

V. Ramesam—for Respondents.

Judgment.—It is not improbable that the plaintiff's omission to ask questions of his witnesses to prove that the signatures of the persons executing Ex. B were in the handwriting of these persons and his omission to prove the handwriting of the executants and attestors of Ex. C were due to oversight. The District Judge appears to have granted the plaintiff's application to examine further witnesses, when it was made, and his judgment does not contain anything to show that it was subsequently refused at the time of hearing the appeal.

We must call for findings on the questions: (1) Whether the mortgage deeds Exs. B and C, are genuine? and (2) whether Ex. A is wholly or partially binding on defendant 2. It would be binding on him if the money was borrowed by the father for the necessary purposes of the family or if the mortgages were executed by the father to discharge an antecedent debt: *Sahu Ramchandra* v. *Bhup Singh* (1). The onus of proving the whole of this issue will lie on the plaintiff as defendant 2 was not a party to these documents. Fresh evidence may be admitted. The finding will be submitted in two months, and ten days will be allowed for filing objections.

Findings.—The suit has been remanded for findings on the following issues:

(1) Whether the mortgage-deeds, Exs. B and C are genuine? (2) Whether Ex. A is wholly or partially binding on defendant 2. Both parties have examined

(1) A. I. R. 1917 P. C. 61=39 All. 437=39 I.C. 280=44 I. A. 126 (P.C.).

witnesses at the remand hearing. Plaintiff now says that he saw the mortgagors sign Ex. B and that he can identify their signatures on Ex. C. P. W. 3 is the son of the man who wrote Ex. A, B and C and he identifies his father's writing and signature. P. W. 5 is the son of Enni Appanna, whose name appear among the witnesses who attested Ex. B, and he identifies his father's signature and says that he was present himself and saw Ex. B executed though he did not attest it. P. W. 2 is a retired postman who attested Ex. C and says that he saw the mortgagors sign, and P. W. 4 who is related to all the defendants says that the signatures of the mortgagors on Exs. B and C are genuine. The only evidence on the other side is that of defendant 2, who says that the signatures of the mortgagors on Exs. B and C are not genuine. The evidence now on record is certainly sufficient to prove Exs. B and C, if it be true and the question is whether it should be believed. There is little or nothing to be said against plaintiff's witnesses, but it has been argued: (1) that the circumstances show that the deeds were forged to create a title for defendants 3 and 4 to the mortgaged properties; (2) that the endorsement of discharge on Ex. C was found by my predecessor to be a forgery; (3) that the mortgagees under Ex. C were not examined; and (4) defendant 3 was nat examined to prove that he had executed Exs. B and C. The first argument is based partly on the evidence of D. Ws. 2 to 4, who were examined to prove that the mortgaged property belonged to defendants 1 and 2 and that plaintiff managed their property for a number of years because defendant 1 was incompetent, and partly on recitals in Exs. A, B and C about the property.

The defence witnesses are clearly interested, and I cannot see that the recitals in the mortgage-deeds afford any foundation for defendant's case that there has been a long series of forgeries. In Exs. B and C the recital is that the property had been in the possession of an aunt of the fathers of defendants 1 and 3 and that she had given it to defendant 1's father, or (as in Ex. C) that it had devolved on him by means of adoption, and the recitals would surely have been very different if these deeds had been forged with the object of creating a title for the father of defendant 3. Besides this there is the all important fact that defendant 1, who was alive at the time of the original trial, was not put into the witness box to deny his signatures on Ex. A and B. Defendant 2 stated at one time before the Subordinate Judge that defendant 1 did manage their property. The plea of his incompetency was not supported by any independent evidence, and even the witnesses who were examined did not speak of him as an idiot.

No proof has been offereed of the endorsement on Ex. C, but the omission of this endorsement in the public copy given on 25th May 1915 is not conclusive proof that this endorsement is a forgery. It is insignificant in appearance and position, and it has been omitted in the translation appearing in the printed book. In any case I think there is clear proof that Ex. B is genuine and Ex. B recites a debt due to the mortgagee of Ex. C. I am inclined to think that Ex. C is genuine too. Two circumstances on which my predecessor laid some stress, viz. that plaintiff did not retain the paddus and that no record was made of payments said to have been made under Ex. A, may be explained by the close relationship between the parties, and I have taken these circumstances into consideration in forming an opinion about Exs. B and C. My finding on issue 1 is that Exs. B and C are genuine.

2. Issue 2 is "whether Ex. A is wholly or partially binding on defendant 2," and it is stated in the referring order that

"It would be binding on him if the money was borrowed by the father for necessary purpose of the family or if the mortgage were executed by the father to discharge an antecedent debt: *Sahu Ram Chandra* v. *Bhup Singh* (1)."

In the case quoted the words "antecedent debt" have been defined as meaning "an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded, or supposed to be available by such estate."

and in another passage their Lordships speak of the father's power to bind his son as being confined to cases

"where the father's debts have been incurred irrespective of the credit obtainable from immovable assets which do not personally belong to him, but are joint family property."

The consideration for Ex. A was made up of Rs. 2,000 required to discharge Ex. B, and of Rs. 1,000 said to have been borrowed from time to time. Money was borrowed under Ex. B to discharge Ex. C.

a mortgage-deed held by a third party, and Ex. C is said to have been executed in discharge of yet another mortgage-deed—Ex F. In all these cases money was borrcwed on the security of the family property, and if this is one of the tests to be applied in deciding whether a debt is an antecedent debt or not, the Rs. 2,000 secured by Ex. A must be held not to be an antecedent debt. It has been argued that a different interpretation has been put on this case by the Madras High Court, or rather that the Madras High Court has held in *Vinjanampati Peda Venkanna* v. *Vad amannati Sreenivasa Deeksnatulu* (2) that this ruling cannot be held to apply in Madras, but the question decided in *Vinjanampati Peda Venkana* v. *Vadlamannati Sreenivasa Deekshatulu* (2) was rather different and did not depend on the meaning of the words "antecedent debt." I think I am bound to follow the Privy Council case, and as there is no proof of necessity apart from the fact that there was a prior debt due to plaintiff himself, and as plaintiff being a near relation, should be in a position to prove necessity, if any existed, I find that Ex. A is not binding on defendant 2 to the extent of Rs. 2,000 of the original consideration.

The balance according to the terms of Ex. A, was borrowed at various times for household expenses and to pay Government assessment, but there is no evidence that money was really required for these purposes, and according to defendants' evidence which has not been contradicted in this respect the family lands yielded an ample income. P. W. 2 said that he saw money paid on two occasions, and there is no other evidence to show when this Rupees 1,000 was advanced, but even if it be assumed that the money was advanced before the mortgage-deed was executed, I doubt whether the debt can be treated as an antecedent debt coming within the terms of the very restricted definition given by the Privy Council. If money is borrowed ostensibly for household expenses and to pay Government assessment the debt can hardly be said to have been incurred wholly apart from the ownership of the joint estate. My finding on issu 2 is that Ex. A is not binding on defendant 2.

After the return of the findings of the lower appellate Court upon the issue referred for trial.

Spencer, J.—We must accept the learned District Judge's findings of facts, (1) that Exs. B and C are genuine; (2) that family necessity has not been proved for the debts secured by Ex. A, apart from the fact there was a prior debt due to the plaintiff secured by the previous instruments (Exs. B and C) executed by defendant 1 and defendant 3 and their fathers which mortgaged the family property.

On the question of law, which is whether a prior morgage over joint family property created by a father can be treated as an antecedent debt for the purpose of binding his sons' interest in co-parcenary property in a subsequent mortgage between the same parties, I think we are bound to give the fullest effect to the words of Lord Shaw in *Sahu Ram Chandra* v. *Bhup Singh* (1). If the arguments advanced before their Lordships are read with what preceded and followed this expression of the Judicial Committee's opinion, there cannot be any doubt as to what was meant by the words

"an obligation not only antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate."

If the law were different from what it is here pronounced to be, it would be open to a father to create a mortgage over the joint estate of himself and his sons one day and the next day to execute a second mortgage over the same property citing the first mortgage as an antecedent debt to make the transaction binding on the sons' interest. The effect would be to give the sanction of law to the very evil which the Privy Council seek to avoid when they speak of the undue and improper extension of this exception in respect of antecedent debts to the manager's power of mortgage. The effect of the decision in *Sahu Ram Chandra* v. *Bhup Singh* (1) has been considered in a recent decision of this High Court in *Vinjanampati Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu* (2). The question that arose in that case was whether a creditor could proceed against the son's share during his father's lifetime to recover a debt upon a promissory note executed by the father after partition in renewal of a

(2) [1918] 41 Mad. 186=48 I. C. 225.

note executed before partition. It was held that the Privy Council decision was not intended to overrule the whole current of authorities on this topic. The learned Chief Justice observed that the latest Privy Council decision did not question a creditor's right to bring the son's interest to sale for an antecedent debt. The new definition of what is an antecedent debt was not discussed in his judgment or in that of Kumarasami Sastri, J., who sat with him. There was nothing said, nor could there be, to diminish the authority of this pronouncement by the Privy Council, and even if anything in earlier judgments of that tribunal can be cited as being difficult to reconcile with this we should have to follow the more recent. I consider that the appeal must be allowed to the extent of giving the plaintiff a decree in the usual mortgage form, including costs of this suit throughout, against the share of the deceased defendant 1 in the hands of his son, defendant, 2, allowing 6 months for payment and that as regards defendant 2's share the appeal must be dismissed with costs and a decree will be made accordingly.

Krishnan, J.—The learned District Judge has now found on issue 1 that the prior mortgage deeds, Ex. B and C, are genuine, and on issue 2 that Ex. A is not binding at all on defendant 2. The finding on issue 1 is not objected to and must be accepted. The appellant has however contested the finding on issue 2 before us and we must consider it. Defendant 2 is not a party to Ex. A; his share in the joint property mortgaged is sought to be made liable on the ground that his father executed Ex. A, and that the consideration for it is binding on him. The consideration for Ex. A as recited in it consists of two parts. viz. Rs. 1,000 said to have been borrowed by the father at various times to pay household expenses and the Government assessment on the joint estate and Rs. 2,000 to pay off the prior mortagage on the same property under Ex. B. It is now found that there was no necessity to borrow either of the sums. Ex. B was executed for paying off the mortgage under Ex. C and that again to pay off the mortgage under Ex. F. No evidence was given to show that there was any necessity to borrow under Ex. F; and, therefore Ex. A also is not shown to be justified by necessity. This finding that Ex. A was not proved to have been executed for any necessary purpose of the joint family was not seriously contested before us. The appellant has based his claim to make Ex. A binding on defendant 2 on the ground that it was executed by his father for "antecedent debts." That a mortgage interest can be created on joint property by the father alone, so as to bind the son, to pay off his antecedent debts is not disputed. But the question is, whether the consideration for which Ex. A was executed can be held to be "antecedent debts". As regards the Rs. 1,000 it is not clear whether there was a debt at all before Ex. A, and whether the moneys were not paid as consideration for the mortgage itself; the alleged paddus were not produced at all. We must take it that plaintiff has not established the existence of any debts for Rs. 1,000 antecedent in time to and dissociated in fact from the mortgage sued on and therefore as laid down by the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1) his claim to enforce Ex. A on that ground against the son to the extent of Rs. 1,000 fails. The question, whether the previous mortgages should not be treated as antecedent debts is a more difficult one. As stated already Ex. A was partly to pay off Ex. B, and that again to pay of Ex. C which was to pay off Ex. F. They are all mortgages on the same joint family property; Exs. A and B were in favour of plaintiff; but Exs. C and F were in favour of third parties.

If any of these deeds created a valid charge on the son's share as having been executed for an antecedent debt itself, the subsequent ones no doubt will also be binding to the extent that they were executed for paying off such a valid charge. It is not shown that there was any antecedent debt to pay off which Ex. F was executed; but the argument has been that each prior mortgage was an antecedent debt for the one next in time. This argument must fail under the recent ruling of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1). Their Lordships make it clear that a debt borrowed by the father on the security of the joint family estate cannot be treated as a debt of the father within the meaning of the doctrine in question. They say:

"In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold, or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made ... to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed as in the state of athorities it must be, it appears to their Lordships to apply, and to apply only, to the case where the father's debts have been incurred irrespective of the credit obtainable from immovable assets which do not personally belong to him, but are joint family property."

Their Lordships observed in an earlier part of their judgment:

"This (that is, the doctrine of the validity of mortgages or sales by the father for antecedent debts against his sons) being an exception from a general and sound principle, their Lordships are of opinion that the exception should not be extended and should be very carefully guarded."

There cannot be any doubt on their language that they meant to restrict the doctrine to cases of antecedent debts borrowed on the father's sole responsibility with no obligation on the joint family or on its properties. We are bound to follow this expression of opinion which is quite clear, as pointed out by Mr. Ramesam, and we cannot consider any arguments about its correctness.

The lower Court's finding that Ex. A is not binding on defendant 2's share of the property must therefore be accepted. Defendant 1, the father, being himself the executant of Ex. A, the liability of his half-share in the plaint property is not disputed. His death after the decree in the District Court cannot in any way affect the liability. Recitals in Ex. A are good evidence against its executant and as there is no proof that such recitals are false, the claim must be taken to be proved against the father. There must be a mortgage decree as prayed for, with the variation that only half the plaint property will be made liable.

I agree to the order proposed by my learned brother.

S.N./R.K. *Appeal allowed.*

A I. R. 1919 Madras 751

PHILLIPS AND KRISHNAN, JJ.

Divakar Singh—Plaintiff—Appellant.

v.

A. Ramamurthi Naidu—Defendant—Respondent.

Second Appeal No. 666 of 1917, Decided on 15th March 1918, against decree of Dist. Judge, Guntur, in A. S. No. 154 of 1916.

(a) Criminal P. C. (1898), S. 165—General search of stolen property is not allowed.

Section 165 does not authorize a general search for stolen property. A search for specific stolen property is however allowed by the section: *A. I. R.* 1914 *Cal.* 256, *Foll*; 17 *I. C.* 76, *Dist.* [P 751 C 2]

(b) Criminal P. C. (1898), Ss. 165 and 173—Investigation by police officer after submission of report is legal.

The number of investigations into a crime that can be made by the police is not limited by law, and the police after submitting a report of an investigation have power to make further investigation on receipt of further information. [P 751 C 1]

V. Ramadoss and *V. Rathnasomanathan*—for Appellant.

C. Narasimhachariar—for Respondent.

Judgment.—Upon the finding that the Sub-Inspector of Guntur conducted the search 'there can be no question of defendant's jurisdiction over the place searched. The finding is objected to on the ground that no specific issue was raised on the point, but the plea that the defendant did not himself conduct the search, but only searched the house as the Sub-Inspector's assistant, was specifically raised in the written statement and comes within the scope of issue 1. Even otherwise it is questionable whether defendant, as investigating police officer, was not attached to Guntur police station by the orders of his superiors, but this point does not seem to have been considered. The contention chiefly relied on by Mr. Ramadoss is that the search was wholly illegal inasmuch as S. 165, Criminal P. C., does not give authority to search for stolen property. This is a somewhat startling proposition put in this way, and it is based on the rulings in *Baijrangi Gope* v. *Emperor* (1) and *Pran khang* v. *Emperor* (2). These two cases were considered in *Bisser Misser* v. *Emperor* (3), where it was held that they were only authority for the proposition

(1) [1911] 38 Cal. 304=9 I. C. 64.
(2) [1912] 17 I. C. 76.
(3) A I. R 1914 Cal. 256=41 Cal. 261=20 I. C. 229.

that S. 165, Criminal P. C., does not authorise a general search for stolen property, as opposed to a search for specific stolen property. This latter form of search, which is the form in the case now under our consideration, was expressly held to be legal and it was remarked that its legality had never been questioned since the case decided in *Mahomed Jackariah and Co.* v. *Ahmed Mahomad* (4). We agree in their view and hold that the present search was not illegal. It has been found to have been made bona fide and therefore plaintiff is not entitled to damages.

Another contention is put forward that when a report of investigation has been sent in under S. 173, Criminal P. C., the police has no further powers of investigation, but this argument may be briefly met by the remark that the number of investigations into a crime is not limited by law and that when one has been completed another may be begun on further information received. The second appeal is dismissed with costs.

S N /R K. *Appeal dismissed.*

(4) [1888] 15 Cal. 109.

A. I. R. 1919 Madras 752

PHILLIPS AND KUMARASWAMI, JJ.

Rudravaram Venkatasubbiah—Plaintiff—Appellant.

v.

Rudravaram Venkata Seshaiya and *others*—Defendants—Respondents.

Second Appeal No. 1549 of 1917, Decided on 16th July 1918, against decree of Dist. Judge, Cuddapah, in Appeal Suit No 33 of 1915.

Civil P. C (1908), O 21, Rr. 54 and 57—O. 38, Rr. 5, 6 and 7 and 11—Attachment ordered before judgment but effected after judgment is not nullity—R. 57 does not apply to attachment under O. 38, R. 5.

An attachment which is ordered in a suit before judgment cannot be treated as a nullity merely because as a matter of fact, the attachment is not actually completed until after judgment.

Order 21 R 57 has no application to attachments ordered under O. 38, R. 5: *A. I. R.* 1914 *Mad.* 312; *A I. R.* 1915 *Mad.* 386 and 14 *I. C.* 345, *Foll.*, and 33 *Cal.* 639, *not Appr.*

[P 753 C 2]

Per *Phillips, J.*—When a Court makes an order under O 38, R. 6 that order cannot be deprived of all force by the mere failure of the executive officers of the Court to carry it out before the decree is passed. [P 753 C 2]

Per *Kumaraswami Sastri, J.*—There is nothing in O. 38, Rr. 5 to 12 requiring that the actual attachment in pursuance of the order directing conditional attachment should be made before the passing of the decree. Attachment of the property in the manner prescribed by O. 21, R. 54, is a purely ministerial act. Any delay of the officers of Court in effecting the attachment should not prejudice the decree-holder and the validity of the order of attachment under O. 38, R. 5, should not depend on the date when it is actually effected. An attachment ordered before judgment invalidates an alienation made after the property is actually attached in pursuance of the order, even though the actual attachment was made after the passing of the decree.

[P 754 C 1]

N. R. K. Thathachariar and *K. P. Ramakrishna Aiyar*—for Appellant.

B. Somayya and *B. Ramaswamiah*—for Respondents.

Phillips, J.—In this case defendant 1 attached the plaint property before judgment in connexion with a suit filed against defendant 3, viz., Original Suit No. 137 of 1910. The plaintiff subsequently purchased the property. The question is whether at the time of the plaintiff's purchase the property was subject to the attachment by defendant 1. Two points are raised now: (1) that the original attachment was invalid as having been completed after the decree in the suit was passed; and (2) that even if the attachment was valid, it became an attachment in execution when the decree was sought to be executed and ceased to exist under the provisions of O. 21, R. 57, Civil P. C. So far as the second contention is concerned, the matter is practically concluded by authority: vide *Bavuddin Sahib* v. *Arunachalla Mudali* (1), *Ganesh Chandra Adak* v. *Banwari Lal Roy* (2) and *Kosuri Suraparaju* v *Mandapaka Narsimham* (3). No doubt in *Sewdut Roy* v. *Sree Canto Maity* (4) there is an observation by Woodroffe, J., that the attachment before judgment on application to execute the decree becomes attachment in execution. Except for that one observation, I can find no other authority in support of the proposition that the nature of the attachment is altered by the filing of an execution application. I am not at all inclined to adopt this view in opposition to the authority of the cases above cited. In support of the first proposition, reliance is placed on the language of O. 38, R. 11, Civil P. C., which is as follows:

"Where property is under attachment by virtue of the provisions of this order and a decree is sub-

(1) A. I. R 1914 Mad. 312=22 I. C. 351.
(2) 1912] 14 I. C. 345.
(3) A I. R. 1915 Mad. 386=26 I. C. 81.
(4) [1906] 33 Cal. 639.

sequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property."

No doubt under this rule it would appear at first sight that the attachment must have been completed before the decree was passed in order to give a party the benefit of the rule, that is to say the benefit of not being obliged to apply for re attachment of the property, when he wishes to execute his decree. In the present case it is not necessary to consider whether re-attachment was necessary and we need only consider whether the property was validly attached under O. 38. Attachment was applied for and an order of attachment was passed before judgment was actually pronounced. But the attachment was not effected until a few days after the date of the decree. This being so, can it be said that there was any attachment before judgment? No doubt the order was passed under R. 6 (1) before the decree, and if the order had been carried out at once, there could have been no doubt in the matter. Can it be said that the fact that there was delay in carrying out the order of the Court has deprived the Court of its powers to make such order effectual? The scope of O. 38 is unquestionably limited to attachment before judgment, and all its provisions are set forth with a view to securing the plaintiff in the suit up to the time that he obtains a decree. It would be only by applying this limited scope of the order to the present case that we would be justified in ruling that the attachment actually effected after the decree was ineffectual and void. It has been held in *Sivakolundu Pillai* v. *Ganapathi Iyer* (5) that when an application for renewing attachment under S. 46, Civil P. C., has been put in before the expiry of the two months described in the proviso to that section, and an order of the Court has not been passed until after the two months expired, the date of the application should be deemed to be the date of the order extending time.

On the other hand the appellant's vakil relies on *Venkatachelapathirao* v. *Kameswaramma* (6), deciding that the written order of the appellate Court staying execution does not take effect from its date but only from the date of its communication to the executing Court. Neither of these cases is really directly in point, and the question has to be decided on general principles. It seems to me that when a Court makes an order under O. 38, R. 6, Civil P. C., that order cannot be deprived of all force by the mere failure of the executive officers of the Court to carry it out before the decree is passed. The attachment, when effected, is an attachment made in pursuance of an order to attach before judgment and must be treated as an attachment before judgment and not as a nullity merely because, as a matter of fact, the attachment is not completed until after judgment. To adopt the opposite view would be to allow a formal judicial order to be upset by the negligence or default of a subordinate ministerial officer. The language of O. 38, R. 11, is also in favour of my view, for it does not refer to "an attachment made before judgment," but to an attachment "by virtue of the provisions of this order," and an attachment made in pursuance of an order under R. 6, could be such an attachment in spite of its being completed after decree. I find therefore that the attachment in the present case was a valid attachment. The claim for damages is certainly premature. The second appeal is accordingly dismissed with costs.

Kumaraswami Sastri, J. — The plaintiff is the appellant. Defendant 1 instituted a suit (Original Suit No. 137 of 1910), against defendant 3, and on the same date applied for attachment before judgment. Notice was directed to the defendant and interim attachment was ordered under O. 38, R. 5, Civil P. C., on 17th February 1910. The attachment was actually effected on the property on 26th February 1910. Meantime a decree was passed in the suit on 21st February 1910. After decree the decree-holder applied for execution on 3rd January 1912 and on 10th July 1912, but both the applications were dismissed for default of prosecution. The plaintiff herein purchased the property on 27th April 1911 and sued for a declaration that the decree in Original Suit No. 137 of 1910, was satisfied and was unexecutable and in the alternative for damages. The lower Courts dismissed the plaintiff's suit on the grounds, inter alia, that the purchase of the plaintiff, being subsequent to the attachment, was invalid against the decree-

(5) [1916] 34 I. C. 302.
(6) [1918] 41 Mad. 151=43 I. C. 214.

holder and that the suit for damages was premature. As regards the first point it is contended by the appellant that the attachment having been actually effected after passing of the decree, it is invalid and that, even if valid, the dismissal of the execution application for default put an end to the attachment under O. 21, R. 57, Civil P. C. I am unable to agree with either of the contentions. There is nothing in O. 38, Rr. 5 to 12, (which deal with attachments before judgment) requiring that the actual attachment in pursuance of the order directing conditional attachment should be made before passing of the decree. R. 5 empowers the Court to direct conditional attachment of the property specified in the application, when at any stage of the suit it is satisfied that the defendant is about to dispose of the whole or any part of his property or is about to remove it from the local limits of the Court's jurisdiction. An order duly passed under R. 5 cannot be ipso facto vacated by reason of the decree supervening before actual attachment is effected in manner specified by R. 54, O. 21, unless there is something in Rr. 5 to 12 to that effect. It is contended that R. 11, O. 38 refers to an attachment and subsequent decree and that by implication it negatives the validity of an attachment made subsequent to decree in pursuance of a previous order under R. 5. All that R. 11 states is that it shall not be neceesary to re-attach, if before decree has been passed property has been attached in pursuance of an order under R. 5.

The section is only an enabling one and relieves the decree-holder from going over the same process again after decree if he has attached the property while the suit is pending. It is unnecessary to consider whether, if the attachment ordered before was made after decree the section would apply so as to dispense with attachment after the filing of the execution application. The invalidity of the attachment order under R. 5, effected after decree, is one thing and the necessity for re-attachment owing to the terms of R. 11 not having been complied with is another. The case is one of first impression and I think there is neither reason nor authority for holding that the mischief to prevent which R. 5 was enacted is nonetheless because of the passing of a decree subsequent to the order. It is argued that the party could re-attach, but a re-attachment would take some time (especially if the property is situate at some distance from the Court) and should the order under R. 5 cease to have any effect immediately on the passing of the decree, there is nothing to prevent alienation between the date of the decree and the date when the attachment is actually effected in manner specified by O. 21, R. 54, as under S. 64 the attachment invalidates an alienation only when the alienation is after the actual compliance with the provision of R. 54. Attachment of the property in manner prescribed by O. 21, R. 54, is a purely ministerial act. Any delay of the officers of Court in effecting the attachment should not prejudice the decree-holder and the validity of the order of attachment under R. 5, O. 38, should not depend on the date when it is actually effected. I am of opinion that an attachment ordered before judgment invalidates an alienation made after the property is actually attached in pursuance of the order, even though the actual attachment was made after the passing of the decree.

It is argued that the dismissal of the execution application puts an end to the attachment before judgment and reliance is placed on an observation of Woodroffe, J., in *Sewdut Roy* v. *Sree Canto Maity* (4), to the effect that on an application for execution being filed

> "the attachment before judgment enures and becomes upon and by virtue of the application an attachment in execution."

The question whether R. 57, O. 21, which expressly refers to cases where property is attached in execution of a decree, can be extended to cases of attachment before judgment merely by reason of the provision of R. 11, O. 38 dispensing with the necessity for re-attachment was considered by Sadasiva Aiyar and Spencer, JJ., in *Bavuddin Sahib* v. *Arunachalla Mudali* (1), and we agree with them in holding that R. 57, O. 21 has no application to attachments effected under R. 5, O. 38. A similar view was taken in *Kosuri Suraparaju* v. *Mandapaka Narasimham* (3). As regards the claim to damages, it is premature as the decree has not been executed and plaintiff did not at the date of the suit suffer any damages. The decree may

never be executed by sale of the property purchased by plaintiff, and there is no reason why he should get the consideration paid by him by way of damages and also keep the property. It is open to him to pay the amount due on the decree in respect of which the property is attached and recover it by proper proceedings, but his case is that the decree has been satisfied. The second appeal fails and is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A I. R. 1919 Madras 755(1)

SADASIVA AIYAR AND NAPIER, JJ.

Kutti Chami Moothan and *others*—Accused—Petitioners.

v.

Rama Pattar—Complainant—Opposite Party.

Criminal Revn. No. 56 of 1918 and Criminal Revn. Petn. No. 43 of 1918, Decided on 17th June 1918, to revise judgment of Court of Sub-Divl. Magistrate, Palghat Divn. in Cri. Appeal No. 113 of 1917.

Penal Code (1860), S. 295.—'Defile' is not confined to making dirty but also includes ceremonial pollution-- Entry of members of Moothan caste into precincts of temple open to non-brahmins does not amount to defiling'.

The word "defile" in S. 295, in not confined to the idea of making dirty but is also extended to ceremonial pollution, which however must be proved. Where the accused, who belonged to the Moothan caste in Malabar and claimed the status of Vaisyas, entered into the Nallambalam of a temple which was open to non-Brahmins:

Held: that their act did not amount to "defiling" the temple within the meaning of S. 295. [P 755 C 2]

K. P. Laksmana Rao, for *Doraiswamy Aiyar*—for Petitioners.

K. P. Kesava Menon — for Opposite Party.

Publie Prosecutor—for the Crown.

Sadasiva Aiyar, J.—The accused belong to the "Moothan" caste, which is one of the divisions of the Sudra caste. There is nothing to show that their caste status is less high than that of Nairs and on the other hand while most Nairs are content to call themselves Sudras, Moothans have been trying to claim the status of Vaisyas as following the profession of trade; their women are called Chettichiyars and some of them have adopted the Vaisya surname "Gupta". The prosecution theory that while a Nair's entry into the Nallambalam of the temple does not pollute the temple or the idols in it, the entry of a Moothan does so is prima facie improbable and I may say it almost amounts to an absurdity.

The contention that the particular custom in this temple is to make such entry an act of pollution, is sought to be proved by the evidence of Brahmin and Nair witnesses who gave no reason for their extraordinary opinion, which is clearly of very little worth. I would set aside the conviction and sentences and order the fines to be refunded.

Napier, J.—I agree. I accept the contention that the word "defile" cannot be confined to the idea of making dirty but must also be extended to ceremonial pollution, but it is certainly necessary to prove pollution. The caste of the accused is not one of the polluting castes, vide Malabar Gazetteer. p. 117. Neither is the act alleged, one confined by right to Brahmins as was the case in *Sivakoti Swami* (1) where a goldsmith touched the idol. It is simply presence in that part of a temple which is open to non-Brahmins but is alleged not to be open to the caste of the accused. In my opinion this is not "defiling" within the meaning of S. 295, I. P. C.

S.N./R.K. *Conviction quashed.*

(1) 1 Weir 253.

A. I. R. 1919 Madras 755 (2)

SESHAGIRI AIYAR AND NAPIER, JJ.

S. V. Sitaramaswamy—Petitioner—Appellant.

v.

Dulla Lakshmi Narasamma and *another* Plaintiff and Defendants—Respondents.

Second Appeal No. 1153 of 1916 and Appeal Against Order No. 74 of 1916, Decided on 2nd November 1917, against decree of Dist. Judge., Ganjam, in Appeal Suit No. 200 of 1915.

(a) Civil P. C (1908), O. 22, R. 10—O. 22, R. 10 only governs applications to continue suit.

O. 22, R. 10, only governs applications made to continue a suit. Applications presented after the termination of the suit are not within the rule: 40 *I. C.* 846 and 18 *All.* 86, *Foll.*

[P 756 C 2]

(b) Civil P. C. (1908), S. 146, O. 22, R. 10—"Proceedings" and "claiming under" in S. 146—Meaning explained.

The "proceeding" contemplated by S. 146, includes an appeal and the expression "claiming under" in the section is wide enough to cover cases of devolution, etc., mentioned in O. 22, R. 10, of the Code. The effect of S. 146, is to grant

an assignee of the interest of a party to a suit a right to prefer an appeal against the decrees passed in the suit which his assignor could have preferred, even through the assignee did not make himself a party to the suit. [P 756 C 2]

(c) **Civil P. C. (1908), O. 22, R. 10—Return of plaint—Devolution of interest pending proceedings in first Court has same effect in second proceedings.**

Obiter—Where a plaint is returned for presentation to the proper Court any devolution of interest which takes place while the proceedings are pending in the first Court must be taken to be a devolution in the course of the suit which is subsequently tried in the second Court: 14 *I. C.* 157. *Cons.* [P 756 C 2]

K. V. L. Narasimham—for Appellant.

S. Varadachariar—for Respondents.

Judgment.—Plaintiff, the mother sued her son the defendant, for a declaration that the property in suit was her stridhanam. The suit was first filed in the District Munsif's Court and on objection being taken to valuation, it was returned for presentation to the Court of the Subordinate Judge and was tried in that Court. When the suit was in the Munsif's Court the defendant executed a mortgage in favour of the present appellant. The suit was decided by the Subordinate Judge in favour of the plaintiff. It is alleged that while the son was taking steps to file an appeal, he colluded with his mother and gave up the idea of preferring an appeal. Thereupon the present appellant filed an application to the District Court under O. 22, R. 10, for an order that he be allowed to prefer an appeal, as the right to the property in suit devolved on him pending the suit. At the same time he filed a memorandum of appeal against the decree of the Subordinate Judge. On the application, the District Judge held that O. 22, R. 10, was not applicable and dismissed it. On the appeal, he held that his order on the application concluded the right of the appellant. Against these two decisions a civil miscellaneous appeal and a second appeal have respectively been preferred.

As regards the dismissal of the application we agree with the conclusion of the District Judge, though not with the reasons given by him. He has relied on *Seshagiri Row* v. *Velayudam Pillai* (1) for the proposition that the suit in the Munsif's Court was not continued in the Court of the Subordinate Judge. We reserve our opinion on the exact point decided in *Seshagiri Row* v. *Velayudam Pillai* (1). That decision is authority only for the proposition that for purpose of limitation, the suit in the Court of the Subordinate Judge was different from that which was first filed in the Munsif's Court. As at present advised, we are inclined to think that where a plaint is returned for presentation to the proper Court any devolution of interest which took place while the proceedings were pending in the first Court must be taken to be a devolution in the course of the suit which was subsequently tried in the second Court. But the order of the District Judge can be supported on the ground that when the appellant applied to the District Judge there was no suit pending. O. 22, R. 10, only governs applications made to continue a suit. Consequently the application presented after the termination of the suit was not within the rule. The recent decision of this Court in *Subba Pillai* v. *Rangasami* (2) takes that view, which is also supported by *Collector of Muzaffarnagar* v. *Husaini Begam* (3). We agree with the view taken in these decisions. Following them, we hold that the District Judge was right in rejecting the application and we dismiss the civil miscellaneous appeal with costs.

The District Judge is clearly wrong in holding that the appeal failed by reason of his rejection of the application. Apparently his attention was not drawn to the provisions of S. 146, of the new Civil P. C. It is rather anomalous that if the person claming under a party applied to continue the suit while it was pending, the Court had a discretion to permit him to do so or to refuse him application the effect of S. 146, is to grant such a person an undeniable right to prefer the appeal which his assignor could have preferred.

But the language of the section is clear and we are not at liberty to go behind its plain terms. The proceeding contemplated by the section would include an appeal and the expression "claiming under" is wide enough to cover cases of devolution, etc., mentioned in O. 22, R. 10. We therefore hold that the appellant was entitled to prefer the appeal to the District Judge. That appeal must now be heard on the merits. We reverse the decree of the District Judge and remand the appeal to him for disposal. Costs of the second appeal will abide the result.

S.N./R.K. *Case remanded.*

(1) [1912] 36 Mad. 482.=14 I. C. 157

(2) [1917] 40 I. C. 846.

(3) [1896] 18 All. 86.

A. I. R. 1919 Madras 757

KRISHNAN, J.

Venkatachallam Pillai—Defendant—Petitioner.

v.

Krishnaswami Pathan — Plaintiff — Opposite Party.

Civil Revn. Petn. No. 774 of 1917, Decided on 23rd January 1919, from decree of Sub-Judge, Negapatam, in Sm. C. Suit No. 2060 of 1916.

Limitation Act (1908), Arts. 83, 97 and 116 —Sale of property—Indemnity bond—Vendor undertaking liability against mortgage, sale and other disputes—Property lost by vendees on account of adverse claims—Claim on implied covenant held barred under Art. 116—Claim on misrepresentation presented after three years after decision of High Court also held barred — Indemnity bond construed—Claim on indemnity bond held within time—Plaintiff held entitled to interest under Interest Act (1839), S. 1.

Defendant sold certain land to the plaintiff by a duly registered deed. He also executed a registered indemnity bond undertaking to idemnify the plaintiff against "mortgage, sale, security, etc., minor suits and other disputes on the property." The plaintiff was, by the terms of his purchase, to redeem a subsisting mortgage, but when he sued to redeem the mortgage he was met by adverse claims of two persons. It was found that the defendant had no title to the property at the date of his sale. This finding was upheld by the High Court in second appeal. Plaintiff brought the present suit for damages against the defendant basing his claim: (1) on the implied warranty as to title under S. 55, T. P. Act; (2) on the indemnity bond; and (3) on the ground of misrepresentation by the defendant as to ownership. The trial Court found that the claim on the implied covenant was barred as it was brought more than 6 years after the date of the sale, but that the claim based on the indemnity bond and misrepresentation was not barred as the suit was instituted within 6 years of the High Court decree. He decreed as and for damages Rs. 100 fixed by the parties, interest on the same at six per cent. and plaintiff's costs of the litigation as against the adverse claimants:

Held: (1) that the claim on the implied covenant for good title was barred under Art. 116.

(2) That the claim based on misrepresentation was also barred as it was preferred more than 3 years after the date of the High Court decree.

(3) That the language of the indemnity bond was wide enough to include loss caused by an adverse title being set up by third parties.

(4) That the claim based on the indemnity bond was governed as to limitation by Art. 116 and not by Art. 83, and was therefore within time.

(5) That plaintiff was entitled to interest under the Interest Act but not to the costs of the previous litigation. [P 757 C 2]

T. S. Ramaswami Aiyar—for Petitioner.

S. Gopalaswami Aiyangar — for Opposite Party.

Judgment.—The Subordinate Judge has returned his findings. The suit, so far as it is based on the covenant for title, is found to be barred by limitation and that is not disputed. So far as it is based on misrepresentation, the claim would also be barred. For, even assuming that Art. 95 applies, as held in *Punnayil Kuttu* v. *Raman Nair* (1) to such a claim, the suit was brought more than 3 years after the date of the second appeal decree; so that, making every allowance in plaintiff's favour, the claim based on misrepresentation also fails. But the claim based on the indemnity bond remains. I agree with the Subordinate Judge that the language of the bond is wide enough to include loss caused by an adverse title being set up by third parties as was done in this case. The covenant talks of security, etc., muthaliathu in Tamil, and later on contemplates the whole property being lost which may be due to minors' suits or otherwise. The suit, so far as it is based on the bond, is within time as held by the Subordinate Judge. Art. 116 has to be applied as the bond is a registered one and not Art. 83: see *Ram Dulari* v. *Hardwari Lal* (2) and *Parvataneni* v. *Lanka Rambrahman* (3).

The same view has been taken in suits for rent under registered lease-deeds, though there is a special article about rent, Art. 110, *Tricomdas Cooverji Bhoja* v. *Gopinath Ji Thakur* (4). The claim on the indemnity bond must therefore be allowed. The bond however provides for a payment of Rs. 100 only and I do not see how plaintiff can claim to be paid the costs of his litigation over and above that amount. It is however claimed that interest should be allowed. The money became payable on the date of the second appeal decree and it was a sum certain payable under a written instrument. It seems to me therefore that interest could be allowed under the Interest Act if not otherwise. I therefore allow 6 per cent interest on the amount. The decree of the lower Court will therefore be modified by reducing the amount of decree to Rs. 136 and further interest as allowed

(1) 1908] 31 Mad. 230.
(2) [1918] 40 All. 605=48 I. C. 18.
(3) [1918] 47 I. C. 924.
(4) A. I. R. 1916 P. C. 182=44 Cal. 759=44 I. A. 65=39 I. C. 156 (P. C.).

by the lower Court with proportionate costs to each party in both Courts.

S.N./R.K. *Decree varied.*

A. I. R. 1919 Madras 758 (1)

BAKEWELL AND KRISHNAN, JJ.

(*S. R. M. M. C. T.*) *Muthiah Chetty* and *others*—Plaintiffs—Appellants.

v.

(*A. L. V. R.*) *Alagappa Chetty* and *others*—Defendants—Respondents.

Second Appeal No. 1428 of 1916, Decided on 5th February 1918, against decree of Dist. Judge, Ramnad, in A. S. No. 11225 of 1914.

(a) Civil P. C. (1908), S. 73 — Payment of assets and application for rateable distribution on same day— There is no presumption as to priority.

Where the payment of assets and an application for rateable distribution under S. 73 are made on the same day, no presumption can be made by the Court as to which event was prior in time. The party challenging the action of the Court Officer must show that it was wrongful. [P 758 C 1]

(b) Civil P. C. (1908), S. 73— "Same judgment debtor" illustrated.

To entitle decree-holders to rateable distribution under S. 73, the decrees should be against the same judgment-debtor, i. e., the individuals must be the same. Where the fund in Court is the property of the same person who is judgment-debtor under two decrees, he may be regarded as the same debtor in respect of that fund. If the fund is the joint property of two persons, their respective rights cannot be ascertained without an inquiry which is beyond the scope of S. 73.

Where however the joint debtors are entitled to the fund in equal shares, and the plaintiff claims only half, the provisions of S. 73 can be enforced. [P 758 C 2]

K. R. Guruswami Aiyar and *A. Subbarama Aiyar*—for Appellants.

A. Krishnaswami Aiyar and *K. Narasimha Aiyar*—for Respondents.

Judgment.—The payment into Court of assets realized and the application for rateable distribution were made on the same day, and the officer distributing the assets should have ascertained which act was prior in point of time. He distributed the assets on the footing that the application was prior.

The plaintiffs who now challenge his action must show that it was wrongful, since there can be no presumption as to the order of events. The second point argued was that owing to an irregularity in the proceedings the application for execution made by defendant 1 was not legally subsisting at the date of distribution. A valid application within S. 73 had been made and was on the file of the Court at the date of distribution, and we think that the requirements of the section had been fulfilled. The third point is whether the decrees were against the same judgment-debtor. The appellants obtained a decree for money against defendants 3 and 4 personally and respondents obtained a similar decree against defendant 3. It has been held by this Court that the individuals must be the sa me: *Srinivasaiyengar* v. *Kanthimathi Ammal* (1), and the precise point was decided by the Calcutta High Court: *Deboki Nundun Sen* v. *Hart* (2). It has been pointed out that if the fund in Court is the property of the same person who is judgment-debtor under both decrees, he may be regarded as the same debtor in respect of that fund: *Nimbaji Tulsiram* v. *Vadia Venati* (3) and *Grant* v. *Subramaniam* (4); but if the fund is the joint property of two persons their respective rights thereto cannot be ascertained without an inquiry which is beyond the scope of S. 73 *Deboki Nundun Sen* v. *Hart* (2)].

It is however admitted here that the joint debtors were entitled to the fund in equal shares, and in the argument on this part of the case the plaintiffs did not claim more than half of the fund paid to defendant 1; and therefore the inquiry mentioned in *Deboki Nundun Sen* v. *Hart* (2) is unnecessary. We are therefore of opinion that defendant 1 must account to the plaintiffs for their share of half of the fund in which defendant 1 was not entitled to participate. The appeal is allowed to this extent and there will be a decree for plaintiffs for Rs. 1,118 with interest at six per cent. from 23rd July 1913 till payment with proportionate costs of both parties throughout.

S.N./R.K. *Appeal partly allowed.*

(1) [1910] 33 Mad. 465=5 I. C. 917.
(2) [1886] 12 Cal. 294.
(3) [1892] 16 Bom. 683.
(4) [1899] 22 Mad. 241.

A. I. R. 1919 Madras 758 (2)

SESHAGIRI AIYAR AND NAPIER, JJ.

Kamulammal Avergal—Appellant.

v.

Athikari Sangali Subba Pillai and *others*—Respondents.

Second Appeal Nos. 1307 to 1357, 1359 to 1367, 1369 and 1370 of 1916, Decided on 31st October 1917.

(a) Madras Estates Land Act (1908), S. 6 (2), Expl. 45 and 163 —Claim for rent against persons within estate who occupy raiyati land is to be instituted in Revenue Court.

Under the provisions of Ss. 45 and 163 read with the Explanation to S. 6, Cl. (2) of the Act, a claim for rent against persons within an estate who occupy raiyati land, either by legal right or otherwise, must be instituted in the Revenue Court. [P 762 C 1]

(b) Landlord and Tenant—Grant of land for cultivation without fixity of property or tenure does not confer heritable right.

A grant allowing the grantees to cultivate whatever and whenever they like is not a grant with any fixity of property or of tenure. which the law will recognize us conferring a heritable right. [P 762 C 2]

(c) Madras Estates Land Act (1908), S. 26 —Permanent settlement of rent is not binding on successors except under Act.

Except under the provisions of the Madras Estates Land Act, a permanent settlement of rent by a landlord is not binding on his successors. The burden is on the grantee to show that there is a grant of the kind mentioned in S. 26 of the Act. [P 763 C 1]

(d) Evidence Act (1872), Ss. 64 and 65—Copy of document exhibited by consent of parties—Appellate Court cannot reject it because of nonproduction of original.

Where a copy of a document is exhibited in the trial Court with the consent of both parties the appellate Court has no jurisdiction to reject it on the ground that the original has not been produced. [P 760 C 2]

Per *Napier, J.*—Where there has been a bona fide mistaken belief that a document has been properly proved and where that document is of fundamental importance for the decision of the questions at issue between the parties, the appellate Court should always give the parties an opportunity of producing proper evidence on the point. [P 763 C 2]

(e) Landlord and Tenant—Rent—Relationship admitted—Nonpayment for many years does not bar landlord's right to recover reasonable rent.

Per *Seshagiri Aiyar, J.*—Where the relationship of landlord and tenant is admitted, the mere fact that the tenant has not paid rent for a long number of years will not bar the landlord's right to recover what he considers to be a reasonable rent. [P 763 C 1]

(f) Landlord and Tenant— Grant on payment of fixed rent—Grantee is only tenant—(Obiter).

Obiter.—A grant on payment of a kandetha poruppuguthagai, i. e., by payment of a fixed rent will not make the grantee a landlord but only a tenant. [P 764 C 2]

K. V. Krishnaswamy Aiyar and *K. V. Sesha Ayyangar*—for Appellant.

S. Panchapagesa Sastri for *K. S. Jayarama Aiyar*—for Respondents.

Seshagiri Aiyar, J.—The same point arises in all these second appeals. Second Appeals Nos. 1307 to 1340 arise out of suits by the landlord for rent in the Revenue Court. Second Appeals Nos. 1341 to the 1370 are from suits by tenants against landlord to set aside revenue sales. The first group of cases relates to the rent of Fasli 1318. The second group of cases relates to the sales for the rent due for Fasli 1321. The landlord is the zamindarini of Bodinaickanoor. The tenants are known as Mannadies and reside in the village of Agamalai within the zamindari. The plaintiff, by which expression I refer to the landlord throughout this judgment, sued for rent on the ground that Agamalai is within her zamindari, that she is the landlord and that defendants are her tenants. The plea of the Mannadies is that the plaintiff is not their landlord, that from time immemorial, they have been paying a bil mukta amount of Rs. 50 a year known as poruppugthagai, that the said payment was not made by them in the capacity of tenants, that, consequently, this suit brought in the Revenue Court does not lie and also that the claim for rent is barred by limitation.

The Deputy Collector found against most of the contentions of the defendants, but he held that the suit was barred by limitation, that the defendants were not tenants and that consequently the plaint should be returned for presentation to the civil Court. The judgment was practically confirmed in appeal by the District Judge. Some of the points raised by the tenants are not supported by any document filed in the case. The Courts below have drawn largely from the District Manual of Madura compiled by Mr. J. H. Nelson in arriving at their conclusions. Even this compilation does not help us in finding a solution for many points of antiquarian interest which have been raised by the defendants. Before considering the points argued before us I may state that we have been assisted a great deal in our task by the well-arranged and clearly thought out judgment of the Deputy Collector. The points which have to be considered in deciding whether the Revenue Court or the civil Court has jurisdiction are these: (a) whether the village in which the properties in question are situated is part of an estate; (b) whether the plaintiff is a landlord; (c) whether the lands, in respect of which rent is claimed, is a raiyati land; (d) whether the defendants are tenants; (e) and. lastly, what is the amount of rent pay-

ble in respect of the holdings of each of the defendants?'

As regards the first question, the Deputy Collector was of opinion that Agamalai is part of the Bodinaickanoor estate. The District Judge has differed from him mainly on the ground that the sannad relating to Bodinaickanoor has not been exhibited in the case. The original of the sannad undoubtedly was not filed. But, it is clear that both parties agreed that a copy of it printed in a Privy Council record may be exhibited in the place of the original. The District Judge says that the sannad was not mentioned as an exhibit in the list of documents in the lower Court's judgment. His opinion was that the Deputy Collector, without exhibiting the document, perused it and used it irregularly in arriving at a conclusion on the question whether Agamalai was within the Bodinaickanoor zamindari. The learned District Judge is clearly under misapprehension on this question. What happened was that the printed book was put in before the Deputy Collector. He marked that portion of it relating to the sannad as Ex. 62 and put his initials thereunder. Apparently the printed copy was returned to the party without getting a certified copy filed under O. 14, R. 9, Civil P. C. This is undoubtedly an irregularity which has apparently misled the District Judge. But there is no ground for saying that the copy of the sannad was not exhibited before the Deputy Collector. Apparently the District Judge is of opinion that a copy should not have been allowed to be filed. If he thought that the original should be referred to, he should have given the parties an opportunity of producing it, having regard to what took place in the Court below. Before us, the vakil for the tenants conceded that the copy exhibited is a true copy of the original sannad. We also find, on referring to the printed book, that this same copy was filed as an exhibit on a previous occasion in the Munsif's Court. We suggested to the vakil for the respondents that if he desired to have an adjournment in order that the original may be compared with the copy we were willing to grant him time. But the learned vakil said that there is no necescity for the original being sent for, the sopy having been exhibited with the concent of both the parties it was not open to the District Judge to have rejected the sannad. The appellate Court has, no doubt, large powers in rejecting documents on the ground of their not being relevant.

But on the question whether the original should have been produced and whether the lower Court was justified in putting on file a copy, I do not think the appellate Court had any right to reject a document exhibited. The reason of the rule is that if one party objected to the copy going in, the other party could have taken steps to produce the original. As was pointed out by the Judicial Committee in *A. B. Miller, Official Assignee of the Estate of Ramkisher Das* v. *Babu Madho Das* (1), while the appellate Court has jurisdiction to reject a document on the ground of its not being relevant, it has no right to object to a document on the ground of insufficiency of proof. This principle was recognized in *Padman* v. *Hanwanta* (2), *Uppara Hanumanthu* v. *Peddapalle Samacharlu* (3), *Chimnaji Govind Godbole* v. *Dinkar Dhondev Godbole* (4) and *Akbur Ali* v. *Bhyea Lal Jha* (5). Benson, J. and Sundara Aiyar, J., after reviewing all the authorities on the question, point out in *Sri Rajah Parakasrayanim Garu* v. *Venkata Rao* (6)

"consent or want of objection to the reception of evidence which is irrelevant cannot make the evidence relevant. But consent or want of objection to the wrong manner in which relevant evidence should be brought on record of the suit disentitles parties from objecting to such evidence in a Court of appeal."

I entirely agree with this statement of the law and hold that the District Judge was wrong in not having considered the sannad which was admitted in evidence by the Deputy Collector. On perusing the sannad, it is clear that Agamalai is one of the villages within the ambit of the Bodinaickanoor zamindari. That was the view taken by the Deputy Collector and I agree with him. Therefore the first requisite is satisfied, namely that the suit village is part of an estate. On the second point it is not easy to follow the tenants' allegations. In their written statement they say that the village origi-

(1) [1897] 19 All. 76=23 I. A. 106 (P. C.).
(2) A. I. R. 1915 P. C. 111=29 I. C. 807=93 P. R. 1915 (P. C.).
(3) [1916] 33 I. C. 188.
(4) [1887] 11 Bom. 320.
(5) [1881] 6 Cal. 666.
(6) [1913] 33 Mad. 160=21 I. C. 319.

nally belonged to the Travancore Government, that during that reign, the Mannadies themselves were landlords and paid a sort of quit rent to the Travancore Government; that after the British Government assumed sovereignty over this part of the country, their rights as landlord continued to subsist ;that consequently when the village become a part of the Bodinaickanoor zamindari, the zamindar could have been assigned only the right of collecting poruppuguthagai or quit rent which was all along being paid by the Mannadies first to the Travancore Government and then to the British Government.

There is nothing in the documentary evidence produced before us to support this contention. The reference in Nelson's District Manual does not support the contention that the defendants were landlords. Even if they had any special rights under the Travancore regime, unless they were recognized or continued by the British Government; they are not entitled to it, *Secy. of State* v. *Bai Rajbai* (7). On the other hand, there are two unimpeachable documents which show that the British Government did not recognise any proprietary rights in the Mannadies. Ex. N is of the year 1802. It gives a list of the names of the Mannadies as cultivators and regards the Government as landlords. Ex. N (1) is to the same effect. In both these documents Agamalai is mentioned as being within the Bodinaickanoor Palayapat. The jamabandi account Ex. O (1) gives the boundaries of the village and speaks of a Nattamai as the lessee of the village. Apparently the village was not given to the Bodinaickanoor Zamindars until the year 1834. In Ex. BB, which is a statement recorded by the Tahsildar in the course of an inquiry regarding boundary disputes between the zamin village of Agamalai and the neighbouring Government village, it is stated that the village belonged to the Bodinaickanoor zamindari. Apparently by this time the Government had granted the village to the zamindars. The next document of importance is Ex. 6. That is a takeed from the Collector to the Tahsildar, in which the latter officer is asked to inform the zamindar

"that he himself may collect from the 5th instalment the teervai due in respect of the aforesaid land belonging to zamindars and that, for realizing the kist due for the four instalments from the raiyats who ploughed his said land, if the zamindar distrains their property according to law and sends the yadast to the Huzur, the Commissioner will be ordered to put the same to auction, realize the money and pay it (to the zamindar)."

This was on 7th March 1836. By this time the Government had completely severed their connexion with the village; they had no doubt intended to directly deal with the Mannadies because, as was stated in Nelson's District Manual, the Government wanted to have control over these hill tracts as they were places of refuge for bandits. The same authority points out that the Collector, Mr. Hurdiz, tried the experiment for one or two years to come to some settlement with the Mannadies and that he ultimately gave up the task and handed over the village to the zamindars. This is all the evidence available in the case regarding the history of the village. There is practically no evidence on the side of the defendants to substantiate their contention that they were themselves the landlords. There is the unquestioned fact that the Eruvadees have recognized the Bodinaickanoor zamindars as their landlords. There is no reason for supposing that the Mannadies occupied a different position towards the zamindar from the Eruvadees. I must hold with the Deputy Collector that it has been established that the Bodinaickanoor zamindars are the landholders. The third question is as to whether the land is a raiyati land. S. 23, Estates Land Act, enacts that where the question is whether the land is old waste or raiyati land the presumption is that it is a raiyati land. But this is a presumption which can be rebutted. The question as to whether the land in respect of which rent is claimed is raiyati land has not been considered by the Courts below, and although there is this presumption in favour of the landlord, I am not prepared to hold at present that these lands are raiyati lands. That is a question which will have to be considered by the Court of first instance. The fourth question is whether the defendants are tenants. Mr. K. V. Krishnaswami Ayyar argued that, where the lands are within a zamindari and they are raiyati lands if a person is in possession of them, he can be proceeded against in a Revenue

(7) A. I. R. 1915 P. C. 59=39 Bom .625=42 I. A. 229=30 I. C. 303 (P. C).

Court. S. 163, Estates Land Act, provides for ejectment of a trespasser by a civil Court.

On the other hand S. 45 of the Act enables a landholder to recover from a person unlawfully in possession of raiyati land rent in the Revenue Court. When Ss. 45 and 163 are read together with the explanation to S. 6, Cl. 2, it is clear that a claim for rent against persons within the estate who occupy raiyati land, either by legal right or otherwise, must be instituted in the Revenue Court. Therefore even if it is found that the defendants are not regular tenants, the jurisdiction of the Revenue Court will not be ousted. But I think that in this case, having regard to the pleadings and to the defence raised by .the defendants, there is hardly any room for doubt that the defendants are tenants. We asked the learned vakil for the respondents to state the exact position he contended for his clients. If we reject the interesting but unfounded theory that the Mannadies were themselves landlords, we have to see what their status is otherwise. It was suggested rather faint-heartedly that they may have been inamdars. There is not a scrap of paper to support this. Then it was argued that under Ex. J they acquired a permanent right to be on the land not necessarily as tenants but as having a sort of under-tenure on payment of a favourable quit rent. Now as regards Ex. J, a document on which apparently the Deputy Collector and the District Judge have relied I may at once say that I see no reason for holding that it is not receivable in evidence. It purports to have been written by a clerk of the Collector's office, and he boldly quotes a statement of a karnam who in the discharge of his duty compiled a list and the descriptive memoir added to the list. It was admitted that excepting for the heading which says:

"that this is an account of the village taken from the statement of Chinnayya Asari, karnam of the village,"

the rest of it is a verbatim report of the karnam himself. I think that this is receivable in evidence as being an official record compiled in the course of business, under S. 34, Evidence Act. Now as regards the value and effect of this document the tenants contend that by this document they obtained a right for all time to come to cultivate whatever extent of land they liked and wherever they liked, and to pay only Rs. 50 per annum for such cultivation. There is no doubt the language in the document is in their favour. I may at once say that I do not agree with the contention of the learned vakil for the appellant that this right must be confined to certain particular forest tracts and not to the cultivable portion of the village. This construction would do violence to the language of the document. The real question is, whether such a comprehensive grant can convey any heritable right to the grantees. It is to be remembered that we have not any written grant. The karnam purports to embody in this statement an oral promise said to have been made to the tenants by the zamindar. As the grant is vague, there is no fixity of property nor fixity of tenure. That such a grant cannot confer a heritable right was laid down in *Bhaskarappa* v. *Collector of North Kanara* (8). West, J., points out at p. 584:

"Even in the case of a grant of a definite quantity of land, but of undefined locality, the two eminent lawyers Yorke and Talbot, both afterwards Lord Chancellors, said: We are of opinion that, in regard to the place where the said lands lie is not described, nor any method provided by which the same may be ascertained such grant . . . . . is by reason of the uncertainty thereof absolutely void in law."

Again he says:

"As there must be certainty in a grant as to the area conferred, so must there be certainty as to the area, or at least as to the identity of the object occupied, if the occupation is to raise the presumption of a grant of acquiescence in definite occupation: talis enim proesumitur titulus proecessisse qualis apparet usus et possessio."

In the present case there is no ascertained locality; and an indefinite promise to allow the Mannadies to cultivate wherever and whatever they liked is not a grant which the law will recognize as conferring a heritable right. I must therefore hold that Ex. J did not confer a perpetual tenure in favour of the tenants. There is a further difficulty in this case and that is that, even supposing that the grant was capable of conferring a permanent right, it is not available against the successors of the zmaindar who granted it. It was conceded that the original grantee is dead and that there have been three generations since his time. S. 26, Estates Land Act, provides that except in the case of grants made by a zamindar to enable the grantee

(8) [1878-79] 3 Bom. 452.

to clear the jungle and to bring the waste land into cultivation, a permanent settlement of rent by a predecessor is not binding upon the successors. I do not want to say that it is not open to the defendants to show that the grant was made for the purpose mentioned in Cl. 1, S. 26, but the burden is on them to show that there was a grant of that nature and that it is binding upon the present zamindarini. But it is unnecessary for the landlord to invoke the aid of S. 26, as I have held that Ex. J did not confer a fixed tenure.

It was argued before us that even though defendants may be tenants, they are not liable to pay anything more than Rs. 50 agreed to under Ex. J. It was suggested in this Court that the defendants have acquired a limited prescriptive right to continue to hold the lands in their holding by paying an amount considerably less than what otherwise is being demanded in the present suits. There can be no question that until the present suits were brought the tenants have not been asked to pay anything like the amount now claimed against them. It may be that by long payment they have acquired a right to continue that payment, as argued in this Court. But that would not oust the jurisdiction of the Revenue Court. I express no opinion on the amount of rent payable by the tenants or on the question of prescription raised. My conclusion is that the Revenue Court has jurisdiction to hear and determine these suits. I must therefore reverse the decrees of the Court below and remit the case to the Court of first instance to determine whether the land in respect of which rent is claimed is raiyati land, and what is the amount of rent payable by each of the tenants in respect of the lands in his possession.

It was rightly conceded before us that, if these defendants are tenants, the mere fact that for a long number of years they have not paid any rent, will not bar the right of the landlord to recover what he considers to be reasonable rent. Really no question of limitation can arise under the circumstances, excepting it be in respect of the particular sums claimed in the suits. The costs hitherto incurred will be provided in the revised decree. In disposing of the cases the right said to have been conceded in the Courts below and recorded in para. 41 of the Deputy Collector's judgment, will have to be borne in mind. As regards the vakil's fee in this Court, we award Rs. 500 and direct that it be distributed, if costs are awarded against them or in their favour among the tenants. The costs of printing will be similarly distributed.

Napier, J.—I agree. The District Judge was undoubtedly in error in supposing that the copy of the sannad had not been properly exhibited in the case. I am satisfied that, by consent of parties, the printed copy was put on the file instead of the original. It is not suggested to us that it is not a correct copy, and indeed it must be so, being a print made for the purpose of an appeal to the Privy Council. Even if the District Judge had been right, he should not, in my opinion, have dealt with the case without giving the plaintiff an opportunity of producing the original sannad. Where there has been a bona fide mistaken belief that a document has been properly proved and where that document is of fundamental importance for the decision of the question at issue between the parties, an appellate Court should always give the party an opportunity of producing the proper evidence. The District Judge has however considered the case on the assumption that the copy is a true one, and has decided that, although the village in question is within the ambit of the zamindari, the zamindar is not a landholder in respect of it within the meaning S. 3 (5), Estates Land Act, and that the defendants :who hold possession are not raiyats within the meaning of sub-S. 15 of the same section. He has accepted the theory of original tenure of this village and of its dealings by the British Government which, I think, is not supported by the evidence. He considers it proved that this village was not originally a part of the zamindari, but belonged to the defendants' ancestors and that therefore the inclusion of it in the terms of the sannad could not affect their vested rights. During the argument on appeal the claim of the defendants was put in two ways, one on the lines of the judgment of the District Court and the other on the theory of a perpetual grant from the zamindar.

I agree with my learned brother that neither of these contentions has been made out. There is nothing, in my opinion, in the information gathered from

the District Manual of Madura to support this theory of an original grant to the defendants: and whatever may have been their rights under the previous Government, there can be no question that, at the time of the cession, Government dealt with this village as being at its own disposal unfettered by any previous grants. It appears from the District Manual that the Collector recommended the retention of this village in the hands of Government for the time being, as it was situated in the hills and was occupied by lawless persons who required close observation. This proposal was accepted by the Board of Revenue, who agreed with the Collector that the hill villages must be kept under Sarkar management. In pursuance of this policy the Collector fixed the rent payable for the village at 47·5 pans by jamabandi in 1802, but no period is mentioned in the document Ex. O evidencing this transaction, and it is obviously a settlement for one year only. It is clear that this temporary arrangement continued for a number of years, but was subsequently put an end to.

Ex. 6, dated 7th March 1836, is an entry in the book containing the orders of the Collector of the Madura District. It is an instruction to the Tahsildar to inform the zamindar that he might collect teervai from certain lands in the Agamalai village as those lands were comprised in his Agamalai village and not in the adjacent Tenkarai Government village. It recites that there had been a dispute between the Bodinaickanoor zamindar and the Government with regard to the boundary between the two villages which dispute had terminated in favour of the zamindar. And we have in Ex. BB the evidence of a witness called during that boundary dispute to prove the true boundary between the villages. It appears in the form of an attakshi given on 1st September 1834, and the witness deposed that the land in question was in the village of Agamalai attached to the Bodinaickanoor zamindari. There can be no doubt therefore that some time before 1834 the Government had decided no longer to retain possession of this village but had granted it to the Bodinaickanur zamindar. This grant was subsequently made permanent by the sannad of 1880 I am constrained therefore to differ from the District Judge in his conclusion on this point.

The next line of argument is that there had been a perpetual grant of the ownership of the village to the raiyat proved by the statement of the karnam in Ex. J. I agree with my learned brother that this document is receivable in evidence under S. 34, Evidence Act. The statement is as follows:

"Coming to know that the other raiyats were not able to pay poruppuguthagai the kandetha poruppuguthagai was fixed for all time at Rs. 50 per annum as per the oral orders of the late zamindar in Fasli 61 (1852), whatever be the extent of land cultivated and wherever be the place cultivated by these raiyats and the said raiyats had to pay the same in the zamindar's cutcherry and it was not includsd in the village zamabandi. No documents have been secured in writing regarding the said lease."

The contention for the defendants is that they thereby became the land-holders they were not tenants within the meaning of Cl. 15, S. 3. With regard to the argument that they were the land-holders by virtue of being "persons owning an estate or part thereof" I agree with my learned brother that this statement by the karnam does not prove a grant of title to defendants' ancestors. The village is a forest tract and the cultivation is kumati. All that that the zamindar purported to do was to permit the raiyat to cultivate in this peculiar manner such land as they required at a fixed rent of Rs. 50. It is admitted that in the same area there are and have been for a great many years, a number of tenants not descendants of the original raiyat who are known as Eraewadees, and a number of grants on darkhast to such persons by the manager of the zamindari during the minority of one of the zamindars have been put in (vide Ex. 7 series), and there is a mass of other evidence showing the same thing which is not disputed in this case. The existence of these other tenants made it impossible to hold that the zamindar ever purported to make a grant of ownership of any definite portion of the tract. It is clear, therefore that the defendants are not land-holders. They contend that they are not tenants, as it is not shown that they hold for the purpose of agriculture raiyati land in an estate on condition of paying rent to the land-holder. It is not necessary at this stage to decide the questions raised on this point. Land in a zamindari which is not excepted under Cls. (a), (b) and (c), sub-S. 16, S. 3 is raiyati land and S, 23 raises a pre-

sumption in favour of the zamindari. That question is one which will have to be decided. If it is found that the land in question is raiyati land it will in my opinion be difficult for the defendants to make out that they are not raiyats.

The contention has been raised before us that their liability being limited to pay Rs. 50 a year that is not rent within the meaning of the Act because it cannot be increased. During the argument I asked for any authority for this proposition or for any case in which it had been held that persons holding under a zamindar in this manner who were not land-holders themselves within the meaning of S. 3 (5), were still not raiyats within the meaning of sub S. 15, and no such authority was brought to my notice. It is quite open to question whether the right to cultivate as much land as they required at a fixed rental of Rs. 50 is still binding on the estate. It may be that the defendants can show that under the provisions of S. 26, Cl. (1), they are entitled to pay only this fixed rent but it rests on them to show this if such rent is found to be lower than the rent payable upon land of similar description in the neighbourhood: vide S. 26 (3).

In the result I agree with my learned brother in reversing the decrees of the lower appellate Court and remitting the cases to the Court of first instance to determine whether the land is raiyati land and what is the amount of rent payable by each of the tenants in respect of the lands in his possession.

S.N./R.K. *Cases remitted.*

A. I. R. 1919 Madras 765

SADASIVA AIYAR AND SPENCER, JJ.

Venkatarama Sivan and *another* — Plaintiffs—Appellants.

v.

Secy. of State—Defendant—Respondent.

Second Appeals Nos. 1401 and 1402, of 1917, Decided on 25th September 1918, against decrees of Sub-Judge., Kumbakonam, in Appeal Suits Nos. 229 and 230 of 1916.

Grant—Inam—Village granted as sarvamaniyam "besides poramboke"—Cremation ground required for communal purposes must be deemed to be excluded.

A whole inam village was granted to plaintiff's ancestors by a former ruler of Tanjore. The sanad or deed of grant recited that the grant was of the entire village on sarvamaniyam "besides poramboke" The plaintiff was ejected by the officers of Government from a cremation ground in the village on which he was alleged to have encroached. Plaintiff filed the present suit claiming ownership of the cremation ground under the terms of the grant :

Held : that the words "besides poramboke" in the inam title deed should be construed as excluding burning and burial grounds and other portions required for communal purposes which are vested in the Government as trustees for the public. [P 766 C 2]

T. R. Ramachandra Aiyar—for Appellant.

V. Ramesam—for Respondent.

Spencer, J.—These second appeals are brought against the judgment of the Subordinate Judge of Kumbakonam confirming the judgment of the District Munsif of Valangiman dismissing two suits instituted against the Secretary of State for India for the recovery of portions of poramboke land comprised in Survey No. 95/2 corresponding to Paimash No. 809 in the village of Govindapuram, from which the plaintiffs were evicted by order of Government officers under the provisions of Act 3 of 1905, and for damages for the unlawful felling of trees standing upon the said land. The village of Govindapuram is a whole inam village granted in 1809 by Pratap Singh Raja Sahib, one of the former rulers of Tanjore. The entire village was granted to the inamdars "in free tenure, exempt entirely from payment of revenue or rent," which is the meaning of sarvamaniyam. The original grant is not available, but we have the title-deed (Ex. E) issued by the Inam Commissioner in 1865, wherein the grantees' title was acknowledged by the Government to the sarvamaniyam village of Govindapuram claimed to be of 14·15 acres of dry land, 216·15 acres of wet land and 54·29 acres of garden land besides poramboke. The portions alleged by the defendant to have been encroached upon by the plaintiffs are classed as sudda rudrabhumi or cremation ground, and the substantial question to be now decided is whether upon the construction of the grant, these portions passed to the grantees under the words "besides poramboke."

These words occurring in similar deeds of grant have been the subject of judicial interpretation and in *Venkataratnammah* v. *Secy. of State* (1), Benson and Sundara Aiyar, JJ., laid down that the effect to

(1) A. I. R 1914 Mad. 482=37 Mad. 364(note.)

be given to them must depend on the evidence available in each case and the circumstances attending the grant. In the case that they were then considering, they held that, as the stream in question was not a large one and was not connected with any system of irrigation by Government and as the British Government had shown no intention at any time to derogate from the original grant, the channel must belong together with other poramboke to the inamdar. At the same time, the learned Judges cited the case of *Papala Narayanaswmy Naidu* v. *Secy. of State* (2) and expressed their concurrence with the view therein taken of the meaning of the words "besides poramboke", that they should not be interpreted as an acknowledgment by the Government of India of the inamdar's title to all kinds of poramboke. In *Papala Narayanasawmy Naidu* v. *Secy. of State* (2), Benson and Bakewell, JJ., observed that

"it could never be supposed that the Government, in making a grant as a reward for services rendered, included in the grant the property of private persons, or the communal property of the villagers, such as temples threshing floors, cattle-stands, burning grounds, or the like, or public roads simply because they are included in the area of the village as shown in the village and survey accounts, and are not in terms excepted from the grant.,"

In the village of Govindapuram we find from reference to the Inam Register, Ex. 20, that the entire area of the village being 441 acres 25 cents, 354, acres 99 cents, consisted, at the time when the register was written up, of wet and dry fields, topes and gardens, leaving 86 acres 26 cents to be deducted for poramboke. Below this there is a note that the poramboke consists of houses and backyards about 44 acres 37 guntas and 5 annas in local measure, and pathways, roads, irrigation channels, tanks, river, sites of pagodas, burning grounds, etc. Now as regards public roads the Government has divested itself of its rights over them by directing them under S. 49, Local Boards Act (5 of 1884), to be vested in the District Board, a statutory body constituted for the maintenance of roads and for other objects of public utility. As regards irrigation channels, rivers and tanks, the beds would, under the authority of *Papala Narayanasawmy Naidu* v. *Secy. of State* (2), ordinarily remain vested in the Government which under Act 7 of 1865, has the control of irrigation in this Presidency. Lastly, as regards sites of pagodas, burning grounds, etc, which word "etc," must also include public threshing floors, cattle-stands and unassigned house-sites and backyards, Government is the custodian of the rights of the public and could not be deemed to have permanently assigned over such property to individuals for their private use without a derogation from its trust. The legal title has all along been in the Government in respect of such communal land for the sake of convenience, and therefore the Government could, at the time of the grant, have assigned to the inamdars what rights it possessed in these sites; but it could not have done so without a violation of its trust to the community to preserve the land for communal use, and I think that we should not assume, without clear proof, that the Government intentionally committed a violation of trust. The lower Courts were, therefore right in dismissing these suits and as the second appeals fail on the merits, without deciding the question of limitation, they must be dismissed with costs.

Sadasiva Aiyar, J.—In *Secy. of State* v. *Ragunatha Thathachariar* (3), I said at p.34 (of 24*M. L. J.*)

"The word 'poramboke' is loosely used in many senses. Whatever land does not yield revenue to Government is usually known as poramboke though several kinds of lands may be included in it."

So far as *Papala Narayanasawmy Naidu* v. *Secy. of State* (2) decided that burning and burial grounds, temple sites and public roads remain vested in Government in trust for communal purposes, notwithstanding the grant of a whole inam village including the poramboke. I concurred with that opinion respectfully in *Secy. of State* v. *Ragunatha Thathachariar* (3) and I still adhere to that opinion. So far as *Venkataratnammah* v. *Secy. of State* (1) decided that river porambokes and channel porambokes contained within the ambit of a sarvamanyam whole inam village did not pass to the inamdar by the grant, that opinion must be deemed to have been overruled by the recent decision of the Privy Council in the *Urlam* case. see *Kandukuri Balasurya Prasadha Row* v. *Secy. of State* (4). The present case, however,

(2) [1912] 14 I. C. 261.

(3) [1913] 38 Mad. 103=18 I. C. 41.

(4) [1917] 41 I. C. 98.

relates to burning ground porambokе and that in my opinion, continued notwithstanding the inam grant of the village to vest in the Government as legal owner in trust for communal purposes. The legal ownership of Government as regards burial and burning ground porambokes and public road porambokes in inam villages is no doubt, of a different character from its legal ownership of cultivable waste lands in raiyatwari villages (legal ownership over the latter involving much larger powers of grant, auction sale, ejectment, direct possession, subjection to various and indeterminate kinds of uses, etc., than their legal right of ownership of communal lands like burning grounds, etc., set apart for particular portions of the community), but both kinds of lands are the subject of the Government's legal ownership in the very real sense so far as trespassers are concerned.

The contention of Mr. Ramachandra Aiyar, therefore that the Sudra community is the legal owner even on the findings of the lower Courts and that the Government had no right to eject his clients while his clients were in lawful possessions, the Government being not the legal owner, cannot be upheld. The members of the Sudra community may form the objects of the trust but the trustee and legal owner is the Government itself. I, therefore agree that the second appeals must be dismissed with costs.

S.N./R.K. *Appeals dismissed.*

A. I. R. 1919 Madras 767

SESHAGIRI AIYAR AND PHILLIPS, JJ.

Secretary of State—Plaintiff—Appellant.

v.

Hosangadi Shitaramappa and *others*—Defendants—Respondents.

Second Appeal No. 57 of 1917, Decided on 14th November 1918, against decree of Dist. Judge, South Kanara, in Appeal Suit No. 126 of 1915.

(a) Land Tenure—Mulgeni tenure—Death of mulgenigar without issue—Right does not escheat to Government.

An essential incident of a mulgeni tenure is that on failure of heir to a mulgenigar, his rights revert to the mugar from whom the mulgeni was acquired and do not escheat to Government. 1 *Cal.* 391 (*P.C.*); 17 *Cal.* 826 and 30 *All.* 488 *Dist.* [P 768 C 1]

(b) Land Tenure—Mulgeni tenure.

A mulgeni tenure is not of the same character as a permanent lease. [P 768 C 1]

V. Ramesam—for Appellant.

B. Sitarama Row—for Respondents.

Judgment.—The question in this case is whether the right of a mulgenigar escheats to the Government on the death of the last owner dying without issue or whether it reverts to the mulgar from whom the mulgeni was acquired. This question is not uncovered by any direct authority. If a mulgeni tenure is of the same character as a permanent lease, on the authority of the Judicial Committee in *Sonet Kooer* v. *Himmut Bahadoor* (1) the right would escheat to the Government and would not revert to the landlord. Therefore the question is, what are the characteristics of a mulgeni tenure. In the 5th Raport, Vol. 2, p. 78, it is pointed out that on the death of the mulgenigar the right would revert to the mulgar, just as the mulgar's property would escheat to the Government in case he died issueless. Similar observations are to be found in the report of the Collector in the same report at p. 481. The learned Government Pleader suggested that this is not a statement of fact but an inference from ideas relating to the feudal tenure. We are unable to agree with this contention. The 5th Report was a collection of facts and statements laid before the House of Commons and there is no reason to suppose that the Collector and the other officers were influenced by feudal notions in making the above statements. In the minutes of Sir Thomas Munro at pp. 71 and 79 a similar statement occurs. In *Timmarsa Puranik* v. *Badiya* (2) an extract is made from the report of Mr. Chamier speaking on behalf of the Board of Revenue, which also shows that the tenure would revert to the mulgar.

Then there is an observation of Benson, J. in *Vidyapurna Thirthaswami* v. *Uggannu* (3), wherein the learned Judge accepts the view contained in the earlier reports. That was a case in which the question was whether a mulgar or a mulgenigar should pay the increased assessment levied by the Government. After the decision of the Full Bench the Government of Madras collected opinions on the advisability of legislating on the

(1) [1875-76] 1 Cal. 391=3 I. A. 92 (P. C.).
(2) [1864-66] 2 B. H. C. R. 66.
(3) [1910] 34 Mad. 231=7 I. C. 321.

question of increased assessment. In their final order, which is G.O. No. 2154, dated 18th July 1912, the Government say with reference to mulgeni leases:

"As long as the rent paid, the tenant cannot be evicted and even when it is unpaid the landlord, on evicting the tenant, is liable for the improvements which the tenant has made. On failure of heirs the tenant's interest ordinarily lapses to the landlord."

Thus we have the opinion of a Collector, of the Board of Revenue of that experienced administrator, Sir Thomas Munro, of the Government, and of the High Court in favour of the contention that an essential incident of mulgeni tenure is that on failure of heirs it lapses to the mulgar. In these circumstances the decision in *Sonet Kooer* v. *Himmut Bahadoor* (1) is not applicable to the present case. As pointed out by Mr. Sitaram Row, the view taken by Sir Charles Sargent in *Vyenkatraya* v. *Shivrambhat* (4) and *Tamaya* v. *Timapa Ganpaya* (5) is also in favour of this view. It is true that in these cases there was a condition restraining alienation. But it was held that such conditions were not void. If it were a permanent heritable tenure to which the landlord has no manner of right, such a condition would be void under the general law as well as under S. 10, T. P. Act. The fact that that condition was held not repugnant to the grant is another ground for holding that a mulgeni tenure should not be regarded as of the same character as a permanent lease. In *Parameshri* v. *Vittappa Shanbaga* (6) the view taken in 7 Bombay was accepted by Bashyam Ayyangar, J. *Nil Madhab Sikhdar* v. *Narattam Sikhdar* (7) and *Ram Dihal Rai* v. *Maharaja of Vizianagaram* (8) relied on by the Government Pleader do not take the case further than *Sonet Kooer* v. *Himmut Bahadoor* (1). For these reasons we are of opinion that the decision of the District Judge is right and that this appeal should be dismissed with costs to be paid in three months.

S.N./R.K. *Appeal dismissed.*

(4) [1883] 7 Bom. 256.
(5) [1883] 7 Bom. 262.
(6) [1903] 26 Mad. 57.
(7) [1890] 17 Cal. 826.
(8) [1908] 30 All. 488.

A. I. R. 1919 Madras 768

AYLING AND SESHAGIRI AIYAR, JJ.

Krishna Iyer—Plaintiff—Appellant.

v.

Swaminatha Iyer and *others*—Defendants—Respondents.

Civil Appeal No. 160 of 1917, Decided on 22nd February 1918, against decree of Temporary Sub-Judge, Tanjore, in Original Suit No. 28 of 1916.

Hindu Law—Widow—Suit by reversioners—Suit compromised—Reversioners to take property on widow's death—One reversioner dying before widow — Reversioners took vested interest under compromise and surviving reversioner cannot claim wholly by survivorship.

A suit by two of the reversioners of a deceased Hindu against his widow for a declaration that an alleged will by the deceased was not genuine ended in a compromise which provided that the property should go to the reversioners on the widow's death. One of the reversioners having predeceased the widow, the survivor claimed the entire property, on the death of the widow to the exclusion of the deceased reversioner's sons:

Held: that by the compromise, the reversioners took a vested interest in the property which did not pass by survivorship, but was heritable and divisible between the two donees. [P 769 C 1]

T. K. Muthukrishna Aiyar and *N. Muthuswamy Aiyar*—for Appellant.

A. Krishnaswami Aiyar—for Respondents.

Judgment.—The facts of the case are as follows: One Kuppuswami Aiyar was the last male owner of the properties in suit and of other properties. He made a will under which his mother, his widow and his natural brother were the legatees. Original Suit No. 27 of 1901 was brought by the widow Minachi against her mother-in-law Seshiammal and against her husband's natural brother Srinivasa Iyer disputing the genuineness of the will. The suit ended in a compromise, Ex. D. Thus the widow's claims were settled. Thereupon two persons claiming themselves to be the nearest reversioners of Kuppuswami Aiyar sued in Original Suit No. 32 of 1902 the widow, the mother and the natural brother for a declaration that the will was not genuine. This suit also ended in a compromise, Ex. F. The present suit is by one of the two plaintiffs in Original Suit No. 32 of 1902 for a declaration that he was solely entitled to the property secured under the compromise. It may be mentioned that the other plaintiff in Original Suit No. 32 of 1902 predeceased Seshiammal. Seshiammal died a few months before the present suit.

Plaintiff's case is that as of the two plaintiffs who got the compromise decree, he alone was alive when Seshiammal died, the heirs of the other plaintiff are not entitled to any rights. The compromise provided for the property being taken possession of on the death of Seshiammal. We are unable to agree with the appellant that the two plaintiffs did not take a vested interest in the property. The widow of the last male holder having been bought off by the mother by the compromise of the previous litigation, she was virtually the full owner of the property of Kuppuswami, with the exception of some of the properties given to natural brother. It was competent to Seshiammal to have alienated the property in any way she liked. Consequently the compromise which secured to the then plaintiffs rights dependent upon the death of Seshiammal was a vested interest: see S. 19, T. P. Act and *Rewun Persad* v. *Mt. Radha Beeby* (1) and *Bhagabati Barmanya* v. *Kali Charan Singh* (2). This vested interest under the Indian law does not pass by survivorship, but is heritable and divisible between the two donees. We do not think they can be said to have sued or obtained the properties as reversioners because they were not reversioners to Seshiammal. In this view, the Subordinate Judge was right in holding that plaintiff is not the sole owner.

But he was wrong in refusing to give a decree for partition. We must reverse the decree of the Subordinate Judge and direct him to give a decree to plaintiff for one-half of the suit properties including in those words also the properties for which the suit properties may have been exchanged. Plaintiff is entitled to mesne profits at the rate admitted in Ex. III-B. Future mesne profits from the date of Ex III-B up to delivery will also be provided for. Appellant must pay the respondent's costs in this Court. Costs in the lower Court will be provided for in the revised decree.

S.N./R.K. *Appeal allowed.*

(1) [1846-50] 4 M. I. A. 137=7 W.R. 35 (P.C.).
(2) [1911] 38 Cal. 468=10 I. C. 641=38 I. A. 54 (P. C.).

1919 M/97 & 98

A. I. R. 1919 Madras 769

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Eyunni Raghavacharyulu and *others* —Plaintiffs—Appellants.

v.

Epuri Govindasari—Defendant—Respondent.

Second Appeal No. 1700 of 1916, Decided on 18th April 1918, against decree of Temporary Sub Judge, Nellore, in Appeal Suit No. 17 of 1915.

Cosharer—Perpetual lease by majority of cosharers is not ordinarily binding on dissenting minority—Suit by minority to set aside lease is maintainable.

A lease of common land granted in perpetuity by a majority of the cosharer landlords is not binding on the dissenting minority, except (1) where there is a custom authorizing such a lease or (2) in a case of unavoidable necessity or (3) where the lease is obviously beneficial to all the sharers.

In such a case the minority can sue to eject the lessee, and their remedy is not limited to a suit for a partition of their shares : 18 *Cal.* 10 ; 19 *Cal.* 253 (*P C.*) ; 28 *Cal.* 223 and *A. I. R.* 1914 *Cal.* 577, *Dist.* [P 770 C 1]

The proper decree to be passed in such a suit is to declare that the lease is not binding on the plaintiffs and to direct that they should be put in possession for themselves and on behalf of the other cosharers. [P 770 C 2]

A. Krishnaswami Aiyar—for Appellants.

L. A. Govindraghava Aiyar and *L. Venkataraghava Aiyar*—for Respondent.

Judgment.—The suit is by a few sharers of samudayam or common lands for ejectment against the defendant, who has obtained a lease of it from the other shareholders. The lessee is himself a cosharer and the karnam of the village. The lease is a permanent one. The extent mentioned is 60 acres, but it has been found by both the lower Courts that it comprises nearly 240 acres. There is a clause in the lease to the effect that the property should be regarded as comprising only 60 acres although the actual measurement may be more or less. The District Munsif held that the lease was not binding and decreed joint possession to the plaintiffs with the defendant. On appeal the Subordinate Jndge rightly held that the decree for joint possession was wrong. His view was that, as the lease was given by a majority of the shareholders, it is binding on the plaintiffs.

The principal question argued in second appeal is whether a majority of cosharers can validly grant a perpetual lease of common property. The Courts below

have found that it has not been proved that there is a custom authorizing the majority to impose their will upon the minority. It is now settled law that, unless for unavoidable necessity, a trustee cannot grant a permanent lease of trust property: see *Palaniappa Chetty* v. *Deivasikamoney Pandara Sannadhi* (1). It has also been held that a karnavan of a Malabar tarwad cannot grant a permanent lease except under exceptional circumstances. The same rule applies to the managers of Hindu families. At best the position of the majority in this case can only be regarded as that of managers of joint property for themselves and on behalf of others. Prima facie therefore their action in granting a permanent lease is ultra vires. The learned vakil for the respondent referred to the fact that the lands were waste and that it was a prudent act of management to grant a permanent lease. Under the Madras Estates Land Act, in exceptional circumstances, the landlord for the time being is permitted to grant leases on favourable conditions. Even such a lease is not binding upon the successor. A fortiori a lease granted in perpetuity by a fraction of the shareholders should not be regarded as binding upon the dissenting minority. Mr. Govindaraghava Aiyar argued that even if the lease is beyond the powers of the majority, the only remedy open to the plaintiffs is to sue for a partition of their shares.

We are unable to agree with this contention. *Watson & Co.* v. *Ramchund Dutt* (2) was strongly relied on. In that case the propriety of the lease was not questioned. What the Judicial Committee decided was that it was not open to some of the shareholders to claim joint possession with the lessees who were let in by the other cosharers. *Lachmeswar Singh* v. *Manowar Hossein* (3) is also to the same effect. In *Madan Mohun Shaha* v. *Rajub Ali* (4) it was held that a cosharer being in possession, another cosharer was not entitled to sue in ejectment against him. In *Dhakhyani Debi* v. *Mana Rout* (5) the Courts implied an assent on the part of dissentients from the fact of their not objecting to the lease for over ten years. These authorities do not hold that, where a lease is found to be invalid, the lessee should be maintained in his possession leaving it to those objecting to his lease to sue for partition as their only remedy. In the present case we are unable to agree with the learned vakil for the respondent that it was a prudent act of management to grant a perpetual lease of such a large extent of property. We cannot help feeling that the karnam who must have known more or less the real extent of the property he had taken on lease, took undue advantage of the ignorance of the other cosharers in obtaining a permanent lease and in getting the clause, we have referred to already, inserted in it.

In our opinion the proper decree to be passed is to declare that the lease is not binding on the plaintiffs and that they should be decreed possession for themselves and on behalf of the other cosharers. We must therefore reverse the decrees of the Courts below and grant a decree as above indicated. The plaintiffs are entitled to their costs against the defendant in this and in the lower appellate Court. As they were content to have a decree for joint possession in the first Court, we make no order as to costs in that Court.

S.N./R.K. *Appeal allowed.*

(1) A. I. R. 1917 P. C. 33=40 Mad. 79 I. C. 722=44 I. A. 147 (P.C.).
(2) [1891] 18 Cal. 10=17 I. A. 110 (P.C.).
(3) [1892] 19 Cal. 253=19 I. A. 48(P.C.).
(4) [1891] 28 Cal. 223.
(5) A. I. R. 1914 Cal. 577=22 I. C. 666.

A. I. R. 1919 Madras 770

OLDFIELD, J.

Savarajulu Nayudu and *others* In re, —Accused—Petitioners.

Criminal Revn. No. 841 of 1917. Criminal Revn. Petn. No. 682 of 1917, Decided on 3rd April 1918, from judgment of Sess. Judge, North Arcot, in Criminal Appeal No. 85 of 1917.

Penal Code (1860), Ss. 34, 323, 325, 336 and 392—Grievous hurt caused during robbery—Absence of identification of offender—Separate charge against each accused—No specification of common intention to cause grievous hurt—Conviction under S. 325 held bad—Order under S. 106, Criminal P. C., is legal—Criminal P. C. (1898), S. 106.

Accused 1, 2 and 3 were charged with having entered the complainant's house, and removed his ear-rings. The right-ear was cut off with the ear-ring and the left ear was torn. The accused were charged separately and there was no specification of a common intention to inflict grievous hurt.

Accused 1 was convicted under Ss. 326 and 392, the second under Ss. 326, 325 and 109, and the third under Ss. 325 and 392, I. P. C. In appeal

the Sessions Judge substituted convictions under Ss. 325 and 392 with S. 109 as regards accused 1. The accused were also ordered to furnish security under S. 106, Criminal P. C.:

Held: (1) that as the identification of the person who inflicted the grievous injury was not made out, and as there was an absence of common intent, the conviction under S. 325 was bad for which must be substituted convictions under S. 323; (2) that the order under S. 106 was not illegal even though there was technically no breach of the public peace by the accused.

[P 771 C 1]

A person who enters on another's premises and uses violence to him and deprives him of his property commits a breach of the peace in the wider sense of the expression: 29 *Mad.* 190, *Dist.*, 4 *N. W. P. H. C. R.* 154 and 30 *I. C.* 435, *not Appr.*

[P 772 C 1]

T. Rangachariar—for Petitioners.

Public Prosecutor—for the Crown.

Order.—The undisputed facts are that the three accused, resenting complainant's conduct, entered the house, where he was working and attacked him. His ear rings were removed, one being cut off with his right ear and the other torn from his left. The accused were originally convicted, accused 1 of offences punishable under Ss. 326 and 392, I. P. C., accused 2 under Ss. 326, 325 and 109, and accused 3 under Ss. 325 and 392, I. P. C. The learned Sessions Judge, for reasons which are not clear, substituted convictions under Ss. 325 and 392 with S. 109 as regards accused 1.

The first objection to this, that the conviction should be under S. 323 not 325, must be sustained. The only grievous hurt disclosed by the evidence is the injury to the right ear. For the left ear has healed and is intact. But the learned Sessions Judge conceded in effect that identification of the accused, who caused that injury, was impossible on the evidence. He convicted because all three accused having joined with one common intent, it was immaterial which inflicted the wound. Each accused however was charged separately without any allegation of any common intent that an incised wound should be caused, the charge on accused 3 in particular excluding the existence of such intent, since it was limited to S. 323 and was therefore inconsistent with his responsibility for the use of a knife. The charges as framed did not admit of the application of S. 34 and accused can accordingly be held answerable only for the general violence used. Convictions under S. 323 must therefore be substituted for those under S. 325. The convictions under S. 392 are attacked because there is no evidence that the accused kept the jewels, since they may have fallen on the ground, and complainant admits that he did not look for them there; and since the learned Session Judge found that

"accused were not common robbers and intended rather to punish complainant than to steal his ear-rings."

There was however evidence that they took the jewels from complainant's ears and it was for them to show that they did not do so in order to keep them. The punishment which, as the learned Sessions Judge held, they meant to inflict on complainant, may as well have been by deprivation of his property as by causing pain. This objection therefore fails. In view of the substitution of S. 325 for S. 326 the sentences of rigorous imprisonment are reduced to one month in the case of each accused. The fines and sentences in default are confirmed. The orders to give security are, it is argued, not authorized by S. 106, Criminal P. C, because accused have not been convicted of "assault or other offence involving a breach of the peace," assault including only the offence specified in Ss. 351 or 358, I. P. C., and the breach of the peace contemplated being a breach of the public peace, not one committed as this was on private premises. The order against accused must be justified, if at all, as one of the latter class; and it seems to me to fall within it. The English law is not a guide to the construction of S. 106, since under the Criminal Law Consolidation Act, 1861, security may be required on conviction of any offence except murder; and I have not been shown and cannot find that the expression "breach of the peace" has any recognized or definite meaning in England as including only breaches of the public peace or otherwise. In India also it has nowhere been defined. But the reference in S. 504, I. P. C., to "the public peace" and in S. 107, Criminal P. C., to persons "likely to commit a breach of the peace or disturb the public tranquillity," show how the restricted interpretation of S. 106 claimed by accused could and presumably would, if it had been intended, have been expressed. Neither rioting nor assault, the two offences specified in the latter section, necessarily involves a breach of the public peace; and there is therefore no ground

for the application of the doctrine of ejusdem generis.

The first case relied on by the accused, *Muthia Chetti* v. *Emperor* (1), and the two Calcutta cases referred to therein are not relevant, since they decide that only an actual breach of the peace must be an element in the offence established, before S. 106 can be applied. In *Queen* v. *Kunhiya* (2) it was, no doubt, held by a single Judge that S. 280 (meaning presumably R. 489) of the Code then in force (corresponding with S. 106) referred only to offences against the public tranquillity. But the former, like the latter provision, refers to the breach of the peace only generally and the judgment gives no reasons for restricting the application of the terms used. In *Muthurakka Thevan, In re* (3) Spencer, J., without distinguishing between breaches of the public and other peace, held that robbery was not an offence involving a breach of the peace; but he also gave no reasons for his conclusion and apart from the distinction referred to, which he did not mention, I am respectfully unable to follow him. When, as is the case, that distinction is supported by no clearer authority and is not required by the wording of the section, it should not, in my opinion, be recognized. That the conduct of persons who enter on premises where their enemy is, use violence to him, cut and tear his ears and deprive him of his jewellery involves a breach of the peace in the wider sense of the expression needs no demonstration. The order was, in my opinion, proper and must stand as part of the sentence.

The criminal revision petition is allowed to the extent stated as regards the sentence of rigorous imprisonment and is dismissed in other respects.

S.N./R.K. *Petition partly allowed.*

(1) [1906] 29 Mad. 190.
(2) [1872] 4 N. W. P. H. C. R. 154.
(3) [1915] 30 I. C. 435.

A. I. R. 1919 Madras 772

ABDUR RAHIM AND OLDFIELD, JJ.

Puzhakkal Edom—Appellant.

v.

Mahdeva Patter—Respondent.

Appeal Suit No. 344 of 1916, Decided on 8th November 1917, against decree of Sub-Judge, South Malabar, in O. S. No. 49 of 1915.

Civil P. C. (1908), O. 39—Injunction restraining karnavan from contracting loans for managing tarwad property—Loans contracted for necessity—Both tarwad and karnavan are liable for debt—Malabar law, tarwad.

In a suit by the members of a tarwad to remove the karnavan from office, the Court passed an injunction restraining the latter from contracting loans to manage the property. The karnavan nevertheless borrowed money for the necessary purposes of the tarwad while the injunction was in force. In a suit by the creditor for repayment of the loan.

Held: that the effect of the injunction was what was laid down in O. 39, and that both the Karnavan and the tarwad were liable for the debt; *Eastern Trust Co.* v. *McKenzie Mann & Co. Ltd.*, (1915) *A. C*, 750, *Dist.*; 9 *All.* 497 and 25 *All.* 431, *Foll.* [P 773 C 1]

C. V. Ananthakrishna Aiyar—for Appellant.

T. R. Ramchandra Aiyar and *A. S. Venku Aiyar*—for Respondent.

Judgment.—The first question argued before us is on the merits of the case. As a matter of fact, money was advanced by the respondent as alleged by him, and we think there was necessity on the part of karnavan, who held the office previous to the appellant to borrow money for tarwad purposes. As regards the fact of the advances, the only evidence is on the side of the respondent which supports his case and that case is corroborated by the production of receipts obtained from different persons to whom payments were made either on account of maintenance, or salaries or for payment of kist. *No doubt* the respondent himself was in debt to a large extent but he gives evidence that he borrowed money from different persons in order to make a loan to Andi Achan. He brought the loan to the notice of the Court and it must have been known to the appellant in the suit.

On the question of necessity the Edom consists of 160 members and the income, all told, taking it at the highest, does not amount to more than Rs. 12,000 a year and the admission of the appellant himself is to the effect that unless jungle trees are leased from time to time the income is not sufficient to meet the maintenance charges, after paying the necessary outgoings. There is evidence to show that at the time when Andi Achan borrowed from the respondent he had large payments to make amounting to nearly Rs. 3,000 and he did make this payment in full. We are therefore unable to say that the finding of the Subordinate Judge on this point is wrong.

Then it is pointed out that the present appellant and a number of other members of the family had instituted a suit against Andi Achan for removing him from the karnavan's office and in the course of that suit an injunction was obtained restraining him from managing the property. We take it that the effect of the different orders passed in that connexion was to prohibit his contracting loans. Because the injunction seems to be very widely worded—restraining Andi Achan from carrying on the management of the property which would have authorized him to contract loans for the purpose—he however obtained permission afterwards to raise Rs. 3,000 by leasing jungle trees. But then the evidence shows that he was unable to find such a lessee. Therefore he applied to the respondent and obtained from him the amount on the bond in this suit. It has been argued that since there was an injunction restraining Andi Achan from borrowing money, this bond executed to the respondent is not enforceable even though the money was advanced for necessary purposes of the family and was utilized for such purposes. We have not been referred to any authority which supports the proposition, for the English case, *Eastern Trust Co.* v. *McKenzie, Mann & Co. Ltd.*, (1), cited by Mr. C. V. Ananthakrishna Aiyar, does not seem to touch the question at all. On the other hand the ruling in the *Delhi & London Bank* v. *Ram Narain* (2) which has been followed in *Manohar Das* v. *Ram Autar Pande* (3), lays down the law to the contrary. We think the effect of an injunction like this is what is laid down in the Civil Procedure Code, and it will be going much too far to say that a person in the position of Andi Achan being so restrained is not liable to repay the money which he has in fact borrowed and if the money was borrowed and utilized for the benefit of the tarwad that the tarwad is not liable. We therefore uphold the judgment of the Subordinate Judge and dismiss the appeal with costs.

As regards the application for amendment of the decree we think that it must be allowed. The proportionate costs which the Subordinate Judge has directed as being payable to respondent is Rs. 432-10-1. In this he has proceeded on a wrong basis, because the only amount for which deduction has to be made is the court-fee; and calculating on that basis, the costs payable in the lower Court to the respondent would be rupees 573-10-1. The decree will be modified accordingly.

S.N./R.K. *Appeal dismissed.*

(1) [1915] A. C. 750.
(2) [1887] 9 All. 497.
(3) [1903] 25 All. 431.

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* A. I. R. 1919 Madras 773

PHILLIPS AND KRISHNAN, JJ.

Gopalaswami Naick and *another*—Defendants—Appellants.

v.

Nammalwar Naick—Plaintiff — Respondent.

Second Appeal No. 279 of 1917, Decided on 9th October 1918, against decree of Dist. Judge, Tinnevelly, in Appeal Suit No. 9 of 1916.

*** Civil P. C. (1908), O. 21, R. 2—Payment out of Court not certified by decree-holder—Execution taken out without giving credit—Suit by judgment-debtor for damages is governed by Limitation Act (1908), Art. 115 and not Art. 120.**

Where a decree-holder does not certify a payment made to him out of Court by the judgment-debtor towards the satisfaction of the decree under the provisions of O. 21, R. 2, Civil P. C., and takes out execution without giving credit for such payment, the judgment-debtor has a right to sue the decree-holder for any damage he may have suffered by the latter's neglect to certify and by the proceedings in execution.

Such a suit is one for breach of the implied promise to certify payment to the Court and to make it effectual in execution. [P 774 C 1]

In such a case the filing of the execution petition in itself gives a cause of action though no money may have been realized, and successive applications may give rise to successive breaches and fresh causes of action. If money is subsequently realized that will give a fresh cause of action as a further breach of the covenant and the amount recovered will form the main portion of the damages; but where money is not realized, the damages awarded can only be by way of compensation for any injury caused to the judgment-debtor and for any loss he may have been put to by the attempted execution of a satisfied decree. Such a suit is governed by Art. 115 and not by Art. 120, Lim. Act. [P 775 C 1]

K. R. Rangaswami Aiyangar—for Appellants.

V. Viswanatha Sastri — for Respondents.

Phillips, J.—Appellants' chief contention is that plaintiff can have no cause of action until money has been recovered from him in execution. In *Viraraghava Reddi* v. *Subbakka* (1), a similar suit was

(1) [1882] 5 Mad. 397 (F.B.).

held by the majority of this Court to be one to recover damages for the breach of the implied promise to certify the payment to the Court and thereby make it effectual in execution. The third Judge, no doubt, based the right of suit on the failure to discharge a statutory duty. The two views are very similar, but the former is, I think, more accurate, for the duty of certifying satisfaction imposed by the Civil Procedure Code can be performed at any time, and no period is prescribed for its performance, whereas if the cause of action be held to be the breach of an implied covenant not to execute the decree, any application for execution would be a breach of the covenant and would give a right to sue for damages. I think therefore that plaintiff had a cause of action, when the execution application of 1910 was filed, but a suit on that cause of action would now be barred under Art. 115, Lim. Act. As plaintiff cannot act upon this breach of the covenant, he relies upon a subsequent breach in 1913, treating the first breach as condoned and in this view his suit is within time.

Treating the suit as one for damages, the measure of damages is not necessarily the sum paid by plaintiff in satisfaction of the decree together with subsequent interest, for that is the maximum amount of damages that plaintiff could suffer if the decree were actually executed and plaintiff could only claim that sum if it were actually recovered from him. In the present case it is necessary to consider how far plaintiff has been damaged by the filing of the execution application, which is the breach of covenant complained of. He would be entitled to all expenses incurred by him in defending the claim, and also to compensation for any moral or mental worry caused by the fact that an executable decree is unlawfully kept alive, and steps may be taken against the judgment-debtor at any moment. I therefore agree in the order proposed by my learned brother.

Krishnan, J.—The facts necessary for the decision of this second appeal may be briefly stated as follows: A mortgage decree was obtained by the father of defendants 1 and 2 against the plaintiff and his sons in 1906. In 1907 plaintiff paid Rs. 500 towards this decree; this payment, though denied by defendants, has been found to be true by both the lower Courts. Plaintiff alleged a further payment of Rs. 40 but that has not been proved. Without certifying the payment of Rs. 500 and without giving credit for it, defendants applied for execution for the whole decree amount, first in July 1910 and then again in June 1913. In July 1914 plaintiff brought this suit, praying that the defendants may be directed to certify payment or to pay back the amount paid with interest at 18 per cent. The lower Courts disallowed the first prayer; the Munsif held that it could be granted only in execution proceedings under O. 21, R. 2, Civil P. C., and no objection was taken to this view in the appellate Court. The Munsif had dismissed the suit in toto as barred by limitation, but the District Judge has given a decree for Rs. 500 and interest at 18 per cent, as claimed. The first point argued before us is that as no money had been realized in execution of the decree, plaintiff had no cause of action at all. We must therefore consider what the nature of the plaintiff's suit is and what his rights are. The nature of a suit like the one before us was considered by a Full Bench of this High Court in *Viraraghava Reddi* v. *Subbakka* (1) and though Kindersley, J., was of opinion that the suit should be taken as based on the ground of fraud or negligence on the part of the decree-holder in not certifying the payment to Court as he was under a statutory obligation to do, the majority consisting of Turner, C. J., and Muthuswami Aiyar, J., considered it to be:

> "a suit to recover damages for the breach of the implied promise to certify the payment to the Court and thereby make it effectual in execution."

I am prepared to follow the view of the majority that the suit is really one for damages for breach of implied contract. When a decree-holder receives from the judgment-debtor money outside Court in payment of the decree amount, if there is no express agreement between the parties at the time, it may properly be held that the decree-holder does so under an implied promise that he would certify that payment as required by law and that he would not execute the decree any more for the amount or realize the amount again in execution. If this is the implied contract, as I think it is, the breach will give rise to a cause of action:

and it is clear that the decree-holder commits a breach as soon as he files his execution petition claiming the same amount again. It seems to me therefore that the filing of the execution petition in itself gives a cause of action, though no money may have been realised; and successive applications will give rise to successive breaches and fresh causes of action. If money is subsequently realized, that will give a fresh cause of action as a further breach of the covenant. In each case the amount of damages payable for the breach will have to be ascertained. Where money is realized from the judgment-debtor in execution over again, that amount of course, will form the main portion of the damages; but where it is not so realized, as in the present case, the damages awarded can only be by way of compensation for any injury caused to plaintiff and for any loss that he may have been put to by the decree, which ought to have been treated as part satisfied, being attempted to be executed in full against him. That of course, will not include the amount that has not yet been realized.

This view is to some extent supported by the ruling in *Medai Kaliani Anni, In the matter of* (2), though that case does not deal with the measure of damages. There the claim was treated as one based on the ground of breach of duty; but, as already stated, I am inclined to think that is really a breach of an implied contract as held by the majority in the Full Bench. The case of *Sriramulu* v. *Dalayya* (3) has been cited to us as against this view. But that case contains no discussion of the law and no reasons are given for the view held, and I am unable to follow it. It overlooks the fact that coercive processes may be adopted in execution of a decree and considerable injury may be caused thereby to the judgment-debtor without any money being realized. If the decree-holder's action in taking out fresh execution was wrongful, there is no reason why he should not be liable in damages resulting from it. The ruling in *Arunachella Pillai* v. *Appava Pillai* (4) is no longer law as it was departed from in the Full Bench in *Viraraghava Reddi* v. *Subbakka* (1). I therefore hold that the recovery of the decretal amount in execution was not essential to give a cause of action to the plaintiff and this suit is maintainable.

The next question argued is one of limitation. Respondent's vakil contended that Art. 120 should be applied. But that is a residuary article and can be applied only if no other article applies. In the view I am taking of the nature of the suit, it clearly falls under Art. 115 so far as it claims refund of the money paid. The relief claimed by way of injunction to direct defendants to 'certify payment was disallowed by the first Court and not asked for in the appellate Court and has been expressly abandoned before us by the respondent's vakil, as he was entitled to do. It is not therefore necessary to discuss what article applied to the suit with reference to that relief; nor is it necessary to consider whether such relief could be given in this suit. We have a case here of two 'successive breaches of implied contract by two successive applications in execution, one made in 1910 and the other in 1913. So far as the claim is based on the first application it is barred by limitation as the suit was filed in 1914, i. e., more than three years from the date of the cause of action. But the plaintiff is entitled to damages resulting from the application in 1913, as he is within time for it. The decree of the lower Court is clearly erroneous in holding that the plaintiff was entitled to recover the whole of the money paid by him with 18 per cent. interest. If defendants had realized the money a second time, that would have formed a proper item of damages but not otherwise. There must be a finding on the question

"what damages, if any, is plaintiff entitled to as the result of defendant's execution application in 1913.':

Parties may adduce fresh evidence. Finding two months; objections seven days.

(In compliance with the order contained in the above judgment, the District Judge of Tinnevelly submitted the following.)

Finding.—A finding is required on the question:

"What damages, if any, is plaintiff entitled to as the result of defendants' execution application in 1913."

The only evidence on this point is the evidence of the plaintiff. He stated before the Munsif that he obtained copies

(2) [1907] 30 Mad. 545.
(3) [1906] 16 M. L. J. 54.
(4) [1866-67] 3 M. H. C. R. 188

of the application made by the defendants for execution of their decree (Exs. F and F-1), but admitted that he received no notice of these applications until after he had instituted his criminal complaint. To this Court he estimated his loss at about Rs. 200, but said that he spent this sum in applications and in the criminal case. He has given no details of what he spent in applications, nor specified to what matter these applications relate. He has not shown that he incurred any expenditure in consequence of the applications for execution made by the defendants; for it cannot be held that the criminal case entitles him to damages in consequence of the application for execution made by the defendants in 1913. He admits that his memory is bad; and it is not improbable that any expenditure incurred by him was made in the criminal case. I cannot accept his vague estimate of expenditure, and he has given no basis for estimating any damages incurred by him. I find that he has not proved satisfactorily that he is entitled to any damages in consequence of the defendant's execution application in 1913.

(This second appeal coming on or final hearing after the return of the finding of the lower appellate Court upon the issue referred by this Court for trial, the Court delivered the following:)

Judgment.—Upon the finding that plaintiff has sustained no damages in connexion with the execution proceedings he had no grounds for coming to Court. His suit must therefore be dismissed, but in the circumstances each party will bear his own costs throughout.

S.N./R.K. *Suit dismissed.*

A. I. R 1919 Madras 776

ABDUR RAHIM AND NAPIER, JJ.

Kilaru Kotayya—Defendant—Appellant.

v.

Polavarapu Durgayya and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1199 of 1917, Decided on 19th April 1918, against the decree of Sub-Judge, Bezwada, in Appeal Suits No. 22 and 25 of 1916.

(a) Hindu Law—Alienation—Father—Sale held not binding on sons—Consideration is not charge on son's share.

Where a sale by a Hindu father is held to be not binding on the share of the sons, the purchaser is not entitled to any charge on the latter's share for any portion of the consideration for the sale.

In such a case the purchaser cannot treat the consideration which he seeks to get refunded as a debt of the father which it is the pious duty of the sons to repay: Spencer, J's judgment in *A. I. R.* 1914 *Mad.* 9, *not Appr.* Sadasiva Aiyar, J.'s view in *A. I. R* 1914 *Mad.* 9 and 22 *Mad.* 312, *Foll.*, *A. I. R.* 1917 *P. C.* 61 and 43 *I. C.* 225; *Expl.* and *Dist.* [P 777 C 1]

(b) Civil P. C. (1908), S. 110—Applicability.

A decree against the Hindu father will not operate as res judicata in a suit by the sons to set aside the sale in respect of their shares in the property. [P 777 C 2]

T. Prakasam—for Appellant.

T. R. Venkatarama Aiyar—for Respondents.

Abdur Rahim, J.—Defendant 2 purchased certain property from defendant 1, the father of the plaintiffs, the father and sons belonging to a joint Hindu family. Defendant 1 had instituted a suit previously by which he sought to set aside the alienation on the ground of fraud, undue influence and want of consideration. This Court held that the alienation could not be set aside but though the consideration of Rs. 800 had not been originally paid by the purchaser, yet inasmuch as he undertook to pay that amount the previous suit was dismissed. The plaintiffs were not parties to the suit and no question of necessity was considered or decided by this Court. In fact that was not a question seriously pressed at trial in that suit. The present suit has been brought by the sons in order to set aside that very sale and the plaintiffs have obtained a decree to that effect. It has not been proved that the sale was made for purposes binding the family. The question that is now raised before us by Mr. Prakasam appearing on behalf of the purchaser is that plaintiffs should not be allowed to have a decree, so far as their 2/3rds share is concerned, without being directed to pay a like proportion of the amount which has been paid as consideration for the sale; that is to say, he asks us to treat the consideration for the sale, which he sought to get refunded to him, as a debt of defendant 1 which it is a pious obligation of the plaintiffs to repay. He drew our attention, in support of this contention, to a passage in the judgment of Spencer, J., in the case af *Subbayia Mudaliar* v. *Thulasi Mudaliar* (1). But no authorities are cited therein in support of such a proposition.

(1) A. I. R, 1914 Mad. 9=22 I. C. 44.

On the other hand, it is clear from the judgment of Sadasiva Aiyar, J., in the same case that, in his opinion, a purchaser in similar circumstances was not entitled to any charge for the consideration or any portion of it, that is in a case where the sale was held to be not binding on the share of the son.

In so holding he followed a ruling of a Division Bench of this Court in *Virabhadra Gowdu* v. *Guruvenkata Charlu* (2) and the view of the law laid down by Sadasiva Aiyar, J., in *Subbaiya Mudaliar* v. *Thulasi Mudaliar* (1). The consideration of Rs. 800 was paid for the sale of the property and no question of debt could arise until at least the sale is set aside. Whether it could even then be said to be a debt which the son would be under an obligation to pay within the meaning of Hindu law may be open to question. In any case defendant 2 is not entitled to any charge on the son's share for any portion of the consideration of a sale which was not for purposes binding on the family. The learned vakil for the respondent has drawn our attention to a passage in a recent ruling of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (3), where it is stated that the question of pious obligation of a son to pay his father's debts does not arise until after the father's lifetime. This passage was considered by a decision of a Bench of this Court in *Vinjanampati Peda Venkanna* v. *Vadlamannati Srineevasa Deekshatulu* (4), and there it is stated that their Lordships of the Privy Council could not by this statement have intended to modify the law, as laid down in a long series of decisions, as regards the right of a creditor to enforce a debt borrowed by the father both against the father and the son. It is not necessary however to discuss this point any further in this case, as I think that the ruling in *Virabhadra Gowdu* v. *Guruvenkata Charlu* (2) is decisive of the question raised by the appellant. Whether defendant 2 will be entitled to sue the father and the sons for the consideration which has failed in a separate suit afterwards, is not a question on which we need express any opinion at present.

(2) [1899] 22 Mad. 312.
(3) A. I. R. 1917 P. C. 61=39 All. 437=39 I. C. 280=44 I. A. 126 (P. C.).
(4) [1918] 41 Mad. 136=43 I. C. 225.

The second point urged by Mr. Prakasam is that the decree in the previous suit, to which I have already alluded, operates as res judicata. I think it is rightly pointed out by Mr. Venkatarama Aiyar that the father could not, as plaintiff in that suit get the sale set aside on the ground that there was no necessity for his own act. I think that is a sufficient answer to this argument. In the result the appeal fails and must dismissed with costs.

Napier, J.—I agree.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 777
Special Bench

WALLIS, C. J., AYLING AND SESHAGIRI AIYAR, JJ.

A. Seetaramiah, 2nd Grade Pleader.

In the matter of.

Referred Case No. 6 of 1918, Decided on 30th September 1918, by Dist. Judge, Ganjam.

Legal Practitioners Act (1879), Ss. 12, 13 and 14—Conviction of pleader for keeping common gaming house is misconduct unfitting him to be member of profession—In such case procedure in Ss. 13 and 14 need not be followed.

The conviction of a pleader for keeping a common gaming house amounts to misconduct impyling a defect of character and unfitting him to be a member of the profession: *Weare, In re; Incorporated Law Society, Ex parte*, (1893), 2 Q. B. 439, *Appl.*

In the case of a pleader's conviction for a criminal offence the procedure prescribed in Ss. 13 and 14 need not be followed, and the case retried under the Act. The only question for the High Court to determine is whether the offence implies a defect of character unfitting the person to be a pleader: 22 *All.* 49 (*P. C.*), *Foll.* [P 777 C 1]

S. Srinivasa Ayyangar—for Government.

S. Sreenivasa Ayyangar—for Vakils Association.

K. V. L. Narasimham — for Respondent.

Judgment.—In this case the District Judge of Ganjam has reported to the High Court that the respondent has been convicted of keeping a common gaming house in Berhampore town, an offence under S. 6, Towns Nuisances Act 3 of 1889, and sentenced to a fine of Rs. 100. The District Judge has followed the procedure prescribed with regard to charges under Ss. 13 and 14, Legal Practitioners Act by issuing a notice, framing a charge and hearing the respondent, although, strictly speaking, that procedure is not required in cases such as this, which

come under S. 12 of the Act. S. 12 empowers the High Court to

"suspend or dismiss any pleader or mukhtar holding a certificate issued under S. 7 who is convicted of any criminal offence implying a defect of character which unfits him to be a pleader or mukhtar, as the case may be."

The decision of the Privy Council in *Rajendro Nath Mukerji*, In the matter of (1) shows that we are not now to retry the case, but that the question before us is whether the offence of which the respondent has been convicted implies a defect of character unfitting him to be a pleader. Now, the offence is that the respondent who is a pleader of more than 20 years' standing and, according to his own showing, a man of considerable property, used the office which he rented for his business as a common gaming house and was discovered there at night with a number of people of all ranks of society with cards, cowries and other gambling instruments. Lord Esher, M. R., in *Weare, In re; Incorported Law Society, Ex parte* (2), which was a case of a solicitor who had been convicted of allowing houses belonging to him to be used as brothels, indicated the considerations which ought to guide the Court in these cases. He referred to the observation of Lord Mansfield in the earlier case of *Brounsall Ex parte* (3) that it is necessary that members of all branches of the legal profession should stand free from all suspicion, and pointed out that the Court had not only to consider the solicitor's duties to his clients, but also whether his conduct was of such a personally disgraceful character that he ought not to remain a member of a strictly honourable profession, and that other members of that profession ought not to be called upon to enter into that intimate intercourse with him that is necessary between two solicitors even though they are acting for opposite parties. We think that the offence of which the respondent has been convicted is one which affects his character and the learned Advocate-General has shown that this is certainly so according to Hindu ideas.

We think that in the circumstances, we are bound to deal with him under the Legal Practitioners Act, and we have carefully considered what the sentence should be. This is the first time that any such case has come before the Court and it is possible that the pleader was not fully alive, as he ought to have been to the gravity of his conduct. We think it is sufficient to direct in this case that he be suspended from practice for six months. But this is not to be regarded as a precedent in future cases which may come before the Court. The respondent must also pay the costs of the day.

S.N./R.K. *Pleader suspended.*

(1) [1900] 22 All. 49=26 I. A. 242=7 Sar. 556 (P. C.).
(2) [1893] 2 Q. B. 439.
[1778] 2 Cowp. 829.

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* A. I. R. 1919 Madras 778

KUMARASWAMI SASTRI, J.

K. Ukandan Nayar—Plaintiff—Petitioner.

v.

K. S. Sankara Varma Raja—Defendant—Opposite Party.

Civil Revn. Petn. No. 1 of 1918, Decided on 16th August 1918, from order of Principal Dist. Munsif, Calicut, in Sm. C Suit No. 679 of 1917, D/- 6th August 1917.

*** Provincial Small Cause Courts Act (1887), Art. 31—Suit for money with prayer for looking into accounts to ascertain correctness of claim does not become suit for accounts.**

A suit to recover money which is cognizable by a Small Cause Court does not become a suit for an account under Art. 31, merely because accounts have to be looked into in order to ascertain the correctness or otherwise of the amount claimed by the plaintiff. [P 778 C 2]

K. P. Ramakrishna Ayyar—for Petitioner.

Judgment.—The suit is to recover Rs. 51-6-4 paid by plaintiff at defendant's request to remove an attachment. The fact that plaintiff states that there were other transactions in respect of which he reserves his right to sue separately will not alter the nature of the suit. The mere fact that accounts have to be looked into in order to ascertain the correctness or otherwise of the amount claimed by plaintiff would not render the suit one for an account under Art. 31, Provincial Small Cause Courts Act. *Konduru Runga Reddi* v. *Subbiah Setty* (1), *Sankara Reddy* v. *Errama Reddi* (2), *Varadarajulu Chettiar* v. *Pattra Narayanswamy Chetty* (3), *Kshetra Nath Bhuiya* v. *Kali Dasi Dasi*(4). The allegations in paras. 4 and 5 will not affect the jurisdiction of the Court to decide whether plaintiff at

(1) [1905] 28 Mad. 394.
(2) [1909] 4 I. C. 618.
(3) [1913] 20 I. C. 518.
(4) [1917] 41 I. C. 929.

the defendant's request made a specific payment sued for. I set aside the order of the District Munsif and direct him to receive the plaint and dispose of it accordingly to law.

Respondent will pay petitioner's costs.

S.N./R.K. *Order set aside.*

A. I. R. 1919 Madras 779 (1)

PHILLIPS AND KUMARASWAMI SASTRI, JJ.

Sreeram Narasiah—Plaintiff—Appellant.

v.

Bommireddi Venkataramiah—Defendant—Respondent.

Second Appeal No. 1437 of 1917, Decided on 14th August 1918, against decree of Dist. Court, Cuddapah, in Appeal Suit No. 71 of 1916.

Contract Act (1872), S. 108—Bona fide purchaser of hypothecated goods takes free of charge.

A bona fide purchaser of hypothecated goods without notice of the encumbrance takes the goods free of the encumbrance. [P 779 C 2]

E. Doraisami Aiyar and *C. Bakathvatsalu Naidu*—for Appellant.

K. Koti Reddi—for Respondent.

Judgment.—Plaintiff obtained a mortgage of certain properties including a bull, with which alone we are concerned here. The bull was left in the mortgagor's possession and was eventually purchased by defendant 3 from the mortgagor's vendee. The hypothecation of moveables has been recognized in Indian Courts [vide *Shyam Sunder* v. *Cheita* (1) and *Shrish Chandra Roy* v. *Mungri Bewa* (2)] but that is not the question for consideration now. We have to determine whether a bona fide purchaser for value of hypothecated goods without notice of the hypothecation is bound by it. There is no direct authority on the point, nor is hypothecation of moveables recognized by any statute. We are therefore thrown back upon principles of equity and justice.

Under S. 108, Contract Act a person in possession of moveables, although not the owner, can pass the property in the goods to an innocent purchaser. Much more, then, would it appear that the real owner could pass the property, which was only subject to an undisclosed hypothecation. Even if we are to apply the principles of English law on this question, which is perhaps doubtful, we find that it has been held that goods included in a bill of sale and left with the original owner can be purchased in the ordinary course of business by a bona fide purchaser: *National Mercantile Bank* v. *Hampson* (3). When goods are left in the possession of the mortgagor, a wide door is opened for fraud, and when the equities between the innocent purchaser and the mortgagee have to be weighed, the preponderance must be given to the purchaser, for the mortgagee has, by his omission to secure possession of the goods, facilitated the commission of the fraud. In this view we think that a bona fide purchaser of hypothecated goods without notice of the encumbrance takes the goods free of it. The second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1871] 3 N. W. P. H. C. R. 71.
(2) [1905] 9 C. W. N. 14.
(3) [1880] 5 Q. B. D. 177.

A. I. R. 1919 Madras 779 (2)
Full Bench.

WALLIS, C. J., AYLING AND KUMARASWAMI SASTRI, JJ.

Muthirulandi Poosari and *another*—Defendants—Appellants.

v.

Sithurama Aiyar and *others*—Plaintiffs—Respondents.

Second Appeal No. 1822 of 1917, Decided on 18th February 1919, against decree of District Judge, Madura, in Appeal Suit No. 274 of 1916.

Madras Surveys and Boundaries Act (1897), S. 11—Order under S. 11 if not reviewed or questioned by suit is conclusive and operates as res judicata.

An order of a survey officer under S. 11, if not reviewed by the appellate authority or questioned by suit as provided in the section, is conclusive as to the rights of the parties, and will operate as res judicata in a subsequent suit to oust the unsuccessful party who was in possession at the date of the order; 2 *Mad.* 306, *Cons. and* **Overruled.** [P 781 C 1]

M. S. Ramanuja Aiyangar for *E. S. Venkatachariar*—for Appellants.

A. Venkatarayaliah and *L. Venkatanarasiah*—for Respondents.

Order of Reference.

Phillips, J.—The question at issue in this appeal is whether the suit site belongs to plaintiffs or defendants. The District Judge, differing from the District Munsif, has found that in litigation between the predecessors of the parties in 1900 the suit lane was found to belong to plaintiffs. In 1904-1906 the Madura Town Survey took place and the site was demarcated by the Survey Authorities as belonging to defendants. In

the written statement it was pleaded that this demarcation took place after the settlement of a dispute between the parties and we must take it that this was so, although respondents now set up a contention, which was apparently never set up before, that there was no dispute about the site. In this view the decision of the survey officer was not ultra vires, whatever view be taken of the litigation of 1900 and 1902, for the parties referred their dispute to him and he had jurisdiction to determine it. The decision of the survey officer was not appealed against, nor did plaintiffs file a suit within one year of the order.

The District Judge however, relying on the decision in *Krishnamma* v. *Achayya* (1) has held that in this suit for possession the decision of the survey officer does not estop plaintiffs from asserting their rights, and has found that plaintiffs were in possession in 1900 and 1902 and that the present suit is not barred by limitation by virtue of S. 13 Act 4 of 1897. The decision in *Krishnamma* v. *Achayya* (1) does not appear to have been overruled, but in *Kamaraju* v. *Secy. of State* (2) it was held that the decision of a survey officer under the Boundary Act (1860) was res judicata, and this was the view of another Full Bench in *Muthammal* v. *Secy. of State* (3). Similarly in *Krishna Rau* v. *Lakshmana Shanbhogue* (4), *Velayuthan* v. *Lakshmana* (5) and *Peela Yarakayya* v. *Veankata Krishnamaraju* (6) it was held that an adverse order on a claim petition, when no suit was afterwards filed to set it aside, was a bar to the same plea in subsequent proceedings. In *Raj Bahadoor Singh* v. *Achumbit Lal* (7), which is quoted as authority in *Krishnamma* v. *Achayya* (1), it was held that it was unnecessary to set aside an adoption which was wholly invalid, before bringing a suit for possession, and undoubtedly, when the order to be set aside is ultra vires, a suit need not be brought to set it aside before suing for an independent relief vide *Shivaji Yesji Chawan* v. *Collector of Ratnagiri* (8). In *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* (9) the decision in *Raj Bahadoor Singh* v. *Achumbit Lal* (7) was explained as being based upon this ground, and the Judges in *Nagu* v. *Salu* (10) referred to this and consequently doubted the authority of *Krishnamma* v. *Achayya* (1).

We cannot accept respondents' contention, by which it is sought to uphold the decree appealed against, that plaintiffs had held adverse possession for over 12 years, for such possession must have been interrupted when the survey officer gave his decision and fixed the demarcation stones. It might be possible to distinguish *Krishnamma* v. *Achayya* (1), on the ground that in that case it was not shown that the demarcation interfered with the plaintiff's possession so as to give rise to a cause of action, but as the facts appear to be very similar to those of the present case, I think it advisable to refer to a Full Bench the following question:

"When a plaintiff's claim has been disallowed under the Surveys and Boundaries Act, 4 of 1897, but he has been in possession of the property, does the decision of the survey officer operate as res judicata in a subsequent suit for possession."

Seshagiri Aiyar, J.—I agree that the question should be referred to a Full Bench. I take the facts found to be these: There was a decision in favour of the plaintiff in Original Suit No. 802 of 1900 about a plot of ground. Subsequent to the decision the parties disputed whether that decision included the property in suit. Even in this suit the Courts below are not agreed whether the plot in dispute was included in the previous decree, the Court of first instance holding one way and the lower appellate Court the other way. In 1904 there was a survey of the town of Madura. From the judgment of the District Judge I take it that the plaintiff and the defendant asked the survey officer to determine to which of them the site now in dispute belonged. I am also of opinion that it must have been with reference to the question whether the decree included this site or not. I am sure that the decree was before the survey officer. He gave his decision in favour of the defendant. Plaintiff did not bring a suit to

(1) [1878-80] 2 Mad. 306.
(2) [1888] 11 Mad 209 (F. B.).
(3) A. I. R. 1915 Mad. 106=26 I. C. 817=39 Mad. 1202.
(4) [1882] 4 Mad. 302=1 Ind. Dec. (n. s.) 1046.
(5) [1885] 8 Mad. 506=3 Ind. Dec. (n. s.) 346.
(6) [1917] 41 I. C. 694.
(7) [1854-57] 6. I. A. 110=6 C. L. R. 12 (P.C.).
(8) [1887] 11 Bom. 429.
(9) [1886] 13 Cal. 308=13 I. A. 84 (P. C.).
(10) [1891] 15 Bom. 424.

contest it. Mr. Venkatarayaliah contended that so long as a person against whom a survey officer has given his decision is in possession of the property he is not bound to set aside the order; and he is supported by *Krishnamma* v. *Achayya* (1). I regard the decision of the survey officer as in the nature of an award assigning the property in dispute to the defendant. In that view the defendant acquired a title to the property on the date of the survey officer's demarcation. The authorities to which my learned brother referred show that in similar circumstances where the legislature has enacted that a decision would be final unless set aside within a prescribed period by the civil Court, the party against whom the order was passed would be barred by res judicata even though he was in possession. *Krishnamma* v. *Achayya* (1) is not reconcilable with these descisions. I therefore agree that the question propounded by my learned brother should be submitted to the decision of a Full Bench.

Opinion—Assuming that in this case the boundary was disputed and the dispute was the subject of an order by the survey officer under S. 11, Madras Act 4 of 1897, we think that order, if not reviewed by the appellate authority or questioned by suit as provided in the section, was conclusive as to the rights of the parties, and nonetheless so because the unsuccessful party who was in possession at the date of the order was not subsequently ousted from possession. In *Krishnamma* v. *Achayya* (1) there does not appear to have been any order under S. 25, Boundaries Act of 1860, which corresponds to Ss. 11 and 12 of the present Act. The suit had been treated in the District Court as a suit governed by Art. 16, Sch. 2, Limitation Act of 1871

"to set aside any act of an officer of Government in his official capacity, not herein otherwise expressly provided for"

The official act appears to have been the actual demarcation of the land by fixing the boundary stones. If there was an order in that case under S. 25 of the Act of 1860 we think the decision was wrong.

S.N./R.K. *Answered affirmatively.*

A. I. R. 1919 Madras 781

PHILLIPS AND KUMARASWAMI SASTRI, JJ.

Abdul Hashim Sahib and *others* — Plaintiffs—Appellants.

v.

Kader Batcha Sahib and *others*— Defendants—Respondents.

Second Appeal No. 1482 of 1916, Decided on 26th July 1918 against decree of Dist. Court, Salem, in Appeal Suit No. 105 of 1915.

Specific Relief Act (1877), S. 39 — Mortgage—Lease by mortgagee — Suit by mortgagor for declaration that mortgage was unsupported by consideration and for its cancellation held not maintainable.

Plaintiff sued for a declaration that a mortgage executed by him in favour of defendant 1 was not supported by consideration and for cancellation of the instrument. Defendant 1 had leased one of the items of the property in dispute to defendant 2, whose title as lessee was upheld in a suit brought by him against the plaintiff:

Held: (1) that the mortgage deed could not be cancelled, inasmuch as the matter had passed beyond the stage of contract to that of an executed conveyance and the deed was neither void nor voidable for nonpayment of consideration; (2) that the plaintiff was not entitled to relief by way of cancellation of the deed, also on the ground that the parties could not be put in status quo ante by reason of the lease executed by defendant 1 to defendant 2; (3) that the prayer for declaration could not be granted inasmuch as there was no proof of any danger to the mortgagor's title to the properties. [P 783 C 2]

P. N. Marthandam Pillai—for Appellants.

T. R. Venkatarama Sastri — for Respondents.

Phillips, J.—In this case the plaintiffs sued for a declaration that the suit mortgage deed is not supported by consideration and is void and for its cancellation. The plaint properties were mortgaged by the plaintiffs to defendant 1 and it has been found that the consideration money was not paid. Defendant 1 however leased one of the items to defendant 2, who is now in possession, and it has been decided in another suit that defendant 2 is entitled to retain possession and that his lease is valid. Defendant 2's lease is based on the plaint mortgage deed inasmuch as he is a lessee of the mortgagee, and to the extent of the possession of defendant 2, the mortgage deed must be held to be valid.

The plaintiffs' suit has been dismissed on the ground that it will not lie under S. 39, Specific Relief Act, because the document is neither void nor voidable and there is no apprehension of any in-

jury to the plaintiff's right. It has been contended before us that the mortgage deed is a void document inasmuch as no consideration has passed. It has no doubt been held that a suit will not lie to compel a person either to lend or to borrow money, that is to say, the Court will not decree specific performance in a suit to enforce the execution of such a contract and it is contended that, if plaintiff cannot sue for specific performance, he must be entitled to have the contract cancelled. In this case however there is something more than a contract to mortgage, because the mortgage deed has been executed and registered and possession has been given under it. It is therefore a complete conveyance of a mortgage right to defendant 1.

This case is on all fours with the case reported as *Baslingappa* v. *Virupaxapa* (1). There it was held that, in a case where the mortgagee had failed to pay consideration for the mortgage deed, plaintiff was not entitled to bring a suit under S 39, Specific Relief Act. The other side relied on *Ramaswami Chettiar* v. *Sundara Reddiar* (2) and *Kumarappan Chettiar* v. *Narayanan Chettiar* (3). In the first case, the suit was brought by the mortgagee to enforce his mortgage when he had not paid any consideration for it and it was held that, inasmuch as there was no debt due, there was nothing to be charged on the land and the mortgagee could not enforce his charge on the land before he had paid the mortgages money. In *Kumarappan Chettiar* v. *Narayanan Chettiar* (3) also the plaintiff was mortgagee without possession and sued to enforce the mortgage for which no consideration had been paid. In those two cases, Spencer, J., held that the mortgage was a nullity and was inoperative. I think the present case can be distinguished from those cases on the ground that possession has been given under the mortgage, even if it can be held that a mortgage is void when it has merely been executed without consideration and nothing further has taken place. In *Tirumal Raju* v. *Pandla Muthial Naidu* (4), where only part consideration was paid, the mortgage was held to be valid, as also in *Rashik Lal* v. *Ram Narain* (5), where reference is made to *Tatia* v. *Babaji* (6), where Farran, C. J., pointed out the distinction between a perfected conveyance and a mere contract. In *Govindammal* v. *Gopalachariar* (7) it was held that the execution of a sale deed completed the contract and the fact that there was no consideration for it did not make it void. Under S. 58, T. P. Act:

"A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced,"

so that on execution of a registered deed in accordance with S. 59, the mortgage would be complete although the mortgage money had not actually been paid to the mortgagor. It is difficult to draw a distinction between the transfer of immovable property by way of sale and a transfer by way of mortgage. If a sale is complete by the execution of the registered instrument, it appears to me that a mortgage is also complete and can be enforced. The mortgagor would not then be entitled to sue for cancellation of the instrument, but if the consideration was not paid to him, he would have his remedy in damages for breach of the contract. This view does not, I think, conflict with the principle that a suit will not lie to enforce a contract to lend or to borrow, for in this case, the contract has been completed by the conveyance and it is not a case of suing to enforce the contract. Under S. 39, Specific Relief Act, plaintiff cannot bring a suit because the document is not void nor is it voidable. It is however contended that his prayer for a declaration should be granted. So far as defendant 2 is concerned, it has been decided by a Court of law that he is not entitled to such a declaration. As against defendant 1 a decree declaring that no consideration passed might be justifiable, but a declaration to this effect is only asked for jointly with a declaration that the deed is void, and it seems to me that the declaration as to consideration should not be decreed as both the lower Courts have found that plaintiff has no reasonable apprehension of danger and plaintiff has not asked for this particular relief alone against defen-

(1) [1903] 5 Bom. L. R. 392.
(2) A. I. R. 1914 Mad. 684=23 I. C. 805.
(3) [1916] 35 I. C. 455.
(4) [1912] 35 Mad. 114=9 I. C. 289.
(5) [1912] 34 All. 273=13 I. C. 573.
(6) [1898] 22 Bom. 176.
(7) [1906] 16 M. L. J. 524.

dant 1. The second appeal is therefore dismissed with costs.

Kumaraswami Sastri, J.—The plaintiff is the appellant. He sued for a declaration that the deed of mortgage executed by him was not supported by consideration, for cancellation of the deed, for a declaration that the lease executed by defendant 1 in favour of defendant 2 was not binding on plaintiff. Though there is a prayer for "confirming the possession of item 1 by the plaintiff" only the two declarations prayed for were valued and stamp duty paid thereon. The defendant executed a lease of item 1 in favour of defendant 2 on 7th September 1911 for a period of 3 years, and at the date of the suit (12th June 1914) the lease had about three months to run. Defendant 2 filed Original Suit No. 248 of 1912 on his lease, alleging that plaintiff obstructed him and got a decree in his favour restraining the appellant from disturbing his possession which, it is now admitted, was confirmed on appeal.

Various defences were raised but for the purpose of this second appeal it is necessary to consider only two, namely, that plaintiff's remedy was only to sue for the consideration recited in the deed, assuming that it was not paid, and that plaintiffs are not entitled under the Specific Relief Act for the relief claimed. Both the District Munsif and District Judge dismissed the suit on the preliminary ground that the plaintiff was not entitled to the declarations sought for, even assuming that the allegations in the plaint are true. As regards the prayer for the cancellation of the mortgage deed, I think it must fail. A distinction has to be drawn between a case where the matter rests simply on contract and where it has passed to the stage of an executed conveyance and, in the latter case, mere non-payment of consideration will not render the transaction void or voidable. See *Rashik Lal* v. *Ram Narain* (5), *Baslingappa* v. *Virupaxapa* (1). The question has also been fully discussed by Wallis, C. J., in Appeal No. 64 of 1916. In the present case no fraud, misrepresentation or mistake is alleged and no case has been made out for cancellation.

Another ground for refusing the prayer is that the parties cannot be put on status quo ante as the mortgagee has executed a lease of one of the items of property which has been upheld as against the plaintiff. It is unnecessary to decide whether a mortgagee who pays no consideration can, by the simple expedient of transferring his mortgage right or leasing a portion of the property, plead the transfer in bar to a suit for consideration or whether it is not competent to any Court as against such mortgagee to cancel the document in so far as it affects rights not transferred to any bona fide third party, as the lease in this case has been held to be binding on the plaintiff in the suit filed by the lessee and the matter is concluded between the parties. It is well settled that, when a contract is voidable, the right to determine it is subject to the condition that an innocent third party will not be affected by the cancellation or even a wrongdoer in case of delay on the part of the party entitled to rescind and that as a condition to a rescission there must be restitution in integrum, so that the parties may be put in status quo by the Court. See *Clough* v. *L. N. W. Ry. Company* (8), *Western Bank of Scotland* v. *Addie* (9) *Erlanger* v. *New Somlrero Phosphate Co.* (10).

As regards the prayer for a declaration that the mortgage is not supported by consideration, it is clear that a mortgage affects the property only to the extent to which money is advanced as security, *Ramaswami Chettiar* v. *Sundara Reddiar* (2), *Kumarappan Chettiar* v. *Narayanan Chettiar* (3). If there was no consideration, there would be nothing for the mortgagor to pay when a suit is filed. Though there may be cases where a Court will grant a declaration or injunction on proof of danger to the mortgagor's title to the properties, I do not think there is anything in the allegation in the plaint which would justify a Court in exercising its discretion in favour of the mortgagor who has come to Court three years after the execution of the deed of mortgage. Both the lower Courts are of opinion that plaintiffs have no reasonable apprehension of any serious injury in the future. In the result the second appeal fails and is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(8) [1872] 7 Ex. 26.
(9) [1867] 1 H. L. (Sc.) 145.
(10) [1878] 3 A. C. 1218.

**A. I. R. 1919 Madras 784
Full Bench

WALLIS, C. J., SADASIVA AIYAR AND SPENCER, JJ.

A. L. A. Alagappa Chettiar—Appellant.

v.

Chockalingam Chetty and *others*—Respondents.

Appeal No. 327 of 1916. Decided on 25th April 1918, against the order of Dist. Judge Ramnad, D/- 18th July 1916 in Insol. Petn. No. 6 of 1913.

** Civil P. C. (1908), O. 41, R. 22—Memo of objections can be presented in appeal against decision under insolvency Act—Appeal dismissed as time barred—Memo of objections cannot be heard—Provincial Insolvency Act (1907), Ss. 46 and 47.

A memorandum of objections can be presented in an appeal against a decision under the Provincial Insolvency Act.

Where, however, the appeal is dismissed as presented out of time, the memorandum of objections cannot be heard. [P 740 C 2 P 791 C 1,2]

(*Authorities reviewed.*)

Per *Wallis, C. J.*—The expression "in regard to proceedings under this Act in Courts subordinate to them" in S. 47 (2), Provincial Insolvency Act is wide enough to cover cases in the subordinate Courts which comes before the High Court or District Court on appeal or revision as well as applications for transfer, etc. The procedure prescribed in the Civil Procedure Code is the standard procedure and applies not only to insolvency cases in original Courts but also to cases of appeal and revision provided for in the insolvency Act. [P 788 C 1,2]

The right of a respondent to proceed by way of memorandum of objections is strictly incidental to the filing of the original appeal in time, and it is open to a party against whom a memorandum of objections has been filed to set up the bar that the original appeal was filed out of time. [P 790 C 2]

Per *Sadasiva Aiyar*, J.—The right to prefer an appeal by way of memorandum of objections is an extension of the right of appeal, which must be given by Statute. Statutory provisions relating to such rights should be strictly construed. O. 41, rule 22, Civil P. C. must, if possible, not be extended in favour of the right of a respondent to file a memorandum of objections so as to prejudice parties who have obtained a decree in their favour in the lower Court and who might reasonably entertain the belief that, as the time for preferring an appeal has expired, the rights which have been established in their favour under the decision of the Court of first instance have become finally secure. [P 791 C 1]

The expression "in regard to civil suit" in S. 47 (2), Provincial Insolvency Act includes proceedings in appeal in civil suits. [P 787 C 2]

Per *Spencer, J.*—The word "hearing" in the heading to O. 41, Civil P. C. means hearing on the merits, and the heading "procedure on hearing" indicates that the respondent's rights to take cross-objections, which up to the time of the hearing was an inchoate right, becomes perfected at the hearing of the appeal. The words "upon the hearing" in S. 561 old Code were probably omitted in the new Code as being redundant. [P 791 C 2]

K. Srinivasa Aiyangar and *K. Bhashyam Aiyangar*—for Appellant.

A. Krishnaswami Aiyar, A. Venkatarayaliah, B. Sitarama Rao, S. R. Muthusamiy Aiyar, A. Sriranga Chariar, T. Ranga Chariar, and *K. Desikan*—for Respondents.

Order of Reference.

Oldfield, J.—The decision under appeal is one adjudicating 7, 9, 12, 13 respondents insolvents and avoiding transfers evidenced by Ex. B series, Appeal against Order No. 337 of 1916 is by the transferee under these documents. The memoranda of objections are by 7 and 9 to 14 respondents, the persons adjudicated and their sons, for the cancellation of the order of adjudication. If the memoranda succeed, the order under appeal must be set aside in toto; and we have, therefore dealt with them first. We consider at present two preliminary objections taken by respondent, 6 a creditor, who in consequence of an attempt by the original petitioners to withdraw the petition, was given the carriage of the proceedings by the lower Court and who now opposes the appeal and memoranda. His first objection is that memoranda of objections are not authorized by insolvency law and cannot be heard; his second, arising from the fact that this appeal is admittedly out of time with reference to the decision in *Koparthi Lingayya* v. *Araveti Chinnarayana* (1), is that a memorandum cannot be heard, on an appeal, which itself cannot be heard because it is out of time. That memoranda cannot be entertained in insolvency appeals is argued on the ground that the Provincial Insolvency Act contains no reference to them. A memorandum is the means, by which a respondent can take any cross objection to the decree or order, which he could have taken by way of appeal, and in view of *Munisami Mudaly* v. *Abbu Reddy* (2) nothing turns on the facts that the objection raises, as it does in the present case, an issue between him and his co-respondent. A memorandum, although it can be presented only in special circumstances (a qualification material in

(1) [1918] 41 Mad. 169=44 I. C. 805.
(2) A. I. R. 1915 Mad. 648=38 Mad. 705=27 I. C. 323.

the sequel), is in substance indistinguishable from an appeal. It follows that the right to present a memorandum, like the rights to present an appeal, "cannot be assumed" and that "both alike must be given by Statue or some authority equivalent to it:" *Minakshi Naidu* v. *Subramanya Sastri* (3). And certainly no right to present a memorandum is given explicitly by Statute in the case before us.

The first answer attempted is that such a right is given by necessary implication, since the recognition of a right of appeal involves recognition of a right of objection under the general law applicable to appellate proceedings. But, although a memorandum may be indistinguishable from an appeal in substance, the right of appeal is distinguishable from the right of objection, since they are exercisable by different persons in different circumstances, objection being open only to a respondent when an appeal has been filed by an appellant; and it does not follow from the recognition of the right of one person in one set of circumstances, that a similar right must be recognized in favour of another person in others. In fact the right of objection represents an extension of the right of appeal, for which distinct warrant must be required; and such warrant is not forthcoming in any general law applicable to appellate proceedings. For the existence of such general law is impliedly negatived by the decisions in *Sesha Ayyar* v. *Nagarathna Lala* (4) and *Kausalia* v. *Gulab Kuar* (5), in which it was not invoked or applied, the latter relating directly to the right of objection; and it may be observed that we have not been shown in the present case any such course of practice as that referred to in it as a possible ground of decision. The attempt in those was to apply, not any general law, but that enunciated in the Civil Procedure Code consistently, it would appear, with the application to the appeals in question of the provision then corresponding with the present S. 96: and, when the general law was relied on in *Minakshi Naidu* v. *Subramanya Sastri* (3), the judgment dealt with it as represented by that and the connected provisions. I accordingly turn to the argument that S. 96 is applicable to appeals under the Provincial Insolvency Act, and that the right of objection follows from its application.

S. 96 authorizes appeals from all decisions of civil Courts, "save when otherwise expressly provided in the body of the Code or by any other law;" and no doubt S. 46, Provincial Insolvency Act, which purports to deal with appeals under it, contains nothing similar to the provisions in S. 48, Guardians Wards Act (8 of 1890 and S. 19 (3), Succession Certificate Act (7 of 1899) by which all orders not specified as appealable are declared final. On the other hand, the provision in S. 46 for a right of appeal and a point to which I return, the absence of other provisions regarding appeals or the procedure in them indicate that the right of appeal under the Provincial Insolvency Act is conferred by it alone, is subject to the restrictions it imposes and cannot be enlarged by the application of S. 96 and other provisions of the Civil Procedure Code. This indication is strengthened by reference to those restrictions, the requirements of leave to appeal in certain cases and the mention of periods of limitation and the absence of similar provisions regarding objections. It has not been shown how any argument in favour of the right of objection can be limited in its application to the cases of appeals for which no leave is required.

It was no doubt held in *Raghunathdas Gopaldas* v. *Secy. of State* (6) that a provision permitting an appeal to the High Court attracted the application of S. 561, Civil P. C., which at that time authorized the filing of objections; and not the less so, because an appeal could not be filed without the certificate of the original tribunal. But the judgment notices the distinction between a certificate that the case is a fit one for appeal and leave to appeal, such as is now in question, granted to a particular individual in respect of a particular part of the case, that in which he is interested. And the requirement of leave to appeal is material; for, when it is required it is difficult to assume either that the objector is at liberty to proceed without obtaining it and has thus been placed in a better position than the appellant or that the former's obligation to obtain leave is to be based on mere implication from the

(3) [1888] 11 Mad. 26=14 I. A. 160 (P. C.)
(4) [1904] 27 Mad. 121.
(5) [1899] 21 All. 297.
(6) [1905] 29 Bom. 514.

provision regarding the latter. Again, although the periods specified for appeals are identical with those provided for ordinary appeals in Art. 152, 156 Sch. 1, Lim. Act, it was thought necessary to specify them distinctly in the section; and, when limitation was thus dealt with, it is hard to believe that the necessity for a provision similar to 41, R. 22 (1) was overlooked or that such a provision was to be imported from the Civil Procedure Code. As regards both leave and limitation the easy and natural explanation for the omission of provision for memoranda of objections is that memoranda are not contemplated. The specification in S. 46 of the appeals, which can be entertained and of the conditions imposed on their entertainment, indicate, in my opinion, an intention to deal with the law relating to appeals exhaustively in that section and to exclude the application of S. 96, Civil P. C., with all its implications.

Lastly it is argued that the law relating to appeals is to be found also in S. 47, Provincial Insolvency Act, and that its references to powers and procedure impose on this Court the duty to deal with the objections in accordance with the Civil Procedure Code and confer on respondents the right to make them. The first objection to this is that, if the section is intended to deal generally with appellate work, the respondent's right to make and the Court's duty to deal with objections, although they are provided for under the heading "Procedure on hearing" in O. 41, involve an extension of the right of appeal, which, as the decision in *Colonial Sugar Refining Co.* v. *Irving* (7) shows, cannot be described as matter of procedure; and if the question is of the Court's powers, it is an unusual and strained construction to treat the reference to them as conferring a right on the party. But in fact the argument against the application of S. 47 rests on the broader foundation, that no part of it applies to appellate business proper. Sub-S. (1) applies only "to the Court" and allows it the powers and procedure appropriate to the exercise of original civil jurisdiction; and it therefore is irrelevant in this connexion. Sub S. (2) applies to High Courts and District Courts, which no doubt exercise appellate powers, but deals with their position only "in regard to proceeding in Courts subordinate to them," not in appeals before them, and allows them the powers and procedure appropriate, not to appeals, but to civil suits; and the effect of the subsection must therefore be taken as being, not the application to to their appellate work of any of the provisions of part 7, Civil P. C., but only of the powers of transfer and withdrawal and the procedure relating thereto, referred to in Ss. 22, 23, 24. As in my opinion, the right to present memoranda of objections involves an extension of the right of appeal, which the Provincial Insolvency Act does not sanction expressly and is not shown to sanction by implication or with reference to any general principle applicable to appellate proceedings, I would hold that the memoranda before us cannnot be heard. As however my learned brother entertains doubts on the point and it is one of general importance, I concur in referring to a Full Bench the question:

'Whether a memoradum of objections can be presented in an appeal against a decision under the Provincial Insolvency Act?"

On the question, which would arise in case a memorandum of objections can be presented, there is a clear conflict of authority in the decisions of this Court, which we cannot resolve: see *Kanirkamanna Imath Narayana* v. *Maosad Kanirkamanna* (8), *Devibhashyam Venkanna* v. *Peddinti Venkataramanayya* (9), *Biridugadda Venkadu* v. *Receiver of N. & M. Estate* (10) and Second Appeal No. 1864 of 1916. It is therefore necessary to refer to the Full Bench this question also:

"Whether a memoradum of objections, presented in an appeal which is dismissed as out of time, can be heard?"

Sadasiva Aiyar, J.—The preliminary questions for consideration are: (1) Whether a respondent is entitled to file a memorandum of objections in an appeal filed under S. 46, Provincial Insolvency Act. (2) Whether if such a memorandum of objections is admissible, it can be heard after the appeal is dismissed as presented out of time. As regards the first question, the Provincial Insolvency Act is clearly not a self contained or complete Act in itself; see para. 2 p. 570, of 33 *M. L. J.* 562 and also p. 574. As regards procedure, S. 47,

(7) [1905] A. C. 369=74 L. J. P. C. 77.

(8) [1910] 8 I. C. 140,
(9) [1916] 32 I. C. 579.
(10) [1915] 30 I. C. 832.

Provincial Insolvency Act, directs the Court exercising insolvency jurisdiction to follow the same procedure as it has and follows in the exercise of original jurisdiction. Cl. 2 of the same section directs High Courts and District Courts to follow the same procedure in regard to proceedings under the Act in Courts subordinate to them as the High Court and District Courts follow in regard to civil suits. The High Court and the District Courts have got appellate jurisdiction in respect of decisions passed in certain matters in insolvency proceedings in the lower Courts. As regards appeals under the Civil Procedure Code, O. 41, R. 1 to 21, prescribe rules of procedure relating to several necessary matters such as the form of the appeal, stay of proceedings in the lower Court on appeal, endorsements to be made upon the memoranda of appeal, demands for security, sending of notices on appeal, calling for records from the lower Courts, fixing days for the hearing of appeal, service of notices on opposite party, right to begin and so on.

There is no provision in the Insolvency Act as regards any of these matters of procedure in respect of appeals filed under S. 46 of that Act, (at least until rules are framed under S. 51 by the High Court) and unless we hold that they are incorporated in the Act by the provision in S. 47, Cl. 2, which directs the High Court and District Courts in regard to proceedings of subordinate Courts to follow the procedure in regard to civil suits, there is an unexplained omission to make such a provision in the Act. I therefore am inclined to think that S. 47, Cl. 2, does apply to appellate business proper of the High Court and District Courts and not only to the powers of transfer and withdrawal referred to in Ss 22, 23 and 24, Civil P. C. Having regard to the position of S. 47, as immediately following S. 46, which latter section gives the power of appeal, I think S. 47, Cl. 2, though not as clearly and happily worded as it might have been, was intended by the legislature to apply the provisions of all the rules under O. 41, Civil P. C., in respect of the regulation of the procedure in appeal, appeals being only continuations of the original proceedings in suits. I think that the expression "in regard to civil suits" means "in regard to all proceedings in civil suits" and includes proceedings in appeals in civil suits.

Then comes the question whether O. 41, R. 22, which empowers the respondent to file a memorandum of objections is a rule of procedure. No doubt several provisions relating to substantive law are incorporated in the Civil Procedure Code, but the rules in O. 41 from Rr. 9 to 15 are entitled as "procedure on admission of appeals," Rr. 16 to 37 are headed as "procedure on hearing," and R. 22 occurs among these latter rules described as falling under the head of "procedure on hearing." This is no doubt not conclusive on the point and there is much to be said (as shown by my learned brother in his opinion) for the opposite view that whatever may be the nature of Rr. 9 to 37 other than R. 22, R. 22, gives a substantial right of appeal just as Ss. 96, 97 and 100 in the body of the Civil Procedure Code, and S. 46, Insolvency Act give a substantial right of appeal. In *Raghunathdas Gopaldas* v. *Secy. of State* (6) Jenkins, C. J., and Aston, J., had to construe a section which stated that, subject to the provisions of S. 48, sub-S. 11, City of Bombay Improvement Act 4 of 1898, the provisions of the Civil Procedure Code with respect to appeals and original decrees "shall, so far as they can be made applicable, apply to appeals under that subsection." The learned Judges held that the procedure as to memorandum of objections in S. 561 of the old Civil Procedure Code became thereby applicable, that is, that the respondent became entitled to file a memorandum of objections on an appeal having been filed with the necessary permission.

I think that without much straining of language it could be argued that every party to the insolvency proceedings is given the substantial right of appeal under S. 46 (just as every party aggrieved is given a right of appeal under Ss. 96, 97 and 100, Civil P. C.) and that the respondent (who as a party has such a right of appeal) is merely allowed to avail himself of an additional rule of procedure by way of memorandum of objections as provided for in O 41, R. 22, in exercising his said right of appeal. On the whole I am inclined to the view that the legislature intended that O. 41, R. 22, about the right to file a memorandum of cross-objections (the objections being

confined under that rule to those which the respondent could have taken by way of appeal) could be availed of by a respondent where an appeal had been filed under S. 46, Provincial Insolvency Act. It was objected that one of the classes of appeals provided for under S. 46, that is, the class coming under Cl. 3 of the section, requires leave of the District Court or of the High Court, and if a memorandum of objections is allowed after an appeal has been filed under that clause, it will contravene the intention of the Act, as O. 41, R. 22, Civil P. C., makes no mention of the leave of the Court being required for filing a memorandum of objections in any case I am not however impressed with this argument as O. 41, R. 22, restricts the right to take cross-objections to those grounds which the respondent could have taken by way of appeal, and, as he could not advance grounds by way of appeal without the leave of the District Court or of the High Court in a case falling under S. 46, Cl. 3, he could not file a memorandum of objections also in such an appeal without the leave of the Court. [see also the observations in *Raghunathdas Gopal das* v. *Secy. of State* (5), where the learned Judges seem to hold that once permission is given to appeal and an appeal is filed, a separate permission for a memorandum of objections is not necessary]. However I should like, if possible, to express no final opinion on these points and to have the questions argued before a Full Bench and decided finally by such a Bench.

Coming to the second question as to whether a memorandum of objections can be heard after the appeal is dismissed as barred by limitation, there has been a conflict of authority in the several High Courts and in this Court itself there has been such a conflict: see *Kanirkamanna Imath Narayana* v. *Maosad Kanirkamanna* (8). *Devibhashyam Venkanna* v. *Peddinti Venkataramanayya* (9) and Second Appeal No. 1864 of 1916. I would therefore refer the second question also for the decision of the Full Bench if the first question is answered in the affirmative by the Full Bench.

Opinion

Wallis, C. J.—S. 47 (1), Provincial Insolvency Act, provides that, subject to the provisions of the Act, the Provincial Insolvency Court in regard to proceedings under the Act shall have the same powers and follow the same procedure as it has and follows in the exercise of original civil jurisdiction, thus making the provisions of the Civil Procedure Code clearly applicable, as far as may be to original proceedings under the Act. This subsection applies to District Courts in the exercise of original jurisdiction in insolvency. Sub-S. (2) then applies exactly the same provisions in the same language to the High Courts and District Courts "in regard to proceedings under this Act in Courts subordinate to them," and the first question is, what is the effect of these words. Though not very happily expressed they are, in my opinion, wide enough to cover cases in the subordinate Courts which come before the High Court or District Court on appeal or revision as well as on applications for transfer, etc., and there are sufficient indications that they were used by the legislature in this sense. The procedure prescribed in the Civil Procedure Code is the standard procedure, and no reason has been suggested why it should have been made applicable in insolvency cases only in the original Court and not also to cases of appeal and revision provided for in the Act. There must be some procedure or other governing such proceedings, and if it had been intended that it should be prescribed by rules made under S. 51, it would have been specifically mentioned in sub-S. 2, among the other important matters as to which rules were to be made under that section. So far as appeals to the High Court are concerned, the subsection so construed may, in my opinion, be regarded as superfluous, because, under S. 590 of the Code of 1882, now S. 108, the procedure prescribed in Chap. 41, which deals with appeals from original decrees, was made applicable, as far as might be, to appeals from orders under any special or local law in which a different procedure is not provided. No different procedure is provided in the Provincial Insolvency Act as it was in the Insolvents Act of 11 and 12 Vict. C. 21, to which for that reason the provisions of S. 590 were held inapplicable in *Brown*, In the matter of (11).

Clearly therefore in either view the procedure prescribed by the Code is applicable to appeals to the High Court under the Provincial Insolvency Act and

(11) [1886] 12 Cal. 629.

it is unnecessary to refer to S. 117 and Ss. 3, 4 of the Code, which were also relied on. The next question depends on the construction of O. 41, R. 22 (formerly S. 561), Civil P. C., which has given rise to much difference of opinion. In Calcutta it was held that S. 561 did not generally entitle one respopdent in an appeal to present a memorandum of objection against another respondent, and this was followed in *Kallu* v. *Manni* (12). On the other hand, it was held by this Court to be permissible in *Timmayya Mada* v. *Lakshmana Bhakta* (13), approved in *Kulaikada Pillai* v. *Viswanatha Pillai* (14). In these circumstances the section was amended in 1908 by substituting in sub S. (1) "cross objection" for "objection" and in sub-S. (3) "the party who may be affected by such objection" for "appellant," while the new sub-S. (4) speaks of "such notice to the other parties as the Court thinks fit." The interpretation put upon these amendments has not been uniform.

A Full Bench of this Court in *Munisami Mudaly* v. *Abbu Reddy* (2) has relied mainly on the previous practice of this Court, but that consideration has less weight in a case like this, where the legislature in making the amendments must be presumed to have intended to introduce uniformity of practice in place of the diversity prevailing in the different High Courts. While the Bombay High Court adheres to the view that cross objections must be aimed at the appellant in *Nursey Virji* v. *Alfred H. Harrison* (15), it has been held in Calcutta in *Jadunandan Prosad Singha* v. *Koer Kallyan Singh* (16), (same case reported in 16 *C. W. N.* 612), that R. 22 (3) introduces a modification of the old rule in S. 561, that the effect of the alteration is to leave no doubt that a respondent may prefer a cross objection against a co respondent, but that the limits of the rule are not attempted to be defined. The Allahabad Court takes a similar view, *Balgobind* v. *Ram Sarup* (17). In none of these cases has the effect of the substitution of "cross objection" for "objection" in R. 22 (1) been dealt with. Prima facie the intention would appear to have been only to allow objections which arose in some way out of the appeal, whether aimed at the appellant or at another respondent. This discussion is not irrelevant to the present question, as the more widely R. 22 is interpreted, the more serious would be the consequences of answering the second question referred to us in the affirmative. At the time when the present Code was enacted in 1908 that question had been expressly decided in *Ramjiwan Mal* v. *Chand Mal* (18) with reference to the terms of S. 561 of the old Code where the Court held that when the appeal was dismissed as out of time the objection could not be heard, as the entertainment of the objections was contingent and dependent upon the hearing of the appeal. In the course of the judgment Mahmood, J., observed that to decide otherwise would

"be practically holding that an appellant who prefers an appeal long after the prescribed period of limitation may confer upon the respondent the right of having the appeal of his own heard in the shape of objections under S. 561, Civil P. C., although, if the original appeal was barred by limitation, a fortiori such objections ought to be barred also."

The legislature of 1908 must be taken to have known of this decision, and it is exceedingly unlikely that they intended to overrule it by implication. The decision no doubt proceeded on the ground that the case fell within the ratio decidendi of the earlier cases, in which it had been held that the objections could not be heard when the appeal had been withdrawn or dismissed for default. Those decisions were based on the language of S. 348 of the Code of 1869 and S. 561 of the Code of 1882 by which a respondent, although he had not appealed against any part of the decree, was entitled "upon the hearing" to take any objection to the decree which he could have taken by way of appeal. The view taken by the Courts when the section was so worded was as explained by Sir Charles Sargent, C. J., in *Dhondi Jagannath* v. *Collector of Salt Revenue* (19), that once the hearing of the appeal had commenced, the respondent's right to take his objections which up to the time of hearing was an inchoate right, became perfected. The legislature has now removed from this section the words

(12) [1901] 23 All. 93.
(13) [1884] 7 Mad. 215.
(14) [1905] 28 Mad. 229.
(15) [1913] 37 Bom 511=21 I. C. 7.
(16) [1912] 13 I. C. 653.
(17) A. I. R. 1914 All. 424=26 I. C. 83=36 All 505.
(18) [1888] 10 All. 587.
(19) [1895] 9 Bom. 28.

"upon the hearing" upon which these decisions rested, and has expressly overruled the decisions themselves in the case of withdrawal or dismissal of the appeal by enacting in sub-S. (4):

"Where in any case in which any respondent has under this rule filed a memorandum of objections the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit."

It does not however follow that *Ramjiwan Mal* v. *Chand Mal* (18) was also intended to be overruled. If that had been the intention of the legislature, it would probably have added some such words as "or is dismissed as having been filed out of time."

There are moreover strong reasons for not attributing any such intention to the legislature. The right of parties to a suit to treat the decree as final, when no appeal has been filed within the prescribed period of limitation, is a substantive right of great value as pointed out by the Privy Council in *Colonial Sugar Refining Co.* v. *Irving* (7) and in *Saudagar Singh* v. *Pardip Narayan Singh* (20), and there is a strong presumption against any intention on the part of the legislature to interfere with it unnecessarily. It is no doubt impaired to some extent by R. 22, which may have the effect of extending the respondent's time for appealing or even giving a fresh starting point. Provided however the original appeal is required to be filed in time, the interference is a very limited one, and may be defended as necessary to enable the Court to do full justice in disposing of the case on appeal and as governed by the same considerations as have led to the enactment of the new R. 33, which gives the Court a discretionary power to interfere in appeal even as regards parties who have not been made respondents, and respondents who have not filed any memorandum of objections. It would however largely and unnecessarily impair this valuable right to hold that the filing of an appeal by one party, even though out of time, has the effect of enabling the respondents to file appeals not only against the appellant but as against one another. The objections urged by Mahmood, J., in *Ramjiwan Mal* *Chand Mal* (18) against such a course have lost none of their force, and there is no reason to suppose that the legislature intended to disregard them. Even greater difficulties arise if the present rule is treated as giving respondent an unrestricted right of filing memoranda of objections, because the decision on a question raised by a respondent in the same interest as the appellant may give occasion under R. 33 for the modification of the decree in favour of the appellant himself whose appeal is ex hypothesi barred.

The true rule would appear to be that the right of respondents to proceed by way of memorandum of objection is strictly incident to the filing of the original appeal in time, and that it is open to a party against whom a memorandum of objection has been filed to set up the bar that the original appeal was filed out of time. It is no doubt true that a respondent who is served with a notice of appeal cannot always be sure whether the appeal was filed in time or not and if so, whether or not delay will be excused and that he may therefore feel bound to file a memorandum of objection and incur the cost of court-fees and briefing counsel in support of the memorandum. That in my opinion is not a sufficient reason for taking the other view. Moreover in a proper case the hardship may be met by ordering the appellant to pay the costs of the memorandum. I answer the second question in the negative.

Sadasiva Aiyar, J.—In the Order of Reference, I indicated my inclination to answer the first question referred in the affirmative. In other words, while expressing no final opinion, I gave some reasons for holding that a respondent was entitled to file a memorandum of objections in an appeal against a decision under the provisions of the Insolvency Act. My Lord, in the opinion just now pronounced by him, has come to the conclusion that that question should be answered in the affirmative and I agree entirely therewith and have nothing to add to what I have said already. The second question referred has caused me more difficulty. I expressed no opinion whatever upon that question in the Order of Reference. The right to prefer an appeal cannot be claimed by a litigant as a matter of course but should be given by Statute law. The right to prefer an appeal by way of memorandum of objec-

(20) A. I. R. 1917 P. C. 196=45 Cal. 510=43 I. C. 484=45 I. A. 21 (P. C.).

tions is an extension of the right of appeal which must therefore also be given by statute. Statutory provisions relating to such rights should be strictly construed. O. 41, R. 22, corresponding to old S. 561, must if possible therefore not be extended in favour of the right of a respondent to file a memorandum of objections so as to prejudice parties who have obtained a decree in their favour in the lower Court and who might reasonably entertain the belief that as the time for preferring an appeal has expired, the rights which have been established in their favour under the decision of the Court of first instance had become finally secure. This Court has no doubt in *Munisami Mudaly* v. *Abbu Reddy* (2) allowed one respondent to file cross-objections against another, and this is a further reason for strictly confining the right to file such objections. Supposing the plaintiff is the appellant and defendants 1 and 2 are the respondents in an appeal and the plaintiff and defendant 2 are in collusion and the suit was dismissed by the District Munsif, upholding defendant 1's contentions. The plaintiff appeals out of time to the District Court. The Sheristadar's office does not discover that the appeal is out of time and sends notice to both the respondents. The colluding defendant 2 files his memorandum of objections within one month of the receipt of the notice of appeal on the same grounds on which the plaintiff filed his appeal, defendant 2's objections and the plaintiff's appeal being both thus directed against defendant 1. The result of answering the second question in the affirmative would be that while the plaintiff's appeal at the final hearing of the appeal is dismissed as barred by limitation, his friend, defendant 2, by having his memorandum of objections heard, compels the Court to hear the appeal also, and defendant 1, who thought that the decision of the District Munsif was safe owing to no appeal having been filed in time, finds that he was living in a fool's paradise.

I do not see that the omission in O. 41, R. 22 (1), of the words "upon the hearing" which found a place in the old S. 561 is of much importance, though some of the decisions under the old S. 561 (which decisions denied the right of the respondent to have his memorandum of objection heard where the appeal itself was dismissed as out of time) attached importance to those words. I think that much weight attaches to the argument based on the new sub-R. 4, O. 41, R. 22 which makes an express provision for hearing the memorandum of objections only in cases where the original appeal is withdrawn or is dismissed for default and does not expressly allow the hearing of the objections, where the appeal is dismissed as barred by limitation or dismissed on other preliminary grounds. Another consideration which has weighed with me is that the right of a respondent to file an objection depends if, the second question is answered in the affirmative, on what I may call the accident of the Court or the Sheristadar discovering at once whether the appeal is barred. If the bar is discovered at once and the appeal rejected then no notice is issued to any respondent and hence no respondent is entitled to file a memorandum of objections; but if it is not so discovered and notice is issued, then he gets valuable rights. I therefore agree with my Lord in the answer to the second question also.

Spencer, J.—I agree that the first question referred to us should be answered in the affirmative and the second question in the negative. The fact that R. 22, which confers upon respondents the right of taking cross objections, falls under that portion of O. 41 which is headed "Procedure on hearing" supports the latter view and justifies, if I may say so, the observation of Sir Charles Sargent, C. J., in *Dhondi Jagannath* v. *Collector of Salt Revenue* (19), where he speaks of "the respondent's right to take his objections, which up to the time of the hearing was an inchoate right,"

becoming perfected at the commencement of the hearing of the appeal. "Hearing" would then mean heaing on the merits. The words "upon the hearing" in S. 561 of the old Code were probably omitted from the present Code as being redundant, seeing that in both Codes the heading "Procedure on hearing" preceded this provision, and in order that Cl. 1, R. 22, should be consistent with the newly introduced Cl. 4 of the same rule. The retention of the words "upon hearing" in the said note to the section indicates that this change was not intended to have any legal significance. *Deibhashyam Venkanna* v. *Peddinti Venkataramanayya* (9) should be treated as now overruled.

S.N./R.K. *Reference answered.*

A. I. R. 1919 Madras 792

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Singa Raja and *others*—Defendants—Appellants.

v.

Pethu Raja and *others* — Plaintiff — Defendants—Respondents.

Civil Appeal No 405 of 1917, Decided on 16th August 1918, against decree of Temporary Sub-Judge, Ramnad, in O. S. No. 59 of 1916.

Civil P. C. (1908), O. 21, R 2 and O. 34 R. 2 and 5—Mortgage decree for sale—Production of certificate of payment after preliminary decree—Defendant can take advantage of certificate by reducing amount for which property is to be sold—Transfer of Property Act (1882), S 89.

Under O. 34, Rr. 2 and 5, a final decree for sale should be passed if the amount specified in the preliminary decree has not been paid into Court within the time specified. The Court will not recognize any plea, at the time of passing the decree for sale, to the effect that the amount has been paid out of Court to the decree-holder. In this respect, the scheme of the Code differs from the provisions laid down in S. 89, T. P. Act: 40 *I. C.* 845, *Foll* [P 792 C 2]

If however between the passing of the preliminary decree and the passing of the decree for sale the defendant obtains a certificate under the provisions of O. 21, R. 2, he can take advantage of it to reduce the amount for which the property is to be sold and the decision will be the same as if, at the time when the decree for sale was being made, he came forward and paid the amount into Court: 40 *I. C.* 138; *Expl.* [P 792 C 2]

T. M. Ramaswami Aiyar — for Appellants.

A. S. Viswanatha Aiyar— for Respondents.

Judgment.—This is an appeal from the decree for sale in a mortgage suit passed by the Subordinate Judge of Ramnad. The plaintiff obtained a preliminary decree on 27th September 1916 and the appellant defendant 3, complains that the Subordinate Judge, at the time of passing the decree for sale, refused to inquire into and recognize an alleged settlement of the decree out of Court on 13th February 1917. The application for the decree for sale was made on 24th June 1917 and therefore even if the procedure in O. 2, R. 2, Civil P C, were applicable, the defendant was out of time and was too late to have the adjustment recorded. However we think that the appeal fails on a larger basis. The scheme of the Code appears to us to be that, if the amount made payable in the preliminary decree is not paid into Court within the time limited, then the decree for sale is to be made. In this respect the provisions of O. 34 differ from S. 89, T. P. Act, which provided for payment to the plaintiff or into Court. O. 34, R. 2, Cl. (c), and R. 5, Civil P. C., provide that

" where on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in R. 10."

the Court is to pass a decree ordering the plaintiff to deliver up the documents and to retransfer the mortgaged property and if necessary to put the defendant in possession. But sub R. 2 says, where such payment is not so made, that is to say, where such payment is not made into Court, the Court shall pass a decree ordering the sale of the mortgaged property or a sufficient part thereof. Forms of mortgage decrees are given in App. D and Forms 7 and 8 are drawn up in the same way. Form 7 says that if the defendants pay into Court the sum declared due on account of principal, interest and costs, the plaintiff is to deliver up the documents, etc., and Cl. (3) is that if the defendant pays the said sum as aforesaid (that is, into Court) the mortgagor may apply, etc. Therefore we are of opinion that the scheme of the Code, so far as mortgage decrees are concerned, is that if the amount due under the preliminary decree has not been paid before the appointed day, a decree for sale is to be made and the machinery for sale is to be set in motion. This decision is in accordance with the decision of the Calcutta High Court in *Piran Bibi* v. *Jitendra Mohan Mookerjee* (1). It may be that if between the passing of the preliminary decree and the passing of the decree for sale the defendant obtains a certificate under the provisions of O. 21, R. 2, he can take advantage of that to reduce the amount for which the property is to be sold, and the decision will be the same as if at the time when the decree for sale was being made he came forward and paid that amount into Court. We do not think that the decision in *Jogendra Prasad Narain Singh* v. *Gouri Sankar Prasad Sahu* (2) amounts to more than this.

The provisions of the Code are imperative that, if the money is not paid into Court within the time limited, then there is to be a decree for sale. Those provisions

(1) [1917] 40 I. C. 845.
(2) [1917] 2 Pat. L. J. 533=40 I. C. 138

were advisedly inserted in modification of the corresponding provisions of S. 89, T. P. Act, and we are bound to give effect to them. On this ground the appeal fails and must be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 793

AYLING AND SESHAGIRI AIYAR, JJ.

Bobba Padmanabjudu and *another*—Plaintiffs—Appellants.

v.

Bobba Buchamma — Defendant—Respondent.

Appeal Suit No. 78 of 1917, Decided on 5th February 1918, against decree of Sub-Judge, Bezwada, D/- 1st November 1916.

(a) Specific Relief Act (1877), S. 42—Suit is maintainable for declaration that a will giving power to adopt was not executed.

A suit lies under S. 42, for a declaration that a will giving power to the testator's widow to adopt a boy was not in fact executed: *A. I. R.* 1917 *P. C.* 196, *Foll.*; 12 *I. C.* 176 and 12 *Mad.* 136, *not Foll.*; (*Authorities reviewed*).

[P 795 C 1]

(b) Specific Relief Act (1877), S. 42—Where cloud is cast on plaintiff's title, he is entitled to sue under S. 42—But where that cloud is shadowy, Court may refuse to give relief.

Per *Seshagiri Aiyar, J.*—Whenever a cloud is cast or attempted to be cast on the title of a plaintiff, he is entitled to come to Court under S. 42. But where the cloud is flimsy or of a shadowy character or where the machinery of the Court is utilized to unnecessarily harass the defendant, the Court might refuse to grant relief even though the plaintiff can exercise his right of suit.

[P 793 C 2]

P. Narayanamurthi—for Appellant.

B. Narasimha Row and *C. Rama Rao*—for Respondent.

Seshagiri Aiyar, J.—Plaintiffs sue for a declaration that a will said to have been made by their brother, the deceased husband of the defendant, authorizing her to adopt a boy, was never executed. The defendant pleaded in limine that such a suit is incompetent. The Subordinate Judge dismissed the suit; the only question in appeal is whether this decision is right. The diversity of judicial opinion on the construction of S. 42, Specific Relief Act, is so great that I have resolved upon confining my citations to the cases decided in Madras and to the decisions of the Privy Council. If I may say so with respect, the consideration of this question has been rendered difficult by mixing up two distinct issues. S. 42, Specific Relief Act, while indicating the character of the right which may be declared by a Court of Law, leaves it to the discretion of such Court to grant or refuse the relief claimed. In arguments addressed to Courts, and not infrequently in decisions also, the question of the right of suit has been mixed up with the question of exercising discretion in regard to the relief.

If I had only the language of the section to guide me, I would have little hesitation in holding that suits like the present are within S. 42 of the Act. There can be no doubt that the plaintiffs are entitled to protect their alleged legal right as surviving co-parceners to their deceased brother's estate. It must also be admitted that the defendant is denying that character by setting up the will which, if true, would deprive the two plaintiffs of a third of their property. There is a further consideration: in seeking the aid of S. 42, a plaintiff may consider that if time elapses, the pretensions of the defendant who is interested in denying the plaintiff's title, may gain momentum and may in the course of years render the task of refuting those pretensions very difficult. In fact, as I said in *Gandla Pedda Naganna* v. *Sivanappa* (1). whenever a cloud is cast or attempted to be cast on the title of a plaintiff, he is entitled to come to Court under S. 42. It may be that, in many instances, the apprehended danger or the cloud on title may be of such a shadowy character and so flimsy that the Court in its discretion might refuse to grant the relief prayed for. But that is no ground for saying that the suit is not maintainable. There have been numerous instances in which notwithstanding an undoubted right to litigate, Courts have refused in their discretion to grant relief. The object to be borne in mind in such cases is to see that the machinery of the Court is not utilized for unnecessarily harassing the defendant.

With these preliminary observations, I shall proceed to consider the decisions bearing on the section. In Madras there are cases which hold that where the plaintiff is not likely to be immediately affected, the suit should be dismissed as incompetent. Apparently the old English doctrine which prevailed before the enactment of the Specific Relief Act, to the effect that a declaratory decree ought not

(1) [1915] 38 Mad. 1162=26 I. C. 282.

to be made unless there is a right to some consequential relief which, if asked for, might have been given by the Court, has been accepted as a correct interpretation of S. 42 of the Act. In *Kathama Nachiar* v. *Dorasinga Tever* (2), *Sheo Singh Rai* v. *Dakho* (3). *Nogendro Chundro Mittro* v. *Sreemutty Kishen Soondery Dossee* (4) and *Sadut Ali Khan* v *Khajeh Abdool Gunnee* (5), the Judicial Committee enunciated this view with reference to cases which arose before the passing of the Specific Relief Act. In Madras even after the Act, that view was adopted. *Govinda* v. *Perumdevi* (6), is one of this class. The decision which the Subordinate Judge has relied on, viz., *Sreepada* v. *Sreepada* (7), belongs to the same category.

On the other hand, we have *Govinda Pillai* v. *Thayammal* (8) and *Chinnasawmy Mudaliar* v. *Ambalavana Mudaliar* (9), which seem to take a broader view of the section. It is true in the latter case an adoption was set up; but apparently no hostile act followed upon the setting up of the adoption. In *Puttanna* v. *Ramakrishna Sastri* (10) the learned Judges held that the relief under S. 42 is not restricted to cases covered by Ills. (e) and (f) to that section, and granted a declaration that a will alleged to have been made by the last male owner, was never made. There are three recent Madras cases which may be shortly noticed. In *Ramakrishna Pattar* v. *Narayana Patter* (11), all that was laid down, was that S. 42 is not intended to enact a declaration in respect of a personal contract. In *Muchirazu Ramachandra Row* v. *Secy. of State* (12), Ayling, J. with Tyabji, J., held that a declaration can be given against an order debarring a person from acting as a vakil to another in a village Court. My learned colleague there said that even if the suit may not be covered by the Specific Relief Act, the relief can be granted. These are the only Madras cases which need be considered.

Now as regards the Privy Council cases, reliance was placed by both the parties on *Pirthi Pal Kunwar* v. *Guman Kunwar* (13). The real decision in that case was that in the exercise of the discretion vesting in the Court below, it had rightly refused to grant the prayer. It was a suit in which the son's widow in possession sued for a declaration that an adoption by the father's widow was void and ineffectual. The Judicial Committee did not say such a suit would not lie. They said that they saw no reason to interfere with the discretion exercised by the Court below. In *Janaki Ammal* v. *Narayanasami Aiyar* (14), which was relied on by Mr. Narasimha Row, it was pointed out that a cause of action with which the plaintiff came to Court, namely, waste by the widow, having been found to be untrue, it was not open to the plaintiff to ask that his right as reversioner to succeed at some future time should be declared. In the last but one paragraph of the judgment, it is said that if the plaintiff came to Court for a bare declaration of his rights without alleging that there was any infringement of such a right, the Court would reject such a suit, and the fact that a false cause of action was alleged in the plaint, was no ground for deciding the contingent title of the plaintiff. I do not think that this decision helps the respondent. In another Privy Council case, *Sheoparsan Singh* v. *Ramnandan Prashad Narayan Singh* (15), Sir Lawrence Jenkins sounds a note of warning against the machinery of the Court being abused by suits under S. 42, Specific Relief Act. Here again it was decided that a mere declaration of the right of the plaintiffs to succeed at some future time should not be granted. In *Saudagar Singh* v. *Pardip Narayan Singh* (16), Lord Parker in delivering the judgment of the Judicial Committee says :

"It appears to their Lordships to be clear on this section that where any deed is executed the

(2) [1874] 2 I. A. 169=3 Sar. 456=3 Suth. 106 (P.C.).
(3) [1877] 1 All 688=5 I. A. 87=3 Sar. 807=3 Suth. 529 (P.C.).
(4) [1873] Sup. Vol. I. A. 149=3 Sar. 203 (P.C.).
(5) [1873] Sup. Vol. I. A. 165=3 Sar. 229 (P.C.).
(6) [1889] 12 Mad. 136.
(7) [1912. 35 Mad 592=12 I. C. 176.
(8) [1905] 28 Mad. 57.
(9) [1906] 29 Mad. 48.
(10) [1907] 30 Mad. 195.
(11) A. I. R. 1915 Mad. 584=39 Mad. 80=26 I. C. 883.
(12) [1916] 39 Mad. 808=31 I. C. 310.
(13) [1890] 17 Cal. 933=17 I. A. 107=5 Sar. 569 (P.C.).
(14) A. I. R 1916 P. C. 117=39 Mad. 634=43 I. A. 207=37 I. C. 161 (P.C.).
(15) A. I. R. 1916 P. C 78 = 93 I. C. 914 = 43 Cal. 694=43 I. A. 91 (P. C.).
(16) A. I. R 1917 P. C. 196 =43 I C. 484 = 45 Cal. 510=45 I. A. 21 (P. C.).

result of which may be to prejudice the interests of the reversionary heirs, those heirs, though still reversionary and though they may never get any title because events may preclude them from doing so, may have a declaration as to the effect of the deed."

Applying that principle to the present case, it may be said that where a will is set up the result of which may be to prejudice the interest of the plaintiffs, though ultimately the adoption referred to in the will may not take place, the plaintiffs are entitled to the declaration they have claimed. In my opinion this latter pronouncement of the Judicial Committee which is binding on us is decisive of the question; and if I may say so with the greatest respect, gives effect to the true intent of S. 42, Specific Relief Act. An examination of some of the Madras cases to which I have referred, notably, *Govinda* v. *Perumdevi* (6) and *Sreepada* v. *Sreepada* (7), tends to show that where there is no possibility of immediate injury flowing from a contemplated act, deed, or other instrument, the Courts should not allow a suit to be instituted. With all respect I should like to point out that instead of saying that a suit does not lie under such circumstances, it would be more correct to say that Courts should not grant relief in such cases *Govinda* v. *Perumdevi* (6) and *Sreepada* v. *Sreepada* (7) are really instances of cases in which the Courts in their discretion would have been justified in refusing the relief : and I do not think any harm will be done by interpreting them in the way I have indicated. In the present case it may be open to the lower Court to find on hearing the evidence that the allegations are not of such a character as to compel the Court to grant the relief. In my opinion the conclusion come to that the suit is not within the meaning of S. 42, Specific Relief Act, is wrong. I would therefore reverse the decree of the Subordinate Judge and remand the suit for disposal on the merits. Costs to abide the result.

Ayling, J.—I am in entire agreement with the conclusion arrived at by my learned brother, whose judgment I have had the advantage of perusing, and to which I can add little. It seems to me that the defendant in this case (widow of plaintiff's undivided brother) was interested in setting up and utilizing the power to adopt contained in her late husband's alleged will ; in other words, in denying plaintiffs' right of succession by survivorship to the whole joint family property. In such circumstances, the present suit would appear to be under S. 42, Specific Relief Act. I can see nothing in the section to justify the view which seems to have been taken by the learned Judges in *Sreepada* v. *Sreepada* (7) and having regard to the other rulings quoted in my learned brother's judgment and in particular to the spirit of the latest Privy Council case of *Saudagar Singh* v. *Pardip Narayan Singh* (16), I think we are justified in declining to follow it. It seems to me that there can be no question of the expediency of allowing the genuineness of such documents as the present to be tested as early as possible. The difficulty of ascertaining the truth, tends in almost every case to increase with the lapse of time ; we have recently heard arguments in a case in which an adoption was made, based on a disputed authority to adopt said to have been given 28 years before. A view of the law which in such a case precludes the possibility of determining the facts as to the alleged authority until so late is one which I should be loth to adopt unless compelled by irresistible reasoning to do so. I concur in the order proposed by my learned brother.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 795

OLDFIELD, J.

Mulraju Lakshmi Venkayamma Rao Garu—Defendant —Petitioner.

v.

Meka Venkataramiah Appa Rao Bahadur Garu and *others* — Plaintiffs and Defendants—Opposite Parties.

Civil Revn. Petn. No. 397 of 1918, Decided on 2nd April 1918, against decree of Court of Sub-Judge., Kistna, D/- 16th December 1916.

Civil P. C. (1908), S. 35 (2)—Remand by appellate Court directing costs to abide and follow result--Suit withdrawn—Trial Court has no discretion to refuse costs but effect should be given to consequences of withdrawal—Event includes consequences under Civil P. C. (1908), O. 23.

An order of remand by an appellate Court contained a direction that costs before it should abide and follow the result:

Held, that the meaning of the direction was that such costs should be paid to the party in whose favour the litigation might end, and where the suit is withdrawn, effect should be given to the consequences of such withdrawal

mentioned in O. 23. The trial Court has no discretion to refuse such costs. [P 796 C 1, 2]

The word "event" means nothing but the outcome or result of the proceedings and includes the description applicable to the withdrawal of a suit and its consequences with reference to O. 23. [P 796 C 2]

P. Nagabhushanam—for Petitioner.

Swaminadhan and *Chenchiah*—for Opposite Parties.

Judgment.—The question raised relates to an award of costs. As regards the Rs. 100 awarded, as I read the order, for costs incurred before it, the lower Court seems to have exercised its discretion and it is not shown to have done so in any respect unjudicially. With such an exercise it is not open to me to interfere in revision. There is however in the order no reference to the costs incurred by defendant 3 in this Court or to the fact that the order of this Court, remanding the case, directed that costs before it should abide and follow the result. It is urged on the one hand that the lower Court had no choice but to give effect to this order; on the other that (1) it has used its descretion to refrain from doing so; (2) there was nothing in this Court's order by which that discretion was taken away. Reference to the lower Court's order shows that it did not mention expressly or impliedly costs in this Court and that to judge by its tenor, only costs before itself were in its mind. This Court's decree is in the usual form and there is no reason in the present case for refusing its ordinary effect to the wording or for holding that the learned Judges concerned did not mean costs before them to be paid to the party or parties, in whose favour the litigation might end. It is said that when a litigation ends, as this has done, in the withdrawal of the plaintiff's claim, there is no "event" which costs can abide and follow. But the authorities relied on in *Myers* v. *Defries* (1), *Myers* v. *Defries* (2) and *Howell* v. *Dering* (3) do not support this conclusion. They relate to the effect of findings on issues and the identification of such findings with the "event". That isthey invclve attempts to define "event" in a connexion and for a purpose different from that now in question.

Speaking more generally however Buckley and Kennedy, learned Judges in the last case referred to, fully recognize that the "event" was nothing but the outcome or result of the proceedings and there is no reason why the word should not be the description applicable to the withdrawal of a suit and its consequences with reference to O. 23, Civil P. C. Taking this view, I hold that the lower Court ought to have given effect to this Court's order as to costs and that it did not do so. It is then necessary to mention that a preliminary objection has been made, that no appeal lies. I do not deal with the objection on its merits, because in the absence, as I hold of any attempt by the lower Court to apply itself to this part of defendants' claim, there was clearly a failure on its part to exercise jurisdiction and if there is no appeal, defendants will suffer distinct prejudice by the lower Court's order and have no remedy against it. I therefore decide to treat the appeal in the alternative as a revision petition and to modify the lower Court s decree by inserting in it as payable to defendant 3, who alone is appealing here, provision for the payment to her by plaintiffs of the costs incurred by her in this Court in Appeal Suit No. 111 of 1910, in addition to the amount already awarded. Plaintiffs and defendant 3 will pay and receive proportionate costs in these proceedings, on the basis that they are in revision and not appeal. Defendant 2, who has appeared here, will bear his own costs.

S.N./R.K. *Order varied.*

(1) [1879] 4 Ex. D. 176.
(2) [1880] 5 Ex. D. 180.
(3) [1915] I. K. B. 54.

A. I. R. 1919 Madras 796

OLDFIELD, J.

N. N. Krishnaswami Iyer, In re—Plaintiff—Petitioner.

Civil Revn. Petn. No. 382 of 1918, and Civil Misc. Petn. No. 1178 of 1918, Decided on 23rd April 1918, against order of Dist. Judge, South Malabar, D/- 23rd March 1918.

(a) Civil P C. (1908), S. 115—Error of law or fact—Revision is incompetent.

The High Court will not interfere, in revision, with the finding or decision of a subordinate Court, under S. 115, on the ground that it erred in law or fact in its appreciation of the merits. To justify the High Court's interference, there must be a want of, or a failure to exercise, jurisdiction by the subordinate Court. 11 *Cal.* 6 (*P. C.*), *Foll.* [P 797 C 1]

(b) Madras District Muncipalities Act (1884), Ss. 21 and 27—Corporation is protected only if it acts bona fide.

Under S. 21, a Municipal Council is a Corporation with power to contract and to do all things necessary for the purpose of its constitution, the Municipal fund being held by it under S. 27 for the purposes of the Act. If the Council keeps within its authorization and acts bona fide, the Court will not interfere with its operations. It will be deemed the best judge, not only of what is most conducive to its own interest, but also of what is proper and fitting as regards third parties, and it will be left unchecked to take or not to take lands for promoting sanitation, etc. The corporation is however protected only if it acts bona fide. [P 797 C 2]

K. R. Guruswami Aiyar—for Petitioner.

Judgment.—In this petition, which comes before me for admission, I am asked to revise the order of the District Judge, South Malabar, dissolving an injunction granted by the District Munsif, Palghat, restraining the Palghat Municipal Council from making a certain payment form its funds pending decision of a suit for a permanent injunction in the same terms.

The first objection to this petition is that it discloses no ground for revision, fulfilling the requirements of S. 115, Civil P. C. The District Judge undoubtedly had the jurisdiction, which he exercised, to set aside the District Munsif's order, and no argument has been based on his commission of any material irregularity in that exercise. If as is alleged, he erred in law or fact in his appreciation of the merits, that is not material [*Amir Hassan Khan* v. *Sheo Baksh Singh* (1)]. On this ground alone the petition must fail.

But further the learned District Judge does not appear to me to have erred in law. The payment above referred to is to be made for land acquired for a scavening lane. It is not alleged before me that the council's sanction for the expenditure is not formally regular or that the provision of such a lane is not within its power and duty. The injunction is claimed on the sole ground that the lane could be opened more cheaply and conveniently in another way, suggested by petitioner. The learned Judge has held that the District Munsif had not sufficient evidence before him to justify even a provisional conclusion to that effect and, though this is only suggested at the end of his para. 7, that interference with the Council's discretion exercised intra vires cannot be justified.

Only the second of these reasons calls for notice in revision. Under S. 21, Act 4 of 1884 the Council is a Corporation with power to contract and to do all things necessary for the purpose of its constitution, the municipal fund being held by it under S. 27 for the purposes of the Act, of which, it is not denied, the promotion of sanitation by the provision of lanes is one. And the law applicable to it, like other Corporations, is that

> "if it is keeping within its authorization and acting bona fide the Court will not interfere with its operations. It will be deemed the best judge, not only of what is most conducive to its own interest but also of what is proper and fitting as regards third parties and it will be left unchecked to take or not to take lands, etc: Brice on Corporations, Edn. 3 p. 475."

This statement of the law is supported by the learned author by reference to English authority and the cases relied on before me *Dundee Harbour Trustee* v. *Nicol* (2) and *Vaman Tatyaji* v. *Municipality of Sholapur* (3) afford no reason for distrusting it, since they deal only with the right of particular persons to sue, not the validity of their causes of action. No doubt a Corporation is protected in accordance with the foregoing only if its act is done bona fide. But this is not the test applied by the District Munsif's judgment or proposed on behalf of the petitioner here, except in so far as both depend on the illegitimate assumption that any bona fide opinion as to the acquisition must coincide with their own; and this assumption is particularly marked in connexion with the former's refusal to consider the propriety of this acquisition in connexion with the further one, which the Council alleged that it contemplated. In the absence of any attempt by the District Munsif to consider the Council's project as a whole and to decide whether this part of it was sanctioned, rightly or wrongly, in good faith, the injunction cannot be supported and the learned District Judge was right in setting it aside. The civil revision petition is dismissed.

S.N./R.K. *Petition dismissed.*

(1) [1885] 11 Cal. 6=11 I. A. 237 (P. C.).

(2) [1915] A. C. 550.
(3) [1898] 22 Bom. 646.

A. I. R. 1919 Madras 798 (1)

SPENCER AND KRISHNAN, JJ.

Kasi Viswanatha Chetti and *another* —Appellants.

v.

Ramaswami Athitha Nadar and *others* —Respondents.

Second Appeal No. 1210 of 1917, Decided on 1st August 1918, against decree Sub-Judge, Tinnevelly, in Appeal Suit No. 88 of 1916.

Civil P. C. (1908), S. 64—S. 64 does not avoid award—Prior attachment of properties allocated by award to persons other than judgment-debtors does not avoid award—Purchase subsequent to decree on award is subject to that decree.

Section 64 avoids only private transfers and not awards which have become merged in a decree of Court. [P 789 C 1]

A dispute between the plaintiffs and defendants 1 to 3 having been referred to arbitration, the arbitrator passed an award directing the delivery of certain properties to the plaintiffs. The award was filed in Court and a decree was passed in terms thereof. The properties had been attached by defendants 4 and 5 as the properties of their judgment-debtors, defendants 1 to 3, before the passing of the award, but were purchased by them in Court-auction after the decree. In a suit by the plaintiffs for possession of the properties,

Held: that as the attachment created no title in defendants 4 and 5, it could not invalidate the award, but must be taken to be subject to the rights created by it and that as the sale took place after the decree which was passed in terms of the award, it was subject to that decree. [P 789 C 1]

E. S. Chidambaram Pillai and *P. N. Marthandam Pillai*—for Appellants.

S. Ramaswami Aiyar and *Gopalaswami Aiyangar*—for Respondents.

Judgment.—Though the appellants' attachment was before the date of the award which allotted the properties to the plaintiffs, their purchase was long after. Unless they are entitled to rely on their attachment as invalidating the award they must fail as an attachment creates no title and their purchase must be taken to be subject to the rights created by the award. S. 64, Civil P. C., avoids only private transfers and not awards such as the one we have here: such an award cannot be treated as a private transfer as it really only recognized plaintiffs' prior title. Furthermore before the appellants' purchase application had been made to the Court for passing a decree in terms of the award and a decree was so passed. The purchase was therefore subject to that decree. The decree of the lower Court is right and the second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

* A. I. R. 1919 Madras 798 (2)

WALLIS, C. J. AND SPENCER, J.

Midnapore Zamindari Co. Ltd.—Defendant—Appellant.

v.

Malayandi Appayasami Naicker and *another* — Plaintiffs and Defendants—Respondents.

Civil Appeal No. 282 of 1916, Decided on 18th February 1918, against decree of Dist. Judge, Madura, in Original Suit No. 5 of 1915.

(a) Landlord and tenant—Service tenure—Lands held on service tenure are inalienable beyond holder's lifetime—Subsequent enfranchisement of lands from service will not validate alienations previously made—Land originally held on service become alienable on abolition of services—Delay in issuing sanad under Regulation 25 of 1802 does not affect alienability—Regn. (25 of 1802), S. 8.

In India, apart from statute, lands held on service tenure are inalienable beyond the lifetime of the holder: 7 *Mad.* 85 and 14 *M. L. J.* 134, *Foll.* [P 800 C 1]

The subsequent enfranchisement of the lands from service will not validate alienations previously made: 43 *I. C.* 935 (*F. B.*) and 24 *Bom.* 556 (*P. C.*), *Foll.* [P 800 C 1]

Lands originally held on service tenure and which on that ground are inalienable, become alienable on the abolition of the services. They become subject to the ordinary laws of descent and disposal as in the case of ordinary property: 5 *Bom.* 437 and (1864), *W. R.* 39, *Foll.* [P 800 C 2]

Section 8, Regn. 25 of 1802 recognizes and gives effect to the above principle. [P 800 C 2]

The omission to issue or the delay in issuing a sanad under Regn. 25 of 1802 finally settling the peishcush payable by the holder will not affect the alienability of such lands after the abolition of the services. [P 808 C 1]

(b) Regulation (25 of 1802), S. 5—Effect of, stated—Madras Act (3 of 1895).

The effect of S. 5 of the Regulation was to release the lands forthwith from the condition of rendering police service or at any rate that was the policy of the Government and there is nothing in the Regulation to prevent effect being given to that intention without the grant of a permanent sanad. The prohibition against alienation of the lands on the ground of public policy definitely ceased after the passing of Madras Act 3 of 1895 which has repealed Regn 7 of 1831 except to a limited extent. [P 805 C 1]

(c) Vendor and purchaser—Transfer of spes successionis does not operate on transferor's interest when he gets possession.

A mere transfer of a spes successionis in property does not operate on the transferor's interest when he gets possession of the property: 30 *Mad* 255, *Foll.* [P 808 C 2]

*** (d) Limitation Act (1908), Arts. 142 and 144—Zamindar representing estate dispossessed—No suit for possession by him—Dis-**

possessor gets title after 12 years and zamindari successor cannot get new starting point unless he shows that he was debarred from suing by previous zamindar. (*Obiter.*)

Obiter—Where a poligar or zamindar who ordinarily represents the estate is dispossessed and fails to sue for possession, the person dispossessing him gets an indefeasible title after 12 years and the successor of the dispossessed zamindar cannot claim a fresh starting point from the date of his succession unless he shows that the previous holder had effectually debarred himself from suing and there was no one who could have sued successfully. [P 808 C 2]

Eardley Norton, *T. R. Venkatrama Sastriar* and *S. Varadachariar*—for Appellant.

S. Srinivasa Ayangar and *A. Krishnaswami Aiyar*—for Respondents.

Judgment.—This is an appeal from the decree of the District Judge of Madura in a suit brought by the plaintiff as heir of the late zamindar of Kannivadi to recover the zamindari from defendant 1, the Midnapore Zamindari Company, and defendant 2 claiming under it. The defendant company, acquired the zamindari for more than 13 lakhs of rupees from the liquidator of the Commercial Bank of India, which in December 1895 had advanced money on a mortgage to which the plaintiff's grandfather the then zamindar and his son plaintiff's father were parties, and had subsequently obtained a consent decree for sale, and brought the zamindari to sale and purchased it after the death of the plaintiff's grandfather and the succession of his father to the estate. At the date of the Court sale in 1900 the zamindari was an unsettled palayam, but in 1905 the Bank succeeded in obtaining a permanent sanad under Regn. 25 of 1802 at the same peishcush as had been paid without alteration for more than 100 years.

The ground on which the plaintiff has succeeded in the lower Court in recovering the zamindari from the transferees of the auction-purchaser, is that at the dates of the mortgage and the mortgage decree and of the sale thereunder, which were prior to the issue of the permanent sanad of 1905, the zamindari was held on the tenure of rendering military and police service as well as of paying the peishcush demanded; and that in these circumstances it was inalienable by the plaintiff's grandfather and his father after him for more than the terms of their respective lives. These contentions the District Judge has accepted. At the hearing of the appeal the learned Advocate-General raised the further contention that the zamindari was made inalienable by the provisions of Regn. 6 of 1831. The appellants did not admit that such services, if they existed, would render the zamindari inalienable, and contended that even if this were so, this defect in the Bank's title was cured by the grant of the sanad to them in 1905 which admittedly put an end to such services if they were then in existence, and rendered the zamindari freely alienable. Their main case however was that in 1895 the date of the mortgage to the Bank and afterwards the zamindari was not held on any conditions of military or police service. As regards military service they contended that, when after the cession of Dindigul to the company by Tippoo in 1792, the then Poligar who had been expelled by Tippoo for failure to pay the peishcush imposed upon him, was restored by the company, the incident of military service was suppressed by the company in accordance with its settled policy as a necessary preliminary to the introduction of settled Government. As regards the police or kaval duties, they admitted that such duties were at first required of the Poligar by the annual sanads issued to him by the Collector of Dindigal of which several from 1796 to 1804 have been exhibited, but they contended that in accordance with the provisions of S. 5, Regn. 25 of 1802, and the policy declared therein, this police or kaval service was abolished before 1812 and referred to the Fifth Report and Regn. 11 of 1816. They contended that the peishcush was permanently settled at the beginning of the last century, and that the delay in issuing permanent sanads in the case of this and some other palayams was due to other causes and without any idea of claiming military and police services from them.

As regards the alienability of such unsettled palayams, they relied upon the decision of the Judicial Committee, in the *Gundamanaikanoor's* case [*Oolagappa Chetty* v *Arbuthnot*] and *Collector of Trichinopoly* v. *Lekkamani* (1), not only that such palayams were hereditary but that debts incurred by the holder for the time being, were binding on the palayam

(1) [1873-74] 1 I. A. 266=21 W. R. 858 (P. C.)

in the hands of his successors, which could not be the case if they were inalienable except for the lifetime of the holder for the time being. The present contention, they contended, was an afterthought. The zamindari after being held under Government management was restored to the zamindar in 1843 on payment of a sum of money for arrears which he had to borrow. To discharge this and other indebtedness of his predecessors one of the zamindars in 1861 granted a thirty years' lease of the zamindari which was in the nature of a usufructuary mortgage. His successor obtained from this Court a decree in the nature of a redemption decree, and recovered the zamindari by paying off the sum payable to the lessees under the decree in respect of advances made by him to discharge the indebtedness of the estate. The mortgage to the Commercial Bank in 1895 was in respect of the indebtedness incurred by the zamindar in redeeming the zamindari. That it was regarded as binding on the zamindari was shown from the fact that the next heir, the plaintiff's father, joined in the mortgage and consented to the decree for sale.

As regards the inalienability of lands held on service tenure, it is held in India that, even apart from statute, they are inalienable beyond the lifetime of the holder. [Mayne, S. 338, *Muppidi Papiya* v. *Ramana* (2), *Pakkiam Pillay* v. *Seetharama Vadhyar* ( )] and we must so hold. The learned Advocate-General also relied upon the statutory prohibition against the alienation of service lands contained in Regn. 6 of 1831, but, as will be pointed out later, the general statutory prohibition was repealed before the date of the alienations now in question by Madras Act 3 of 1895, and the limited prohibition contained in that enactment does not effect the present case. The further contention that the subsequent enfranchisement of the land from service, as by the issue of the sanad of 1905 in this case, would validate alienations previously made, is supported by certain observations of West, J., which appear to have been made obiter, in *Radhabai* v. *Anantrav Bhagvant* (4) but is opposed to the recent decision of a Full Bench of this Court in *Vaddadi Sannamma* v. *Kaduganti Radhabhayi* (5) by which we are bound, and also to an express decision of the Privy Council in *Padapa* v. *Swamirao* (6) to which our attention was drawn by the learned Advocate-General. This contention of the appellant must therefore be rejected.

The further contention that, assuming the zamindari to have been held at first under the company on service tenure, the abolition of these services would render it alienable, is supported by the judgment of West, J., in the case already referred to in which Sargent, C. J., and two other learned Judges of the Bombay Court concurred. The learned Judge observed in *Radhabai* v. *Anantrav Bhagvant* (4):

"So long as lands are assigned by the sovereign to the support of a public office or the land tax payable on lands is remitted in consideration of services to be performed by a particular family or line of holders, the lands are according to the principles of the Hindu law and the Customary law of the country incapable of an alienation or disposal such as to divert them or the proceeds of them, from the intended purpose: *Rarlojirav* v. *Bilvantrav Venkatesh* (7). This principle has been recognized in many decisions—*Mt. Kustoora Koomaree* v. *Monohur Deo* (8). * * * * When an estate is freed from its connexion with a public office, the reason arising from that connexion for the preservation of the estate, intact and unencumbered necessarily fail. There is not in the lands themselves, according to Hindu law, any inherent quality limiting them to special kinds of ownership and devolution. They become subject to the ordinary laws of descent and disposal, just as where a particular custom concerning them has been abandoned or they have passed into a family not subject to the custom."

It has been held in some later cases that in this case the learned Judges were under a misapprehension as to the service in question in that case having been abolished, but the principle laid down in the above passage was not questioned in any of these cases nor were we referred to any authority the other way. We entirely agree with the decision of the Bombay Court on this point and have decided to follow it. It is moreover the principle to which the legislature has given effect in S. 8, Reg. 25 of 1802. In the *Naragunty* case [*Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (9)], the Judicial Committee accepted the dec-

(2) [1884] 7 Mad. 85.
(3) [1904] 14 M. L. J. 134.
(4) [1885] 9 Bom. 198.
(5) [1918] 41 Mad. 418=43 I. C. 935 (F. B.)
(6) [1900] 24 Bom. 556=27 I. A. 86 (P. C.).
(7) [1880-81] 5 Bom. 437.
(8) [1864] W. R. 39.
(9) [1861-63] 9 M. I. A. 66.

cription of Poligars in Wilson's Glossary as having been originally petty chieftains occupying usually tracts of hills or forest, subject to pay tribute and service to the paramount power, but seldom paying either, and more or less independent; but as having at present since the subjugation of the country by the East India Company subsided into peaceable land-holders. There can be no doubt that Kannivadi was a Palayam of this nature. Dindigul, in which it is situated had formed part of the dominions of Hyder and Tippoo for some time when it was ceded to the Company by the Treaty of Seringapatam in 1792. At that time the Poligar was not in possession having been expelled by Tippoo for failure to pay the revenue demanded from him. The Company restored the Palayam to him; and the first question for consideration is on what terms this was done.

The report of the Board of Revenue, D-16 of January 1795, shows that the precise terms on which the restored Dindigul Poligars were to hold their Palayams had not then been settled and that it was proposed to exact certain kaval or police services from them which were then necessary for the preservation of order. The Board transmitted a draft sanad defining the position of the restored Poligars. The annual sanads subsequently issued for some years no doubt follow this draft sanad Ex. E for 1796, E-2 for 1797, E-1 for 1800, E 4 the corresponding muchilika for 1801 and E.3, the muchilika for 1803. There can scarcely be any doubt that a similar sanad was issued for 1795 and the intervening years for which no sanad forthcoming, and these sanads may be taken as containing the conditions which the restored Poligars were required to observe.

Paragraphs 1 to 5 deal with the payment of tribute and the rendering of kaval services. Para. 6 is important as showing that the Government was already impressed with the necessity of suppressing the military service of the Poligars as a first condition of the introduction of orderly Government. It provides that the Poligar is to render an account of the number of armed men in the Palayam and to abide by the orders of the Government as regards the dismissal of such of them as may appear unnecessary for the performance of the duties of the Palayam and proceeds:

"Since it is the duty of the sarkar to protect the country from foreign enemies, you are only to take a few of the inhabitants of the Palayam into your service."

We have revised the translation as the result of the discussion during the argument. The Poligars was again enjoined not to take up arms

"because the Company's troops have been specifically appointed for that purpose."

Any breach of the conditions was to involve forfeiture. Except as to the amount of the peishcush, the terms continued the same down to 1803 (Ex. E-3) after which there is no evidence of any exchange of sanads and muchilikas. Ex. 26 of 2nd October 1799 is a proclamation by Major Bannerman, addressed to the inhabitants of the Tinnevelly Palayams after the rebellion of the Tinnevelly Palayagars, ordering the surrender of arms and threatening those who retained them, with death. In their Revenue Letter to Fort Saint George of 11th February 1881 (Fifth Report, p. 51, Edition of Higginbotham) the Court of Directors sanctioned the gradual introduction of the permanent settlement into Madras, but laid down, p. 53, that it was of first importance that

"all subordinate military establishments should be annihilated within the limits, subject to the dominion of the company,

and observed that this was so incontrovertible as to preclude all expectations to be derived from an attempt to introduce a permanent system of land revenue or the exercise of a regular judicial authority till this essential preliminary was secured. In conformity with these instructions Lord Clive, on 1st December 1801, issued a proclamation addressed to the Poligars, Sherogars and inhabitants of the Southern Provinces announcing the determination of the Government to suppress the use and exercise of all weapons of offence without the authority of the British Government. The proclamation went on:

"The military service heretofore rendered by the Poligars and Sherogars having been suppressed, and the Company having in consequence charged itself with the protection and defence of the Poligar countries, the possession of firearms and weapons of offence has manifestly become unnecessary to the safety of the people."

General disarmament was therefore enjoined, but the Poligars and zamindars were permitted:

"to retain a certain number of persons carrying pikes for the purpose of maintaining the pomp and state heretofore attached to the persons of the Poligars,"

but the number was to be fixed and the pikes issued to them stamped and registered. The proclamation concluded by announcing to the Poligars:

"the intention to establish a permanent assessment of revenue on the lands of the Palayams upon the principles of zamindari tenure, which assessment being once fixed, shall be liable to no change in any time to come, that the Poligars becoming by these means zamindars of their hereditary estates will be exempted from all military service, and that the possessions of their ancestors will be secured to them under the operation of limited and defined laws, etc."

The District Judge has read the concluding paragraph, which was merely an announcement of the policy declared in the dispatch from the Court of Directors, as limiting the announcement earlier in the proclamation that the military service hitherto rendered by the Poligars and Sherogars had been suppressed, and he has held that the intention of the proclamation as a whole was that their military service was to continue until the issue to them of permanent sanads. Reading the proclamation as a whole and in the light of the dispatch from the Court of Directors, we think it is clear that the suppression of military service was intended to be unconditional. It has however been contended that military service was exacted from the zamindar even after the proclamation, and as much importance was attached by the District Judge to the documents exhibited by the plaintiffs to show this, Exs. D, E, F, G series, it is necessary to refer to them in some detail. Exs. D to D-3 (b) are extracts from the Dindigal Diary kept by the successive Collectors. The other exhibits of importance in this connexion are letters written by or to this Poligar of Kannivadi relating to the events mentioned in the Diary. The District Judge relies on these to show that after the British occupation military services were being rendered. Most of these exhibits relate to the period anterior to 1801, and in many cases relate only to police duties. Among the latter duties may be instanced the attempts made to seize an outlaw named Tombu Gour for whose arrest a reward had been offered, referred to in Ex. D-3 (a) under dates 25th September, 16th December, 1796 and 10th January 1797, and the Collector's warning on 10th June 1795 to the Poligar in Ex. D, which the Poligar acknowledged in D-4 on 4th July 1795, against harbouring a rebel, named Gopaya Naick; and the Assistant Collector's inayatnamah, Ex. D-6, dated 25th July, 1799, to the Poligar directing him to seize some marauders, named Pujari Naick and Alwar Pillay whom the Tahsildar had been endeavouring to capture by placing a guard of peons at the entrance of the Kannivadi District, as appears from the entry of 18th January 1799 in Ex. D-2. The Assistant Collectors's order of 25th July was acknowledged next day by the Poligar in Ex.D-7, in which he repudiates the idea that he has been friendly with these marauders, and on 19th January in Ex. D-2 he promises the Collector not to assist them.

The Collector's directions to make good property stolen by thieves belonging to his estate in the entries in Ex. D-3 (a) of 4th November 1796, of 4th and 7th March, 16th April and 6th September 1797 and in Ex. D-3 (b) under dates 29th August, 18th September and 30th October 1797, and in Ex. D-1 under date 27th June 1796, merely indicate that the kaval system, according to which kavalgars or watchmen are held responsible for tracing the whereabouts of stolen jewels, etc., and, if they fail, are themselves required to make good the value of such articles, existed in those early times. In those days it appears from the entries of 4th and 5th April 1797 of Ex. D-3 (a), from the entry of 21st, July 1798, of Ex. D-3, and from D-16 that there was a kaval fund for remunerating kavalgars. This fund is stated in Ex. D-3 (a) to be quite unconnected with the peishcush or tribute payable in "kists" (or instalments) by the Poligar for his Palayam and it appears from Ex. D-16 that it was a fund raised by contributions of "watching fees" paid by the subjects of the Crown into the hands of the Poligars who were held responsible for its adminstration. This resembles the present day system under which village kavalgars or watchmen are appointed by the villagers to watch their crops and other property and every raiyat contributes at the time of harvest a few measures of grain from his stock at the threshing floor for the remuneration of the kaval-

gars for the current year. If the zamindar held any lands on condition of rendering kaval service, they must have been resumed before 1812 as will be shown later.

Again we find the Collector in Ex. D-2 on 9th January 1799, instructing the Poligar to arrest any Europeans (presumably deserters from the East India Company's British troops) found straying more than two miles from camp without a passport. Again in Ex. D-17 in October 1797 the Poligar of Kannivadi is stated to have promised his assistance to the Collector against the Poligar of Komaravadi, a deposed Poligar who had escaped from confinement at Vellore. The nature of the assistance to be rendered is not mentioned in this exhibit, but from Ex. D-3 (b) it appears that he and four or five other Poligars were to come with their respective men and act as an escort of "Old Lucki Lakshmana Naick" in conducting him from Komaravadi as soon as the arrest of this escaped prisoner was effected. So much for the records relating to the period before the formal abolition of military duty. The District Judge has concluded from certain exhibits of a later date than 1801 that military assistance was rendered by this Poligar during the fighting by the Company's army against Virupakshi Naick, and against the dumb boy called Panchalakurichi Gomayana who led an Insurrection against Government, and also in the rebellion of Lakshmana Naicken in the time of Collectors Hurdis and Parish in 1803 and 1804.

An account of the part played by the Kannivadi Poligar in connexion with the fighting that took place on those occasions, is given in Exs. F and G. Both of these records proceed from interested sources. Ex. F is a petition signed by the Zamindar of Kannivadi in 1837 and presented to the Board of Revenue, in which he appealed for the restoration of his Palayam which had been kept under the management of Government, and Ex. G is a genealogical history of the family written by another member of the family. It was to the interest of the writers of these documents to magnify the meritorious services rendered by various Poligars of Kannivadi to Government from time to time. G1, G2, G4, G5, G6, G7, and G8 are records similar to G.

Exhibits G and G7 mention the fact that the Poligar's men were then in 1804 without arms (no doubt in pursuance of Government's declared policy), and thus when they accompanied the company's sepoys in pursuit of Lakshmana Naicken, it was necessary for Mr. Parish to arm 20 of them before they could be of any assistance to him. At the same time the work that they were expected to perform seems to have been that of guarding roads . . . . and passes, acting as spies of the enemies' movements and as guides to the British troops through the forest tracks and his passes. They could not fight because they had no arms. A more reliable account of what happened is to be found in the contemporary document, Ex. E-5, of 1st July 1804, in which it is stated that 15 men from the Kannivadi Poligar people were sent as guides to "Captain Hamilton's army because they knew the different routes." In Ex. D-13 the Poligar of Kannivadi reports in June 1804 to Mr. Parish that he had dispatched a spy to bring intelligence regarding the rebels. It would be absurd to treat this Palayam as a feudal fief held on condition of rendering military service simply because the holder on one or two occassions assisted the intelligence branch of the company's regular army.

The allusions in Exs. D 11 and D-12 to "our troops" and "our detachment" in the account of the engagement with Lakshmana Naicken only show in our opinion that the Kannivadi men identified their cause with the cause of the Government, and we think that the description of fighting refers to the doings of the company's soldiers, and does not mean that any military establishments of the poligar were employed in the actual fighting. Exs. D-10, E-7, E-8, E-13, refer to the supply of bamboos to be paid, for the use of the British troops (evidently in order to provide them and their officers with quarters). Ex. E-6 relates to the supply of cattle (probably for feeding the troops). It was regarded as the duty of the whole population to furnish the necessary supplies against payment to the officers of Government and still more to its armed forces in the field. The practice of making such requisitions for the supply of touring officers is not yet altogether obsolete. The fact that in the years 1803 and 1804 such requisitions

were made and complied with in a few instances, does not, in our opinion, show that the Palayam continued to be held on condition of rendering military service and still less that it was so held at the time of the alienations now in question nearly a hundred years later. We have next to deal with the well-known Regn. 25 of 1802 on which the permanent settlement rests in this presidency so far as it affects the present case. It was held by the Judicial Committee in *Collector of Trichinopoly* v. *Lekkamani and Oolagappa Chetty* v. *Arbuthnot* (1) to be clear

"that the affirmative words of the second section 'that in consequence of the assessment, the proprietary right of the soil shall become vested in the zamindars,' etc., did not either give to, or take away from, the former owners of lands not permanently assessed, any right which they then had. It merely vested in all zamindars an hereditary right at a fixed revenue upon the conclusion of the permanent settlement with them. It is a maxim that affirmative words in a statute without any negative expressed or implied, do not take away an existing right."

This interpretation is strongly supported by the title of the Regulation which is

"For declaring the proprietary right of lands to be vested in individual, persons and for defining the rights of such persons, under a permanent assessment of the land revenue."

As regards the somewhat ambiguous preamble, their Lordships observed that it did not assert a right, on the part of Government to deprive or dispossess zamindars in their lifetime, or their heirs after their deaths, for the purpose of transferring their rights to Government, or to new holders at the will of Government, independent of any considerations connected with the realization of revenue. They then proceeded to explain the sweeping statement in the preamble to Regn. 31 of 1802 that the ruling power had in conformity to the ancient usage of the country constantly reserved to itself and had exercised the actual proprietary right of lands of every description, and consistently with this principle, all alienations of land, except by the consent of the ruling power, are violations of that right, and observed that

"the words 'alienations of land' referred not to mere transfers from one proprietor to another, but to grants for holding lands exempt from the payment of revenue."

Finally their Lordships observed :

"There is no difference in this respect (its hereditary character) between a Palayam and an ordinary zamindari. The only difference between a Palayam or zamindari which is permanently settled and one that is not, is that, in the former, the Government is precluded for ever from raising the revenue ; and in the latter, the Government may or may not have that power."

The latter words appear to mean that Government may in a particular case have precluded itself from raising the revenue, even though it has not issued a permanent sanad. Applying these principles, their Lordships proceeded to deal with the connected case of *Collector of Trichinopoly* v. *Lekkamani* and *Oolagappa Chetty* v. *Arbuthnot* (1). The judgment is appended to the judgment in Marungapuri case which follows *Collector of Trichinopoly* v. *Lekkamani* and *Oolagappa Chetty* v. *Arbuthnot* (1). In the former case, a razinamah was entered into in the time of the late zamindar making the zamindari liable for debts incurred by him. It having been held that the razinamah could not be enforced except by suit, a suit was instituted but discontinued on the death of the zamindar by order of the Court which directed a fresh suit to be brought against the heir when nominated. A suit was accordingly brought against the minor zamindar in which it was claimed that the revenues and corpus were equally answerable (p. 270 *of* 1 *A. I.*). The Civil Judge held the debt binding on the revenues of the zamindari in the hands of the successors and decreed the claim to that extent. The High Court reversed this decision, and held that, as the Palayam in question was only held on lifetenure, it could not be made liable in the hands of the son for the debts incurred by the father. The Judicial Committee held that prima facie the Palayam was hereditary, and that being so, apparently as a matter of course they held it liable in the hands of the sons for the father's debts. If the revenues are liable in the hands of succeeding zamindars, that is equivalent to saying that the corpus is liable and the decision would be conclusive of the present case, but for the fact that the point that the Palayam was inalienable by reason of its owing military and police service, was not raised.

It is however very significant that it was not raised in that case though the defendant on the record was Mr. Arbuthnot, the Collector of Madura, who represented the minor zamindar as agent of the Court of Wards and would have been likely to know if the holders of unsettled

palayams were liable to render any services such as to render their estates inalienable and an exception to the general rule as to the "free liberty" of proprietors of land to make alienations which is conferred by S. 8 of the Regulation. This contention has not been raised in any other case before the present, and this consideration adds to the already heavy burden on the plaintiff of showing the existence of the bar to alienation on which he relies. The question of the continuing liability of the Poligar for police service may now be dealt with in connexion with the provisions of S. 5 of the Regulation. These provisions show a general intention to release land-holders from the performance of police services except in special cases to be dealt with in the permanent sanad when issued and to resume all lands and rusums granted for police service. The first part of S. 5 provides as follows :

"The Government having charged itself generally with the maintenance and support of such establishments as may be requisite in the several provinces, cities and towns for the better keeping of the police, no lands shall be considered, as heretofore, to be holden on the condition of performing police duties, unless the same shall be specially provided for in the sanad-i-milkiyat-i-istimrar."

With this must be read S. 15, which provides that zamindars shall aid and assist the officers of Government in apprehending and securing offenders of all descriptions, and they shall inquire and give notice to the Magistrates of robbers or other disturbers of the public peace who may be found or who may seek refuge in their zamindaris, an obligation which was not regarded as incompatible with the power of alienation, and is very similar to that imposed on people generally and landowners in particular by Ch. 4, Criminal P. C. Read literally S. 5 operated to release all lands forthwith from the condition of rendering police service. If this be too strict a construction, it at least shows that it was the policy of the Government to release them, and there is nothing in the regulation to prevent effect being given to that intention without the grant of a permanent sanad. Police services had been required in this case by the annual sanads of which E-3 for Fasli 1213, 1803-04 is the least. The issue of these sanads appears to have been discontinued and there is no evidence of any police service being demanded after 1804. Admittedly police service was a rule abolished in all the Palayams and zamindaris that received permanent sanads; and, as will be seen, the fact that no permanent sanad was issued in the case, had nothing to do with the question of police service.

It appears from the fifth report that the kaval lands or lands granted for the discharge of kaval duties which were quite different from those which the officers of an organized police force are expected to perform, had been resumed before 1812; but as regards Madras the report does not deal with the question of police. A police force under officers called Darogas had been introduced but did not work well, and, in accordance with the recommendations of Sir Thomas Munro, the Court of Directors issued instructions which were embodied in Regn. 11 of 1816. By this measure recourse was had to the indigenous police system of the country. Under that system, police as well as revenue duties had been imposed on the village headman, who was responsible as to both to the zamindar or Poligar where there was one. By the regulation, the headman as regards police duties was made responsible to the Tahsildar or Indian Magistrate of the locality, and zamindars were deprived of all police powers except in so far as any of the duties of the Tahsildar might be conferred upon particular zamindars by the Government under S. 39. This the Court of Directors considered should only be done in particular cases of approved respectability and willingness to co-operate in promoting the views of the Government. S. 39 was repealed by Act 17 of 1862 as having become obsolete and thus vanished the last trace of the police powers formerly vested in the zamindar as head of his district. The Police Act 24 of 1859, which took away the control of the police from the Tahsildars and created a separate Police Department, defined police, in S. 1 as including "general" and village Police, cuttoobadies, kavalgars, and all other persons who exercise any police functions throughout the Madras Presidency. This was before the repeal of S. 39, Regn. 11 of 1816, and there is no suggestion that the Kannivadi zamindars were ever regarded as coming within this definition of police. Be this as it may, this definition of police was repealed by

S. 2 (2), Madras Act 3 of 1895, which substituted the following definition. "The word 'police' shall include all persons appointed under this Act," thus excluding cuttoobadies, kavalgars, etc., whose police functions had become obsolete. The same enactment also repealed Regn. 6 of 1831 which made lands held on service tenure, inalienable, and only re-enacted the provision against the alienation as regards village officers, except in the Scheduled Districts. In the Scheduled Districts the prohibition against alienation was continued, not only as regards the emoluments of village officers, but also as regards

"other emoluments granted or continued in remuneration for the performance of duties connected with the collection of the revenue or the maintenance of order."

In the rest of the Presidency, the legislature evidently thought that village offices were the only offices the emoluments of which required to be protected from alienation. This enactment, which came into force before the alienation now in question goes far to show that at the date of that alienation, the services formerly required of the Poligars and others had become entirely obsolete and that there was no longer any sufficient reason for prohibiting the alienation of their lands on the grounds of public policy. It is not questioned that the issue of permanent sanads under Regn. 25 in the terms in which they were issued, released the grantees from conditions of police service and there is no reason to suppose that the delay in issuing the sanads in this and other cases was due to any design of retaining the right to police services which were regarded as a thing to be got rid of as quickly as possible. In this connexion an observation in *Chauki Gounden* v. *Venkataramanier* (10) which was referred to with approval by Scotland, C. J., in *Lekkamani* v. *Sirmat Ranga Kristna Muttu Vira Puchaya Naikar* (11) may be cited again, and with greater force now that the assumption that poligars had only life-estates, has been displaced:

"The poligar of an unsettled Palayam may, according to the generally received theory as to his rights, have only an estate for life in his Palayam; but for such an estate as he has, his relation to the Government on the one side and to the occupiers of lands within his Palayam on the other side, resembles that of a zamindar."

There is really no reason now why an unsettled Palayam should be inalienable any more than a settled one. As regards the revenue history of this particular Palayam, in 1796, a commission reported that these Poligars should be allowed personally to retain one-third of the computed value of their land. Mr. Hurdis, who was Collector from September 1796 to December 1803, was directed to carry out a field survey and to present to the Board of Revenue a detailed report such as would enable them to arrange a Permanent settlement (Nelson Manual I, Part 4, p. 31). Unfortunately, as Mr. Nelson observes, he overestimated the capabilities of the District and the permanent settlement of Dindigul introduced on the basis of this survey had to be abandoned. Ex. 26 1 (b) shows the total beriz of the Kannivadi Palayam as estimated by Mr. Hurdis. Of this the poligar was allowed as before provisionally to retain 30 per cent, leaving a peishcush of pagodas 110,897 or Rs 38,139-14-2 payable to Government. This peishcush did not represent 30 per cent, of the real income, or anything like it, and owing to the defective nature of Mr. Hurdis's assessment and possibly other reasons, a permanent sanad was not issued to this and other poligars on the basis of his assessment. From 1816 to 1843, in consequence of the poligar's inability to pay the peishcush, Government took the Palayam, under its own management and allowed him the 10 per cent on the net collections. In 1843 the Palayam was restored to the palayagar. Ex. 26 (c). This Muchilika which was then taken from his, appears to proceed upon the footing that all he was liable to do, was to pay the peishcush demanded of him and that in default of payment the Palayam was liable to be sold.

It certainly goes to show that no condition of military or police service was recognized as existing at that time. Exs. 22g and 22th, dated 9th July 1843 are mortgages of the zamindari to pay previous debts and save the zamindari from annexation by Government. Ex. 23 is a lease for 30 years, dated 20th July 1861 in discharge of debts which are stated to have been contracted by the zamindar himself, his father and his ancestors. Ex. H series show that ne-

(10) [1869-70] 5 M. H. C. R. 208.
(11) [1870-71] 6 M. H. C. R. 209.

gotiations went on for some years after this as to the grant of a permanent sanad and that Government were prepared to grant a permanent sanad without increasing the peishcush, but that this intention was not carried into effect in the supposed interest of the zamindar himself: Ex. H-5. Nothing is to be found about any military or police service in this correspondence. In 1881 on the death of the zamindar Bangaru, who had executed the lease of 1861, his brother, who succeeded, brought a suit to recover the zamindari from the lessee. In his plaint he raised the contention that the alienations of his predecessors were not binding on the estate in his hands, and this was the subject of issue 4. It was not however suggested that the inalienability depended in any way on the duty of rendering military and police service. The District Judge held that the lease was not binding on the plaintiff as a lease but was binding on him as a mortgage, and gave a decree for redemption.

Before the High Court the zamindar does not seem to have pressed the appeal on the ground that the alienations by his predecessors were not binding upon him. Probably the decision of the Privy Council in *Collector of Trichinopoly* v. *Lekkamani* and *Oolagappa Chetty* v. *Arbuthnot* (1) was held conclusive on this question. In the High Court the controversy appears to have been as to the amount of the mortgage debt. In connection with this litigation and the subsequent redemption, the zamindar contracted usufructuary mortgages, Exs. 7, 3, 5, 9, 6, 7*a*, 4, 22 series 8 and 10, and lastly a consolidating mortgage Ex. 2 on 14th December 1895 and a supplementary mortgage Ex. 18 dated 10th February 1898. Ex. 2, to which the then zamindar and his son the father of the present plaintiff were parties, was for upwards of ten lakhs of rupees.

The Bank brought Original Suit No. 23 of 1897 on this mortgage and obtained a consent decree for sale against the zamindar and his son on 16th August 1898, Ex. 15d, by which the defendants were to pay Rs. 13,15,000 on or before 15th August 1900 and the estate was to be sold in default. The plaintiff's grandfather died on 16th July 1899. On 14th March 1900, the bank applied for an order absolute for sale under S. 89, T. P. Act, and on 21st March 1900 the Court made the order as follows: "Defendant by Mr. Subramania Aiyar does not put forward any objection. Decree made absolute." The estate was subsequently sold and purchased by the bank, who obtained a sanad in 1905, and then sold it to the present defendant 1. The plaintiff's father died on 24th May 1911, and it was in the present suit instituted on 23rd July 1914, that the contention that the zamindari was inalienable on account of the zamindar's liability to render military and police services, was raised for the first time

In our opinion this contention is only an ingenious afterthought. The liability of these unsettled palayams for ancestral debts was treated by the Privy Council in *Collector of Trichinopoly* v. *Lekkamani* and *Oolagappa Chetty* v. *Arbuthnot* (1) as necessarily following from the establishment of the hereditary nature of the estate. There are now no police or military services to be rendered. In this particular estate there have been continued alienations by way of mortgage which have been treated as binding by succeeding zamindars. Though the contention that they were not binding, was raised in the litigation of 1881, this was not on the ground of any military or police service, and the contention was not pressed in the High Court. Lastly the fact that the plaintiff's father was a party to the mortgage of 1895 and to the consent decree and did not object to the sale, shows that the alienable character of the zamindari was fully recognized. The learned Advocate General has relied on certain decisions such as *Narayana* v. *Chengalamma* (12) and *Udayarpalayam case* [*Kachi Yuva Rangappa Kalakka Thola Udayar* (13)] and *Ramnad case* (14) in which it was held that certain zamindaris restored by British Government to the heirs of the former zamindars were restored with the incident of impartibility which had originally attached to them in their character of petty chieftains rendering service to the paramount power, but these cases did not decide or proceed on the footing that any such services were still to be rendered; and as those were cases in which a permanent sanad had been issued, it is clear that there were no such

(12) [1857] 10 M. I. I.
(13) [1901] 24 Mad. 562.
(14) [1901] 24 Mad. 613.

services in existence at the date of suit. He also relied on certain decisions as to Ghatwal tenures in Northern India, but in these cases the succession is not purely hereditary, and Government by the exercise of the right to choose the successor from and among the heirs, manifests is continued recognition of the office of Ghatwal even though the duties have become nominal. On a full consideration of the whole question, we are unable to agree with the District Judge, and have come to the conclusion that the military and police services for which the zamindar was at one time liable, had been abolished long before the alienations in question, even though Government for quite other reasons had delayed the issue of a sanad under Regn. 25 of 1802 by which the peishcush payable by him as a peaceable land owner exempt from such services, would have been finally settled.

The only remaining question is whether the suit is barred on the ground that, when the suit was instituted, more than twelve years had elapsed from the time when defendant 1's vendor got into possession under their purchase at the Court auction. There can be no doubt that, assuming the estate of the zamindar to be for life only as contended by the plaintiff, the zamindar for the time being would ordinarily represent the estate as held in *Radhabai* v. *Anantrav Bhagvant* (4) and numerous other cases, and that therefore time would have begun to run against the plaintiff's father from the date when the bank got possession and the suit would be barred as more than twelve years had elapsed before it was instituted. The question however arises whether the plaintiff's father had not debarred himself from suing to recover possession and whether time did not begin to run only from the date of his death and plaintiff's succession. As has been already stated, the plaintiff's father joined in the mortgages of 1895 and consented to the decree being passed against him for the sale of the zamindari and personally for the mortgage debt and did not object to the order for sale. At the date of the mortgage and the consent decree, he was only a reversioner with a spes successionis and had no power to alienate his interest in the zamindari either by executing the mortgage or consenting to the decree, and these alienations did not take effect against him when he succeeded, as held in *Ramaswami Naik* v. *Ramasami Chetti* (15), which is in accordance with a very recent decision of the Judicial Committee not yet reported, *Amrit Narayan Singh* v. *Ganga Singh* (16). At the date however of the application for the order for sale, which he did not oppose, the plaintiff's father had succeeded to the estate, and his life-interest in the zamindari was liable to be attached and sold in execution of the consent decree in so far as it made him personally liable.

If the consent decree had been for sale only, it may be that the sale would not have passed his life-interest even though he did not oppose the order for sale, but he was also personally liable on the decree and at the date of the application for the order for sale, he had no answer to an application for the attachment and sale of his life-interest in execution of the decree against him personally. In these circumstances, it may be that the sale was binding on his life-interest; and if so it is argued he was not in a position to sue for possession and that his successor had a fresh starting point. The starting point under Art. 142 is the date of the dispossession or discontinuance. To avoid the bar, it would apparently be necessary to hold that the fact that the plaintiff's father had debarred himself from suing for possession, took the case not only out of Art. 142 but also out of Art. 144, as the present plaintiff's father would appear to come within the word 'plaintiff' as used in that Article and to make Art. 190 applicable to the case. The starting point in that Article is, when the right to sue accrues, and there would be no difficulty in holding that the right to sue does not accrue until there is some one who can sue successfully. See *Murray* v. *East India Company* (17), *Musurus Bey* v. *Gadban* (18), and the recent decision of the Privy Council in *Soona Mayana Kena Roona Meyappa Chetty* v. *Soona Navena Suppramanian Chetty* (19) in the view we take of the other question, it is unnecessary to discuss or decide the

(15) [1907] 30 Mad. 255.
(16) Since reported in A. I. R. 1917 P. C. 95 =45 Cal. 590=44 I. C. 408=45 I. A. 35 (P. C.).
(17) 5 B. & Ald. 204=106 E. R. 1167=24 R. R 325.
(18) [1894] 2 Q. B. 352=63 L. J. Q. B. 621.
(19) A. I. R. 1916 P. C. 202=35 I. 323=43 I. A. 113 (P. C.).

point. In the result the appeal must be allowed and the suit dismissed with costs throughout.

S.N./R.K. *Appeal allowed.*

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* A. I. R. 1919 Madras 809 (1)

SESHAGIRI AIYAR AND PHILLIPS, JJ.

Kanda Ponnappa Naicken and *others* —Defendants—Appellants.

v.

Venkataseshaiyar and *others*—Plaintiffs—Respondents.

Second Appeal No. 1821 of 1917 Decided on 28th November 1918, against decree of Dist. Judge, Chingleput, in Appeal Suit No. 299 of 1915.

*** Civil P. C. (1908), O. 1, Rr. 1 and 10—Suit for enforcement of trust—Joinder of new trustee as plaintiffs after expiry of limitation is not within Limitation Act (1908), S. 22.**

Where some persons who have an in'erest in a trust sue to enforce the rights of the trust, the subsequent addition of more representatives out of time is not within the mischief of S. 22, Lim. Act: 9 *I. C.* 739 (*P. C.*); 21 *I. C.* 421; 29 *I. C.* 680 and 17 *Bom.* 413, *Foll.*; *A. I. R.* 1916 *P. C.* 202, *Dist.* [P 809 C 2]

K. Ramanath Shenai—for Appellants.

B. Sitaram Row—for Respondents.

Judgment. — Defendant 1 executed Ex. R, the lease deed, to two trustees of a temple. They sued on it for rent and Thundu and Kuppatham to which the temple was entitled as mirasidar. The suit was decreed in the two Courts below and these decrees were confirmed by Ayling, J., in Second Appeal No. 238 of 1912. In Letters Patent Appeal No. 97 of 1913 against the judgment of Ayling, J., it was held that the two trustees were not entitled to the decree and that the other trustees should be made parties and the case was remanded. When the new plaintiffs were added, the suit was barred by limitation. Both the Courts below have now held that as the suit was originally instituted to enforce the claims of the temple, the addition of other representatives, though out of time, would not bar the suit.

Mr. K. Ramanath Shenai argued that the remand order of this Court precludes the Courts below from giving a decree to the temple. In our opinion, the remand order should be held to have decided only that others should be made parties. The learned Judges who heard the Letters Patent appeal had not to consider the question of limitation. Apparently the decision of the Judicial Committee in *Kishen Parshad* v. *Har Narain Singh* (1) was not brought to their notice, nor the decision in *Subramania Aiyar* v. *Subba Naidu* (2). In the former case it was held that the manager of a family with whom a contract was entered into would be competent to maintain the suit on behalf of the family and that the addition of the other persons after the period of limitation would not affect the right of the family to obtain a decree. In *Meyappa Chetty* v. *Suppramanian Chetty* (3) the Privy Council held that if the institution of the suit was by persons who had no locus standi, the addition of proper persons out of time would not cure the defect and that S. 22 of the Straits Settlements Ordinance No. 6 of 1896 which deals with the limitation of suits would operate as a Bar. That is not this. On the other hand it was held in *Subramania Aiyar* v. *Subba Naidu* (2) that if some persons who have an interest in the trust sue to enforce the rights of the trust, the subsequent addition of more representatives out of time would not be within the mischief of S. 22, Lim. Act. The Calcutta decision in *Nistarini Dassya* v. *Sarat Chandra Mojumdar* (4) is to the same effect: see also *Kasturchand Bahiravadas* v. *Sagarmal Shriram* (5).

We are therefore of opinion that the decree was rightly given to the temple in the case. The Courts below have found that by custom the temple is entitled to Thundu and Kuppatham and we see no reason to differ from that finding. The second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1911] 33 All. 272=9 I. C. 739=38 I. A. 45 (P. C.).
(2) [1913] 21 I. C. 421.
(3) A. I. R. 1916 P. C. 202=35 I. C. 323=43 I. A. 113 (P. C.).
(4) [1915] 29 I. C. 680.
(5) [1893] 17 Bom. 413.

A. I. R. 1919 Madras 809 (2)

SESHAGIRI AIYAR AND PHILLIPS, JJ.

Ramalinga Chetti and *others*—Defendants—Appellants.

v.

Sivachidambara Chetty and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 2258 of 1917, Decided on 15th November 1918, against decree of Temporary Sub-Judge, Cuddalore, D/- 31st August 1917.

(a) **Hindu Law—Alienation — Manager — Dedication to idol on occasion of performance of religious obsequies by manager is valid.**

The manager of a joint Hindu family is competent to make a gift of family property to an idol on the occasion of the performance of religious obsequies : 11 *M. L. J.* 310 ; 8 *Ill.* 76 ; *S. D. A. L. P.* (1843), Vol. 5, p. 24 ; 6 *M. I. A.* 393 ; and 24 *Bom.* 547, *Cons.* ; 16 *Mad.* 353, *Dist.*

[P 812 C 1]

(b) **Transfer of Property Act (4 of 1882), Ss. 5 and 123—Gift to trustees on behalf of idol Offerings to idol—S. 123 does not apply.**

A person can make a gift to the trustees on behalf of an idol or he can make offerings in the temple to an idol. In either case the idol can and does own the property. In the former case the gift must be in writing and registered. Where the dedication is to the idol itself by appropriate recitations from the slokas or by words of similar import, the gift is not to any sentient being, real or artificial, within the meaning of S. 5, T. P. Act, and the provisions of S. 123 of the Act relating to registration do not apply : 36 *I. C.* 989, *not Appr.*

[P 810 C 2; P 811 C 1]

C. V. Ananthakrishna Aiyar, *A. V. Vishwanatha Sastri* and *S. Ramachari* —for Appellants.

T. R. Venkatarama Sastri — for Respondents.

Judgment.—This is a suit to recover property. The father of defendents 1 to 3 gave about 40 cents of land to a temple in 1903, on the Sapindikaranam day of his father's death. There was no writing to evidence it. The donor was himself a trustee of the temple. During his lifetime he regarded himself as a lessee on behalf of the temple and gave it the income from the land. After his death, the defendants refused either to give the income or to deliver possession of the land. There were two main defences. One is that as the gift was not in writing and registered, no title passed to the temple. The other is that it was not competent to the donor who was a member of a joint Hindu family at the time of the gift to dispose of ancestral property in the way he did. The Courts below rejected these contentions.

In second appeal Mr. Ananthakrishna Aiyar relied strongly upon *Mannu Lal* v. *Radha Kishenji* (1) for the first contention. The learned Judges of the Allahabad High Court do not discuss the question nor do they refer to the decisions of the other High Courts bearing on it. It is true that the exact point now raised was not decided before, but there are observations in the judgments of this Court and of the Calcutta High Court which are not consistent with the view taken in Allahabad. Before examining the cases we shall consider the nature of a dedication as understood by Hindus and the few texts of Hindu law bearing on it. A dedication, offering, or oblation as it is called is generally made on the occasions of deaths or marriages in a Hindu family. The usual form is to take a leaf of the tulsi plant in hand and with water offer the property in the presence of the persons assembled. It is not usually done before the temple or in the presence of the trustees. The occasion is such that no writing will be thought of. We are not sure that a writing will not be regarded as detracting from the sanctity of the proceeding. The question is whether such a process is ineffectual to pass property. In the Chandogya Upanishad, this is what is stated regarding the persons who benefit by a religious offering

* * * *

"He who presents an oblation, has made an offering in all worlds, in all beings, in all souls." "As in the world hungry infants press round their mother so do all beings await the holy oblations. They await the holy oblations."

The usual religious formula pronounced by every Hindu male or female, on the occasion of any offering or feeding is that it is made to God as "He is watching all beings." Consequently a dedication of the kind we have referred to is intended to benefit the public in whom the spirit of God is said to reside. It is to the Universal Soul which pervades all beings. These offerings are not to any specific person, real or artificial. The learned vakil for the appellants referred to the observations in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (2), where an idol was spoken of as a juridical person. It was pointed out in *Manohar Ganesh Tembekar* v. *Lakshmiram Govindram* (3) and *Bhupati Nath Smrititirtho* v. *Ram Lal Maitra* (4) that in an ideal sense, an idol is a person capable of owning property. A person can make a gift to the trustees on behalf of an idol or he can make offerings in the temple to the idol. In these cases the idol can and does own the property. But it does not follow from it that a dedication must be in the form prescribed by S. 123, T. P. Act. There are various modes of giving pro-

(1) [1916] 36 I. C. 983.

(2) [1905] 32 Cal. 129=31 I. A. 203 (P. C.).
(3) [1888] 12 Bom. 247.
(4) [1909] 37 Cal. 128= 3 I. C. 642

perty to a temple. One is by giving it to the trustees. In that case, the provisions of the Transfer of Property Act must be complied with. Another is by dedication to the idol itself. If this is in writing, it is open to argument that by virtue of the Registration Act. no title would pass unless the document is registered. The third mode is the one with which we are concerned and which is observed on occasions of marriage or death. Although the donor may intend that the embodiment of the Universal Soul worshipped in a particular place should have the benefit of the dedication, the words employed by him and the object aimed at by him are what has been indicated in the Chandogya Upanishad and in the formula we have referred to. In these cases the gift is not to any sentient being, real or artificial, so as to attract S. 5, T. P. Act. The property thus dedicated ceases to belong to the donor. That undoubtedly is the Hindu idea. After an elaborate review of the Hindu texts. Mookerjee J., says in *Bhupati Nath Smrititirtho* v. *Ram Lal Maitra* (4):

"It is conclusively established from these authorities that according to strict Hindu juridical notions there can be no gift in favour of the gods. We are not concerned now with the philosophical reason for this position, and it is needless to inquire whether it is due to the fact that in the earliest times physical objects were defied, and could not therefore be very well supposed to be capable of acceptance of a gift, or to the fact that the deity was conceived as a being to whom a mortal could not aspire to make a gift, but could only content himself with a dedication of things for acceptance."

In one of the early texts (Vyavahara Mayukha, Ch. 4, S. 7, pl. 23,) it is said quoting Katyayana that wealth which has been assigned for religious purposes is extra commercium. In the Calcutta case already referred to the same learned Judge deals with this matter in these terms:

"If therefore a dedication is made in favour of the deity, what is the position? The owner is divested of his rights. The deity cannot accept. In whom does the property vest? The answer is that the King is the custidion of all such property."

This is sufficiently indicated by the following pasaages: Vijnaneswara in the Mitakshara (Vyavahara Adhyaya v 186) lays down that one of the duties of the King is the protection of the Devagriha, and Aparaditya and Mitra Misra in their commentaries on the same subject lay down the rule in the same manner. In the Sukraneeti, Ch. 4, v. 19, stress is laid upon this as one of the primary duties of Kings. The true Hindu conception of dedication for the establishment of the image of the deity, and for the maintenance thereof is that the owner divests himself of all rights in the property the King as the ultimate protector of the State undertakes the supervision of all endowments. There is no acceptance on the part of the deity but from the dedication, religious merits and spiritual benefit accrue to the founder and material benefit accrues to the person in charge of the worship and the creatures of God: see also West, J., in *Manohar Ganesh Tambekar* v. *Lakshmiram Govindram* (3). This conception of the effect of dedication is common to many systems of jurisprudence. In the Roman law property dedicated to religious purposes was extra commercium: see Ulpian's Frag. 22, S. 6. In Mahomedan law dedications of this kind are not uncommon. It seems to us therefore that to hold that unless a donation for religious purposes conforms to the requirements of the Transfer of Property Act, it would be invalid, would be to introduce an idea foreign at least to Hindu notions of religious donation. Of course, if the statute law imposes such a restriction it must be obeyed. But the Transfer of Property Act is not exhaustive of all modes of transfer, and as we pointed out, if the true intent of a dedication is not to give property to a sentient being the chapter relating to gifts can have no application to gifts by dedication. This is substantially the idea that underlies the decision in *Pallayya* v. *Ramavadhanulu* (5). For these reasons we are of opinion that the dedication on the sapandikarnam day divested the donor of his rights and conferred them on the temple.

On the second question reliance was placed by the learned vakil for the appellant on *Muthusami Pillai* v. *Dorasami Pillai* (6). The occasion of the gift is not mentioned in the judgment. The learned Judges quote without disapproval *Raghunath Prasad* v. *Gobinda Prasad* (7). That judgment refers to *Gopal Chand Pande* v. *Babu Kunwar Singh* (8), the decision of the Sudder Dewanny

(5) [1903] 13 M. L. J. 364.
(6) [1901] 11 M L. J. 310.
(7) [1886] 8 All. 76.
(8) S. D. A. L. P. (1848) Vol. 5, p. 24.

Adawlut, Lower Provinces, 1843, Vol. 5, p. 24, as authority. On turning to this latter decision it is seen that the Vyvasta of the Pandit on which the conclusion was based refer to Hindu texts and Puranic Slokas for the broad proposition that a gift to Vishnu and other deities by the manager of the family is within his competence. In Mitakshara, Ch. 1, S. 1, pl. 28, it is stated:

"Even a single individual may conclude a donation, mortgage or sale, of immovable property during a season of distress for the sake of the family and especially for pious purposes,"

In *Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonweree* (9), this proposition is quoted with approval. In placitum 29 the expression "pious purposes" is explained thus "such as the obsequies of the father", etc. That explanation would undoubtedly cover the present case. It was pointed out by a Full Bench of this Court in *Baba* v. *Timma* (10) that if there is a special text of Hindu law in favour of a disposition by the manager, Courts are bound to give effect to it. In *Hanmantapa* v. *Jivubai* (11) the same principle was enunciated. Having regard to these authorities and to the text of Mitakshara, it seems clear that at any rate in the performance of religious obsequies the manager of a Hindu family is competent to give property to a temple. In *Rathnam* v. *Sivasubramania* (12), a silver vehicle was presented to the temple not on any occasion of death or marriage but as a present on an ordinary occasion. It is doubtful whether such an offering can be said to be one for religious purposes, and whether it would be covered by placita 28 and 29 of Ch. 1, S. 1, of the Mitakshara. The persent case is clearly within the rule enunciated in those texts. Other texts may be quoted in support of this view. But it is not necessary to multiply citations. We hold that it is not beyond the competence of a Hindu manager to make a gift of the kind we are dealing with. For these reasons the second appeal fails and must be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(9) [1854-57] 6. M. I. A. 393=18 W. R, 81 *n*.
(10) [1884] 7 Mad. 357.
(11) [1900] 24 Bom. 547.
(12) [1893] 16 Mad. 353.

A. I. R. 1919 Madras 812

OLDFIELD, J.

Sankara Kylasa Mudliar and *another* —Petitioners.

v.

Kuthalinga Mudaliar and *others*—Opposite Parties.

Criminal Revn. Case No. 716 or 1917, and Criminal Revn. Petn. No. 567 of 1917, Decided on 9th April 1918, against order of Joint 1st Class Magistrate, Tinnevelly, D/- 8th August 1917.

Criminal P. C. (1898), Ss. 145, 146 and 147—Under Ss. 145 and 146 Court is not authorized to recognize joint possession—Under S. 145 Court must record finding as to which party was in possession at preliminary order—Right to lay warps in street is not right to possession but to use particular part of street—Court can find that by custom each party is entitled to use particular part of street provided such right is sustainable under proviso.

Sections 145 and 146 authorize no recognition of joint possession, and no order can be passed for binding one of the parties to interfere with the joint enjoyment by both. 32 *I.C.* 668; 8 *C. W. N.* 485 and 11 *C. W. N.* 512, *Foll.* [P 813 C 1]

Under S. 145, the Court must record a finding as to which party was in possession at the date of its preliminary order. [P 813 C 1]

Petitioners claimed the sole right to lay their warps in a certain street in a village and respondents claimed a joint right with the petitioners. The Court, holding that joint user of both parties was established forbade petitioners from interfering with the joint enjoyment of the street by the respondents:

Held: (1) that it was not competent to the Court to find joint possession under Ss. 145 and 146, Criminal P. C.; (2) that the right to lay warps was not a right to the possession of land but a right to the use of it and the Court should have dealt with the matter under S. 147, Criminal P. C.; (3) that the Court could find that by custom each party was entitled to use a particular part of the street, provided the right alleged by either side was sustainable under the proviso to the section. [P 813 C 1]

M. D. Devadoss—for Petitioners.

K. R. Guruswami Aiyar and *A. Subramania Aiyar*—for Opposite Parties.

Order.—The dispute between the parties in this case is regarding the rights of respondents to lay their warps in a certain street in their village, petitioners claiming the exclusive right to do so and respondents alleging that they are entitled also. The lower Court, holding what it refers to as joint user established, has, under S. 140, Criminal P. C., forbidden petitioners to interfere with the joint enjoyment of the street by respondents in the manner in question. Petitioners have objected to this order on the ground that it was passed after

admissible evidence, oral and documentary, had been excluded. But the view I take involves consideration only of two more substantial objections that (1) Ss. 145 and 146 authorize no recognition of joint possession, (2) the lower Court did not decide, as the former section directs, which party was in possession on 23rd June 1917, the date of the preliminary order. The first of these objections is justified by the description in the sections of the different orders which can be passed and by reference to authority, the latest case being *Veerabhadra Pillai* v. *Shunmugam Pillai* (1); see also *Dharni Kanta Lahiry Chowdhuri* v. *Girija Kanta Lahiry Chowdhury* (2) and *Makhan Lal Roy* v. *Barda Kanta Roy* (3). The second is based on the contention which is consistent apparently (for the lower Court has not dealt with the point) with petitioners' petition of 3rd February 1917 and respondents' evidence that the latter were prevented from laying warps on 1st February 1917 and did not do so subsequently and therefore if possession was in question, had none either at the date of the preliminary order or within the two months preceding it referred to in the proviso to S. 145. If the contention had been established it would have entitled petitioners to succeed, if an order under S. 145, Criminal P. C., had been appropriate, and such an order passed in disregard of this fact cannot be sustained. That the first of these objections to the lower Court's order is available is, however entailed by the fact that it made a fundamental mistake in attempting to apply S. 145 at all. On that account its order must be set aside.

The right to lay warps in a street is clearly, as respondents argue here and as petitioners contended in their review petition to the lower Court of September 1917, not a right to possession of land but a right to the use of such as S. 147, Criminal P. C. deals with, and the lower Court should have proceeded under that section. If it had done so, it would have avoided not only the legally inadmissible recognition of joint possession, but also the use of terms "joint user," and "joint enjoyment" in its judgment and final order, to which it is impossible to attach any definite significance. For it cannot be said that *A* who lays his warps on the one part of the street and *B* who lays his on another are using or enjoying the ground jointly, on the sole ground that they do so similarly and simultaneously. The lower Court may now find, and it will be admissible for it to consider before passing an order, that this user is regulated by custom or otherwise, if only to the extent that priority of occupation on any particular day is respected and if such regulation is established, it may do well to frame its order accordingly. It will, in any case, have to consider whether the right alleged by either side is sustainable with reference to the period prescribed in the proviso to the section. If it is not, no order recognising that side's user can be passed. The lower Court's order is set aside and the petition is remanded to it for re-hearing in the light of the foregoing, after it has passed a preliminary order S. 147. At the inquiry to be held it will take evidence de novo, including that alleged to have been excluded improperly, if it is otherwise admissible. Costs to date here and before the lower Court will be costs in the case and will be provided for in the final order passed. Fee on each side in this Court is Rs. 25.

S.N./R.K. *Order set aside.*

(1) [1916] 32 I. C. 668.
(2) [1904] 8 C. W. N. 485.
(3) [1907] 11. C. W. N. 512.

A. I. R. 1919 Madras 813

SADASIVA AIYAR AND NAPIER, JJ.

Subbaraya Pillai—Appellant.

v.

Sathanatha Pandaram—Respondent.

Appeal No. 126 of 1917, Decided on 23rd April 1918 against Appellate Order of Dist. Judge, Tanjore, dated 30th July 1917 in Appeal Suit No. 754 of 1916.

Civil P. C. (1908), S. 145—S. 145 does not apply to surety bonds executed outside Court.

Section 145 is confined to cases where the liability of the surety has been entered into in the face of the Court or has been recorded by Court in accordance with the provisions of the Code. It does not extend to surety bonds taken by a judgment-creditor outside the Court. 16 *I. C.* 859, *Diss. from.* [P 815 C 2]

N. S. Rangaswami Ayyangar and T. Narasimha Aiyangar—for Appellant.

S. Muthiah Mudaliar—for Respondent.

Napier J.—The sole question raised in this second appeal is whether S. 145, Civil P. C. applies to surety bonds taken by the judgment-creditors outside Court. The counter petitioner in the case execu-

ted a surety bond in favour of the plaintiff in Original Suit No. 110 of 1913 in the Court of the District Munsif of Tiruturaipundi, in consideration for which the plaintiff-petitioner stayed execution of his decree against the defendant. He now seeks execution of the decree against the surety and objection is raised that 145 does not apply. The District Munsif held that S. 145 applies to cases in which the surety bond was put into Court before final orders were passed on the prior execution petition. The District Judge, on appeal, held that the section is of general application and allowed execution to proceed. It is somewhat remarkable that the exact point has not been decided before now and it seems to be generally admitted that the proceedings under this section have not generally been taken in respect of surety bonds not given before the Court. My learned brother, who has an unrivalled experience in these matters, tells me that he has never known of such an application. It cannot be denied however that the language of the section is wide enough to include such surety bonds. But it is argued that the sub Ss. (a), (b) and (c), which describe the classes of surety bonds affected by the section, all in terms refer to bonds taken before the Court under the provisions of the Code and that therefore the application of the section must be so limited. Sub-S. (a) "for the performance of any decree or part thereof" would certainly apply to a provision for staying execution under O. 41, R. 5, Cl. 3 (c), on the appellant giving security for the due performance of such decree or order as may ultimately be binding on him. Sub S. (b) "for the restitution of any property taken in execution of a decree" undoubtedly applies to O. 41, R. 6, which requires the Court which passed the decree, on sufficient cause being shown by the appellant, to take security from the respondent for the restitution of any property which he seeks to take in execution of the decree. Sub-S. (c)

"for the payment of any money, under an order of the Court in any suit or in any proceedings consequent thereon"

in terms applies to O. 38, R. 2, Cl. (2), namely:

"Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit."

In the same sub-S. (c) the words:

"for the fulfilment of any condition imposed on any person under an order of the Court, etc.,"

would in terms apply to any condition for the stay of execution imposed under O. 21, R. 26, Cl. (3), and also to a realization of security in default of a judgment-debtor applying to be made insolvent under S. 55, sub-S. (4). In all these cases the security might contain a surety bond and the bond would, of course, be given before the Court. Sub-Ss. (b) and (c) in S. 145 are new. The corresponding section of the old Code, S. 253, ran as follows;

"Whenever a person has before the passing of a decree in an original suit become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant."

The same question would therefore arise on the construction of this section, but the only case dealing with this section are those that raised the question whether the words "before the passing of a decree in an original suit" apply to suretyships for the due performance of appellate decrees, on which there was a difference of opinion in the different High Courts of this country. There is a decision of the High Court of Calcutta reported as *Lakshmi Narain Khanna* v. *Gnru Datta Mehra* (1), which is against the appellant. In that case a warrant was issued for the arrest of a judgment debtor which directed it to be stayed if the judgment debtor furnished security. The judgment debtor was arrested and brought before the Court. Then the following entry was made in the order-sheet:

"The judgment-debtor has been brought after being arrested. The decree holder's pleader states that the judgment-debtor's father-in-law . . . . has deposited with him Government promissory notes of the value of Rs. 2,000 as stated in his petition as security for the decretal amount; so he asks the Court to release the judgment-debtor from custody. The judgment-debtor is released."

The decree-holder applied for execution against the surety and prayed that the promissory notes in his custody might be sold. Objection was taken that S. 145 was not applicable because the appellant did not become surety by an application to the Court or by a bond filed in the proceedings. The Bench held that the section does not provide that this liability must have accrued upon an

(1) [1912] 16 I. C. 859.

application presented to the Court or a surety bond filed in the proceedings and proceeds as follows:

"We cannot limit the application of the section to cases where the liability of the surety is undisputed or is a matter of record."

The facts of this case however show that execution was stayed under an order the Court and the debtor released on the surety being given, although the security was certainly taken outside Court. In the present case no order has been passed by the Court at all, so that although the language of the Judges seems wide enough to cover the present case and though they specifically decide that the security need not be taken before the Court, there is still the difference that it was the Court that stayed its hand and not the decree-holder. In *Thirumalai* v. *Ramayyar* (2) the main question was whether S. 253 of the old Code could be availed of where security had been given on behalf of the respondent to an appeal under S. 546 of the Code for the due performance of the decree that is, under O. 41, R. 6 of the present Code. The Court held that execution could be had against the sureties and used the following language:

"The obligation which the surety undertakes is an obligation to fulfil the decree which may be passed against the defendant or appellant in the original suit or in appeal, and the obligation is contracted before the Court and is as a much a matter of record as the decree undertaken to be fulfilled. There is no apparent reason for directing the successful party to obtain a fresh decree against the surety, whilst the very obligation is to fulfil the decree against the defendant or the appellant."

The reasoning of the Court here is inconsistent with the contention of the respondent and with the wide language in *Lakshmi Narain Khanna* v. *Guru Datta Mehra* (1), but is not inconsistent with the actual decision in 16 *I. C.* 859. Then there were some decisions under S. 204, Act 8 of 1859, which were as follows:

"Whenever a person has become liable as surety for the performance of a decree, etc.,"

which section it is to be noted has not got the words in S. 253 of the Code of 1882, "before the passing of the decree in an original suit." In a case reported as *Baboo Ram Kishen Doss* v. *Hurkhoo Sing* (3) it seems to have been assumed that section 204 applies to cases such as that of parties who become sureties under Ss. 76 or 83 of the Code. In *Gujendro Narain Roy* v. *Hemangince Dossee* (4) it is held that a security bond entered into subsequent to a judgment cannot be enforced under S. 204. These two cases were considered by the High Court of Calcutta in a later decision reported as *Abdool Kureem* v. *Abdool Huq Kazee* (5). There the judgment-debtor had been arrested upon a warrant in execution of a decree and applied for his discharge on the ground that he had no means of paying the debt. He was released on a bond given to the Munsif by two sureties under a provision corresponding to S. 55, sub-S. 4 of the present Code. The Munsif held that as the bond was given subsequent to the judgment it could not be enforced under S. 204. The Court distinguished the two prior cases in *Baboo Ram Kishen Doss* v. *Hurkhoo Singh* (3) and *Gjendro Narain Roy* v. *Homonginee Dossee* (4) on the ground that the liability of the surety in those two cases did not arise in the course of or out of proceedings in the suit but upon distinct and independent contracts made between the sureties and the creditor, and seemed to be of opinion that in such circumstances the section would not have been applicable.

It is to be noted however that the decision of the two earlier cases did not go on this question at all. But this is an indication of the view of the Court that bonds taken outside the Court are not within the section. The position then is that there are contradictory rulings under the old Code in the Calcutta High Court and language in a modern decision by the High Court of Calcutta which is against the appellant while the language in *Thirumalai* v. *Ramayyar* (2) seems to be in his favour. I find it impossible to express a confident opinion on the point. But as at present advised I think that considering that the language of the various subsections can be referred to specific provisions of the Code and considering that the object of the section is to allow execution against a person who is not a party to the suit or legal representative it is more proper to confine it to cases where the liability has been entered into in the face of the Court or has been recorded by the Court in accordance with the provisions of the Code.

(2) [1890] 13 Mad. 1.
(3) [1867] 7 W. R. 329.
(4) [1870] 13 W. R. 35.
(5) [1871] 15 W. R. 21

The result will be that the civil miscellaneous second appeal succeeds and the judgment of the District Munsif must be restored with costs here and in the lower appellate Court.

Sadsiva Aiyar, J.—I agree and only wish to add with the greatest respect to the learned Judges who decided the case in *Lakshmi Narain Khanna* v. *Guru Datta Mehra* (1) that I agree neither with the reasons for the decision nor with the actual decision even having regard to the particular facts of that case. I do not think that the fact that the Court itself stayed the execution on the report made to it of security having been given outside the Court, would enable the Court to allow the security to be realized in execution. The only security which could be so realized is one to be furnished to the Court or at least filed in Court.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 816

ABDUR RAHIM AND OLDFIELD, JJ.

Lakshumanan Chetty — Defendant — Appellant.

v.

R. M. K. S. Sadayappa Chetty and *others*—Plaintiffs and Defendants—Respondents.

Civil Appeals Nos. 92 and 93 of 1915, Decided on 15th August 1918, against decrees of Temporary Sub-Judge, Ramnad, in Original Suits Nos. 19 and 32 of 1914.

Limitation Act (1908), S. 19, Expl. 2 — Receiver appointed by Court "to do all things necessary for preservation of firm" can acknowledge.

A receiver may be an agent authorized to make an acknowledgment within the meaning of S. 19, Expln. 2. The language of the section is general enough to include an agent appointed either by statute or by Court, provided he is authorized under the law to make acknowledgments : (1858) 25 *Beav.* 421, *Dist.* [P 811 C 1]

A receiver appointed "to do all things necessary for the preservation of the assets of a firm" has authority to make acknowledgments on behalf of the firm, if they are necessary for the preservation of the firm's assets and if the receiver acts bona fide with that object.

[P 811 C 1]

K. Srinivasa Aiyangar—for Appellant.

S. T. Srinivasagopalachariar — for Respondents.

Judgment.—Defendant 1 was a minor. There was a suit for dissolution of the firm, and in that suit a receiver was appointed under order of the Rangoon Court in these terms :

"It is ordered that M. A. R. A. R. Ramanathan Chetty be, and he is hereby appointed, receiver to take charge of the property of the Chetty firms of M. L. R. M. A. and A. L. A. S. R. M. pending the decision of this suit for dissolution of partnership, with power to collect outstandings and do all things necessary for the realization and preservation of the assets of the said firms."

The question we have got to decide in the appeal is whether an acknowledgment of a debt due by the firm under dissolution made by the receiver was valid. It is contended that S. 19, Limitation Act, is limited, so far as the signing of an acknowledgment by agent is concerned, to agents appointed by an act of the debtor himself, or in other words, by a contractual act. Expl. 2 does not cover the case of an agent who is otherwise appointed. Expl. 2 says :

"For the purposes of this section "signed" means signed either personally or by an agent duly authorized in this behalf."

Reference is made to S. 21 which deals with the case of a person under disability and lays down that the expression "agent duly authorized in this behalf" in S. 19 shall include :

"his lawful guardian, committee or manager, or an agent duly authorized by such guardian, committee or manager to sign the acknowledgment."

Section 21 is a new section which has been introduced, as is well known, in view of conflicting decisions as to whether S. 19 covers the case of an acknowledgment made by a guardian. The argument advanced by Mr. K. S. Srinivasa Aiyangar is to the effect that although Expl. 2 does not say by an agent duly authorized by him, that is, by the person sought to be bound by the acknowledgment, yet it must be taken to mean that inasmuch as all other cases are dealt with by S. 21. S. 21, however, only says that, in the case of a person under disability, "agent" shall include his lawful guardian, etc. It does not lay down that there can be no other egent duly authorized to make acknowledgment in the case of persons under disability. The words "by an agent duly authorized in this behalf" in Expl. 2 in S. 19 were in force before the enactment of S. 21. and we cannot accept the contention that by S. 21 the legislature intended in any way to narrow the scope of S. 19. It is unnecessary for us to say whether S. 21 has widened its scope or not, or it has merely explained what was contained in S. 19 itself.

The authorities seem to be uniform against the appellant's contention. The

matter is fully dealt with by a Full Bench of the Bombay High Court consisting of the Chief Justice, Sir Lawrence, Jenkins, and other learned Judges in *Annapagauda* v. *Sangadigyapa* (1) where it is laid down that the agent in Expl. 2, S. 19, need not derive his authority form any contract. That was the case of a guardian, and it was ruled that the guardian appointed under the Guardians and Wards Act was an agent within the meaning of Expl. 2, if the terms of his appointment gave him authority to make acknowledgments. English cases are then noticed and the statement of law on the subject as given by Lord Westbury in *Chinnery* v. *Evans* (2) is cited to show that the law in England is also to the same effect. In *Beti Maharani* v. *Collector of Etawah* (3) their Lordships of the Privy Council upheld an acknowledgment made by the Court of Wards as being operative under S. 19, and that decision must be taken to be based on the principle that the agent mentioned therein may be one appointed under a statute and need not be appointed under contract. There are similar decisions of this Court in *Kondamodalu Linga Reddi* v. *Alluri Sarvarayudu* (4) of the Calcutta High Court in *Rashbehary Lal Mandar* v. *Anand Ram* (5) and of the Allahabad High Court in *Ram Charan Das* v. *Gaya Prasad* (6). We may mention that in the Calcutta case the question raised was with reference to an acknowledgment made after the new Limitation Act had come into force. The learned Judges however proceeded not on the words of S. 21, but of S. 19. We may also mention that there is a dictum of Kumaraswami Sastri, J., of this Court in *Venkataramiah Pantulu* v. *Subramaniam Pillai* (7) supporting the same view, and there is a very recent decision of the Bombay High Court reported as *Abdulalli Badruddin* v. *Ranchodlal Trikamlal* (8) which proceeds on the same view of the law.

Some reliance was placed on behalf of the appellant on *Whiteley* v. *Lowe* (9), but that case is distinguishable inasmuch as there the receiver was only authorized to get in the assets of the partnership and to pay the assets realized into Court. We hold on the authority of the cases referred to that a receiver may be an agent authorized to make an acknowledgment within the meaning of S. 19, Expl. 2 The language is general enough to include an agent appointed either by statute or by Court, if he is authorized under the law to make acknowledgments. The next question in this connexion is whether the receiver appointed in this case had in fact authority to make an acknowledgment. If he had such authority, it must have been under the power "to do all things necessary for the preservation of the assets of the said firm." It is strongly urged on behalf of the appellant that making an acknowledgment cannot be for the preservation of the assets of the firm. We cannot however accept this contention. We can well imagine cases in which an acknowledgment of a debt may be a necessary act to save the estate from loss. This is recognized in one of the cases already referred to—*Kondamodalu Linga Reddi* v. *Alluri Sarvarayudu* (5)—and in support of the interpretation of the order, Ex. I, we may point to the fact that the receiver was appointed not of a firm which had already been dissolved but of a going concern. We have no hesitation in holding that the act of the receiver in this case, if it was necessary for the preservation of the assets of the firm, would be within the scope of Expl. 2, S. 19. The Subordinate Judge says that

> "in the course of such management when the creditors pressed for payment or threatened to sue, he averted the evil by acknowldging receipts and making part payments."

It does not appear, however where he got this from, for none of the parties before us have been able to point to any evidence which bears this out The point does not seem to have been properly understood in the lower Court. We think it therefore necessary that we must have a finding whether at the time the acknowledgments were made by the receiver, such acknowledgments were acts necessary for the preservation of the estate, that is to say, the plaintiffs ought to satisfy the Court that the receiver in making the acknowledgments was in the circumstances of the time acting bona fide for the preservation of the assets of the firm. The Subordinate Judge will return

(1) [1902] 26 Bom. 221.
(2) [1864] 11 H. L. C. 115.
(3) [1895] 17 All. 198=22 I. A. 31 (P. C.).
(4) [1911] 34 Mad. 221=6 I. C. 407.
(5) [1916] 43 Cal. 211=34 I. C. 205.
(6) [1908] 30 All 422.
(7) [1915] 26 I. C. 393.
(8) [1917] 38 I C. 873.
(9) [1858] 25 Beave 421.

the finding within three months. Fresh evidence may be adduced. Ten days will be allowed for filing objections. We make no order for costs at present.

(In compliance with the order contained in the above judgment the Temporary Subordinate Judge of Ramnad at Madura submitted the following :)

Finding.—(1) The High Court has directed this Court to submit a finding on the point.

"Whether at the time the acknowledgments were made by the receiver, such acknowledgments were acts necessary for the preservation of the estate, that is, for the preservation of the assets of the firm."

(2) The plaintiff in Original Suit No. 32 of 1914 alone has recalled and examined P. W. 3. No other evidence has been adduced in both the suits. P. W. 3 has sworn that the receiver was collecting the outstandings of the firm and paying off debts, that the outstandings were over 40 lacs of rupees and the debts due were about 20 lacs of rupees; that he (witness) demanded from the receiver payment of his firm's debts, saying that otherwise he would file a suit therefor; that the receiver thereupon told him to wait for sometime for payment, representing that it would be inconvenient and disadvantageous to the firm if the witness should file a suit, as the debtors of the firm might not pay or might ask for remissions out of their debts, and that there would also be some hubbub and apprehension about the firm, and that he should therefore wait for receiving payment, and that he further said that he would acknowledge the debt by signing in the signature book. The witness adds that the receiver then signed Ex. E-1 and that he (witness) sent Ex. D to the plaintiff mentioning the acknowledgment by the receiver. It is clear from the above evidence of the witness, which stands unopposed or unchallenged, that the receiver apprehended serious inconvenience, disadvantage or loss to the estate or the firm, if the P. W. 3 should have filed the suit for the recovery of his debt, as the firm had very large outstandings to collect and to meet liabilities to the extent of about half the outstandings. If P. W. 3 and the plaintiff in the other suit had rushed into Court with suits, other creditors might also have followed and the credit of the firm would have been in great risk or jeopardy, and it would not have been possible to collect outstandings, as the debtors taking advantage of the condition of the firm, would have refused payment or put off payments, and the loss to the firm would have been immense. By making the acknowledgments of the debts the threatened suits by P. W. 3 and the other plaintiff were not filed and the risk to the firm's assets was averted. I therefore hold that in the circumstances of the case, the acknowledgments by the receiver were acts necessary for the preservation of the estate, that is, for the preservation of the assets of the firm, and find the issue accordingly.

(These appeals and the memorandum of cross-objections filed by respondent 1 in Appeal No 93 of 1915 coming on for final hearing after the return of the finding of the lower appellate Ccurt upon the issue referred to by this Ccurt for trial, the Court delivered the following:)

Judgment.

Appeals Nos. 92 *and* 93 *of* 1915.

We accept the finding and dismiss the appeals with costs.

The Memorandum of Objections in Appeal No. 93 *of* 1915.

With reference to the memorandum of objections, the decree of the Temporary Subordinate Judge will be modified by allowing interest at 6 per cent per annum on the amount decreed from the date of the plaint to the date of payment.

S.N./R.K. *Appeals dismissed.*

A. I. R. 1919 Madras 818

PHILLIPS AND KRISHNAN, JJ.

A. Rama Rao — Defendant — Appellant.

v.

Mandachalugai and *others*—Plaintiff and Defendants — Respondents.

Second Appeal No. 902 of 1917, Decided on 18th February 1918, against decree of Dist. Court, Madura, in Appeal Suit No 250 of 1916.

(a) Transfer of Property Act (1882), S. 74 —Right of subrogation is equitable and can be enforced by suit against auction-purchaser.

The right of subrogaion is an equitable right and where it is a simpe mortgage right that has been acquired it can be enforced by a suit against an auction-purchaser: 29 *I. C.* 916 and 35 *I. C.* 224. *Dist.*; 12 *I. C.* 607, *Foll.* [P 819 C 1]

(b) Transfer of Property Act (1882), S. 101 —Purchaser of equity of redemption paying off prior mortgage out of purchase money is presumed to keep alive that mortgage.

A purchaser of the equity of redemption paying off a prior mortgage out of the purchase money

is presumed to keep it alive as against puisne mortgagees when it is to his interest to do so. The question is one of intention. [P 819 C 1]

K. S. Jayarama Aiyar — for Appellant.

C. V. Ananthakrishna Aiyar and *K. Sankarasubba Aiyar*—for Respondents.

Judgment.—It is first contended that the right of a prior mortgagee obtained by subrogation cannot be enforced by suit, but can only be used as a defence against subsequent encumbrances, and reliance is placed on certain observations in *Arumugusundarn* v. *Narasimha Iyer* (1), quoted with approval in *Rajah of Kalahasti* v. *Prayag Dossjee* (2). In the present case however the right was used as a shield and plaintiff's mortgage right was recognized by the subsequent mortgagee when the property was brought to sale in execution of his decree. The right of subrogation is an equitable right and in the present case, being a mere simple mortgage right, it can now only be enforced against the auction purchaser by suit. To recognize an equitable right and then refuse the means of enforcing it would in effect result in refusing the equity. We cannot therefore accept the contention that such right cannot in any event be enforced by suit and we are supported in this view by the opinion of the Allahabad High Court in *Gur Narain* v. *Shadi Lal* (3). This objection must therefore fail. It is next contended that plaintiff has obtained no right of subrogation because he paid off the prior mortgage out of the purchase money, and we have been referred to numerous cases in support of this contention. The principle that has been applied in all these cases is the same, and each case has been decided on the question of whether it was or was not the intention of the purchaser to keep the mortgage alive, and the presumption is in favour of its being so kept when it is to the purchaser's interest to do so. In this case the question of intention was not raised in the lower Courts. As plaintiffs' right had been recognized by the puisne mortgagee, we cannot allow this question of fact to be re-opened, especially as the available evidence is against appellant. The appeal is dismissed with casts.

S.N./R.K. *Appeal dismissed.*

(1) [1915] 29 I. C. 916.
(2) [1916] 35 I. C. 224.
(3) [1911] 34 All. 102=12 I. C. 607.

A. I. R. 1919 Madras 819

PHILLIPS AND KRISHNAN, JJ.

Aga Mahammadally Beg Sahib—Plaintiff—Appellant.

v.

Chandragiri Venkatapayya and *others*—Defendants—Respondents.

Second Appeal No. 957 of 1917, Decided on 15th March 1918, against decree of Dist. Judge, Godavari, in Appeal Suit No. 252 of 1916.

(a) Transfer of Property Act (1882), Ss. 60 and 62—Usufructuary mortgage—Discharge of mortgage by appropriation of usufruct working out for 37 years—Postponement of redemption is not clog—Option to redeem before term not exercised—Suit to redeem before expiry of original term is premature.

A postponement of the right to redeem a usufructuary mortgage for a period of 37 years is not a clog on the equity of redemption. S. 62, itself recognizes the validity of such covenants : *A. I. R.* 1914 *All.* 334 ; *A. I. R.* 1914 *Mad.* 42 and *A. I. R.* 1914 *Mad.* 563, *Dist.* [P 820 C 2]

Under the terms of a usufructuary mortgage executed in 1902 the property was put in possession of the mortgagee and it was stipulated that the mortgage amount should be worked off by applying the usufruct in discharge, firstly, of the principal, and secondly, of the interest. In that way the mortgage could be discharged after 37 years. There was another stipulation that if payment of what was then due was made on 12th January 1912 the property should be handed over to the mortgagor, but if such payment was not made the mortgagee's possession was to continue on the same terms as before. No payment was made on 12th January 1912 but a suit for redemption was brought in 1916 :

Held : that the postponement of redemption for 37 years, which was the necessary result of the mortgage covenant, was not a clog on the equity of redemption

Held also (*Krishnan, J.*, dubitanto), that the option to redeem on 12th January 1912 was not a personal covenant, but was a provision inserted for the mortgagor's benefit and the option not having been exercised on the date, the suit for redemption brought before the expiry of the original term was premature. [P 821 C 1]

Per *Krishnan, J.* — Even assuming that S. 60 applies and not S. 62 (a), T. P. Act, the suit must still fail as no tender was made on that day and as the right to make the tender or to redeem was not subsisting after that date or when the suit was brought. It is a necessary condition under S. 60 that, when payment or tender is sought to be made, the mortgagor must have the right to make it, as the section speaks of the payment or tender of the mortgage money " at a proper time. " For the time to be proper, the tender or payment must be one validly and properly made ; and for that, the person making it must have at the time the legal right to make it. [P 823 C 1]

(b) Transfer of Property Act, S. 60—" Payable " refers to mortgagor's right than to his obligation.

The word payable in S. 60 seems to refer to the mortgagor's right rather than to his obligation

and to imply no more than that the mortgagor should have a right to pay, the mortgagee being under a corresponding obigation to receive. [P 823 C 2]

(c) **Transfer of Property Act, S. 60—Clog is distinct from unconscionable bargain.**

A covenant may be bad as a clog or it may be bad as an unconscionable bargain. The two are distinct and independent grounds. [P 822 C 1]

B. Narasimha Row—for Appellant.

M. Patanjali Sastri and *C. Rama Row*—for Respondents.

Phillips, J.—Plaintiff-appellant sued to redeem an usufructuary mortgage executed in 1902 (Ex. B.). Under that document the property was put in possession of the mortgagees, and it was stipulated that the mortgage amount should be worked off by applying the usufruct, Rs. 20 a year, in discharge, fistly, of the principal, and, secondly, of the interest, A calculation shows that the mortgage amount would be discharged in about 37 years. There is another stipulation that if payment of what is then due be made on 12th January 1912 the property should be handed over to the mortgagor, but if such payment were not made the mortgagees' possession was to continue on the same terms as before. The payment was not made on 12th January 1912 and this suit for redemption was brought in 1916 and has been dismissed as premature.

It is contended for appellant that the stipulation for payment in January 1912 is a covenant for payment and that consequently the mortgagors are entitled to redeem as the time fixed for payment has expired. A perusal of the document shows that there is no personal covenant to pay and that the stipulation as to payment in 1912 is a provision inserted for the benefit of the mortgagors They failed to avail themselves of the concession allowed and it is expressly stipulated that in default, the original covenant is to continue in force. On this ground the appellant's contention cannot be supported.

It is next urged that the provision in the deed that the mortgagees or to remain in possession until the mortgage money is worked off is a clog on the equity of redemption, and that effect cannot be given to such a provision. In support of this proposition appellant's counsel relies on three cases, *Sarbdawan Singh* v *Bijai Singh* (1), *Srinivasa Aiyangar* v. *Radhakrishna Pillai* (2) and *Chakkangal Govinda Menon* v. *Chakkangal Chathu Menon* (3). The first of the cases laid down that the conditions fettering the equity of redemption in that particular case conld not be enforced, but the learned Judges observed that it is impossible to lay down a hard and fast rule as to what should and what should not be regarded as an improper restraint on the right of redemption. In *Srinivasa Aiyangar* v. *Radhakrishna Pillai* (2) a stipulation that the mortgage was to work itself out as a sale for the principal amount, if the mortgage amount was not paid on the stipulated date, was held to be unenforceable and that the right of redemption remained. The same two Judges in *Chakkangal Govinda Menon* v. *Chakkangal Ohathy Menon* (3) held that a stipulation that the property should only be redeemed during certain months of each year was unenforceable but in that case also there was a personal covenant to pay and the provisions of S. 60 T. P. Act, (4 of 1882) applied. On the other hand, postponement of redemption for long periods had been allowed by the Courts e. g., 26 years in *Rambaran Singh* v. *Ramker Singh* (4) 58 years in *Rama Prasad* v. *Jagrup* (5) and 59 years in *Dulari* v. *Lal Bhadur Singh* (6). Apart from the question of whether the onerous nature of the restriction is such as to justify a Court in refusing to enforce it, there is in this case a further point in respondents' favour, i. e., that a covenant for the mortgage money to be worked out by the usufruct is one that is not uncommon in this country and the validity of such a covenant has been recognised in *Tirugnana Sambandha Pandara Sannadhi* v. *Nallatambi* (7) and *Gunnam Dorayya* v. *Vadapalli Ayyamacharyulu* (8). In the latter case to which one of the Judges in *Srinivasa Aiyangar* v. *Radhakrishna Pillai* (2) was a party, it was expressly laid down that such a covenant is not illegal according to the Indian law. In fact such a covenant is expressly recognized in S. 62, T. P. Act, (4 of 1882).

(1) A I. R. 1914 All. 334=36 All. 551=24 I. C 705.

(2) A. I. R. 1914 Mad. 42=38 Mad. 667=23 I. C. 54.
(3) A. 1. R. 1914 Mad. 563=22 I. C. 907.
(4) [1911] 10 I. C. 243.
(5) [1912] 15 I. C. 880.
(6) [1915] 28 I. C. 129.
(7) [1893] 16 Mad. 486.
(8) A. I. R. 1915 Mad. 481=25 I. C. 797.

The contention that the provisions of S. 60 of that Act must be read apart from S. 62, and that the right to redeem accrues when the money has become payable does not help the appellant for it was held in *Tirugnana Sambandha Pandara Sannadhi* v. *Nallatambi* (7) that in a mortgage like the present redemption could not be sought before the mortgage was worked out, applying the general principle that the right to redeem and the right to foreclosure are usually co-extensive. It was held in *Husaini Begam* v. *Collector of Cawnpore* (9) that the principal money only becomes payable when the payment becomes obligatory on the mortgagor. That this construction is right, in so far as the obligation refers to a debt being payable, would appear from the fact that in a mortgage there may be no personal liability on the part of the borrower, although prima facie a loan involves a personal liability: vide *Ram Narayan Singh* v. *Adhindra Nath Mukerji* (10) and if there is no personal covenant, there is no liability to pay and the money has not become payable. The conditions of the suit contract are such that no personal liability arises and therefore it cannot be said, as contended before us, that the money had become payable as soon as the contract was signed. In this particular case the money cannot become payable as there is no personal covenant to pay; S. 62, T. P. Act must be applied and the mortgagors are only entitled to recover possession when the money is paid according to the terms of the contract. I may refer also to the decision of the Privy Council in *Bakhtawar Begam* v. *Husaini Khanam* (11), where it was held that the right to recover possession accrued when the mortgage debt was actually satisfied. I do not think this view of mine is opposed to *Rose Ammal* v. *Rajarathnam* (12), as in that case there was a personal covenant to pay. I would therefore hold that the plaintiff's suit is premature.

If it were necessary to decide whether the restriction on redemption is so onerous that effect should not be given to it, I would express my opinion that it is not. The parties entered into the contract with open eyes and the mortgagors were given an opportunity of evading the restriction, but failed to take advantage of it. I can see no reason why they should be given a further equitable relief. I would therefore dismiss this second appeal with costs of respondent 1.

Krishnan, J.—I agree with my learned brother that this second appeal fails. The language of the mortgage-deed is too plain to admit of any reasonable doubt that the dominant intention of the parties was that the mortgage amount and interest were to be worked off by the usufruct of the property which was agreed to be taken at Rs. 20 a year, the property being retained in the mortgagees' possession for the requisite number of years to enable that to be done. An option is no doubt given to the mortgagors to pay the amount due on 12th January 1912, but the document provides that if the money is not so paid, the "discharge is to take place only as aforesaid," that is by the appropriation of the rent. The mortgagors, having failed to pay under that option, have lost their right to take advantage of it and their suit can succeed only if they have a right to redeem their mortgage by payment, in spite of the special stipulation to let the mortgagees remain in possession till the mortgage amount and interest are worked off by the usufruct. Admittedly the mortgage amount has not been so worked off yet. In fact a calculation shows that it requires 17½ years to pay off the principal which has to be first paid under the terms of the document, and another 18 or 19 years to pay off the accumulated interest.

The learned Advocate for the mortgagors' assignee who is the appellant before us, urged that on the construction of the document itself, the mortgagors were entitled to re-pay the mortgage amount due at any time after the 12th January 1912 as they pleased. I agree that this contention is untenable on the language of the document. He then argued that the covenant was a clog on the equity of redemption and should be treated as invalid and that it was no hindrance to the mortgagors' claim to redeem. It is impossible to argue that an express covenant between the parties that redemption shall take place only at the end of a given term should be ignored or

(9) [1907] 29 All. 471.
(10) A.I.R. 1916 P.C 119=44 Cal. 388=44 I.A. 87 =38 I.C. 932 (P.C.).
(11) A. I. R. 1914 P. C. 36=23 I.C. 355=36 All. 195=41 I.A. 84 (P.C.).
(12) [1900] 23 Mad. 33.

set aside as a clog on the equity of redemption if that covenant is otherwise valid, in the face of the rulings in *Sri Raja Setrucherla Ramabhadra Raju Bahadur* v. *Sri Raja Vairicherla Surianarayana Raju Bahadur* (13), *Tirugnana Sambandha Pandara Sannadhi* v. *Nallatambi* (7), *Rose Ammal* v. *Rajarathnam* (12) and *Gunnam Dorayya* v. *Vadapalli Ayyamacharyulu* (8). S. 62, T. P. Act itself recognizes the validity of such covenants.

The learned Advocate, however relied on the rulings in *Srinivasa Aiyangar* v. *Radhakrishna Pillai* (2) and *Sarbdawan Singh* v. *Bijai Singh* (1) as authorities in favour of his argument. In the Madras case the covenant was one whose effect was to put an end to the mortgage itself, the property being treated as sold; and clearly that covenant was an absolute clog on the equity of redemption. In the present case we have only a postponement of the right to redeem for a period. In the Allahabad case, it was no doubt ruled that a postponement of the right to redeem may itself be a clog if it amounts to an unconscionable bargain. A covenant my be bad as a clog or it may be bad as an unconscionable bargain; the two are distinct and independent grounds, and it seems to me that it will lead to confusion of thought to mix them up. Assuming that a covenant to postpone redemption may be refused to be enforced if it is an unconscionable bargain, it is of no use to the appellant, as here the question of the nature of the bargain was not raised or discussed in the lower Courts and no evidence seems to have been given of it. The appellant relies on the facts that the period fixed is about 37 years and that the rent is to be taken at Rs. 20 a year for the whole period, as showing that the arrangement was an unconscionable one. We do not know if the fixing of the rent was not more to the advantage of the mortgagors than that of the mortgagees, as no evidence has been given on the point.

As for the length of the period I am not able to say that it is enough in the present case to justify, by itself, an inference that the bargain was an unconscionable one. My learned brother has referred to cases where periods ranging from 28 to 59 years have been allowed. Furthermore, the mortgagors had the option to terminate the period in ten years and their failure to do so is their own fault. The covenant in this case cannot therefore be set aside on the ground of its being an unconscionable one.

The last argument urged by the learned Advocate was that under S. 60, T. P. Act, if during the continuance of a mortgage the mortgage money becomes payable even for a day, the mortgagor at once got a right to redeem, which he could enforce at any time thereafter even though there was a covenant against it. He cited the case of *Chakkangal Govinda Menon* v. *Chakkangal Chatha Menon* (3) as an authority for this proposition, which he contended was applicable to the present case as the mortgage money was payable at any rate on 12th January 1912, if not afterwards. This argument seems to me to be very curious. It is based on the words "at any time after the principal money has become payable" in S. 60 of the Act. The respondents' vakil has tried to meet this argument by urging that the word "payable" in the section applies only when there is an obligation on the mortgagor to pay, which the mortgagee can enforce against him: although I think it is not necessary for me to decide the point as, in my view, the appellant's argument fails on another ground as stated below, I wish to guard myself against being understood as adopting this view. It seems to me to be opposed to the view expressed in *Rose Ammal* v. *Rajarathanam* (12), where Shephad, J held that money might become payable by the mortgagor even though payment could not be enforced by the mortgagee. The reasons given in that case seem to me to have considerable force. Where a mortgagor stipulates with the mortgagee that, though he should not be called upon for payment for a given time, he should have the option to pay and redeem the mortgage during that time, it appears to me to be difficult to apply the doctrine of the coextensiveness of the right to redeem and right to foreclose to this case and to refuse to him the very right to redeem that he has stipulated for, on the ground that the mortgagee could not sue him for money seems unreasonable, and a construction of S. 60, T. P. Act, which leads to that result seems to be of doubtful correctness. If, in this very case, for

(13) [1879] 2 Mad. 314.

example the mortgage money had been tendered on 12th January 1912 and had been refused by the mortgagee, the mortgagor's suit to compel acceptance and to redeem could hardly have been rejected and yet the view put forward will necessitate that result. The word "payable" in S. 60 seems to refer to the mortgagor's right rather than to his obligation and to imply no more than that the mortgagor should have a right to pay, the mortgagee being under a corresponding obligation to receive; the existence of a right in the mortgagee to enforce payment does not appear to me to be really necessary to make the word applicable. I do not however wish to pursue the matter further or give a final opinion on it, for I consider that even assuming S.60 applies and not S. 62, Cl. (a), and that money was payable on 12th January 1912, the appellant must still fail as no tender was made on that day and as the right to do so and redeem was not subsisting after that date or when the suit was brought. I think that it is a necessary condition under S. 60 that when payment or tender is sought to be made the mortgagor must have the right to make it, as the section speaks of the payment or tender of the mortgage money "at a proper time." For the time to be proper, the tender or payment must be one validly and properly made; and for that, the person making it must have at the time the legal right to make it.

I do not consider the ruling in *Chankkangal Govinda Menon* v. *Chokkangal Chathu Menon* (3) to be against this view. That decision seems to have proceeded on the ground that after the due date in 1899 the mortgage money was always payable, the arrangement referred to therein apparently not affecting it or the right to sue but only fixing a time for redemption and delivery of possession. It is therefore clearly distinguishable. I do not regard it as an authority for the proposition the appellant contends for.

As the appellant's arguments have all failed, his second appeal must be dismissed with costs of respondent 1.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 823

AYLING AND COUTTS-TROTTER, JJ.

Gaspari Louis—Defendant.

v.

C. P. Gonsalves — Plaintiff— Respondent.

Second Appeal No. 1938 of 1916, Decided on 15th April 1918, against decree of Dist. Judge, South Canara, in Appeal Suit No. 502 of 1915.

(a) Jurisdiction — Church of England is subject to ordinary Courts even in matters of doctrine—But Roman Catholic Church is voluntary association bound by rules which it has made for internal management—Ecclesiastical law.

The Church of England is an established church and is therefore subject to the ordinary Courts of law not only as to matters temporal but even as to matters of doctrine.

The Roman Catholic Church is not an established church but a voluntary association and any member who joins that church will be bound by any rules which it has framed for its internal discipline and for the management of its affairs: *Long* v. *Bishop of Cape Town* (1863); 1 *Moo P. C. (n.s.)* 411 and *Merriman* v. *Williams*, (1882) 7 *A. C.* 484, *Foll.* [P 824 C 2]

(b) Ecclesiastical Law—Voluntary association adopting rules which differing from those of parent body—Members are not members of parent body but form independent association.

If a branch voluntary association adopts rules which differ materially from those of the parent body then the members of that association will not be members of the parent body but will be an independent organisation with their own rules. [P 824 C 2]

(c) Ecclesiastical Law—Canon law governing Catholic Church recognizes no distinction between spiritual and temporal powers of Papacy.

The Canon law recognises no distinction between the spiritual and temporal powers of the Papacy, and the Episcopate and a member of any church which is part and parcel of the Universal Catholic Church would be bound by the Canon law. [P 824 C 2]

(d) Ecclesiastical Law—Church while adopting main doctrines of Catholicism, framing some different rules—Those rules must be proved as custom—Questions of customs being of fact no second appeal lies.

If a church, while adopting in the main the doctrines of the Roman Catholic Church has yet erected certain rules different from the rules of the Catholic Church in matters of discipline and management, those rules must be proved in the same way in which a custom would have to be proved in a Court of law. [P 824 C 2]

Questions of custom though they may in the end become questions of law are at the outset necessarily questions of fact.

Where an appointment as manager of a Vicar in a Roman Catholic Parish Church by the Bishop was questioned on the ground that he was not appointed by the junta composed of the heads of houses in a village as was the custom and that the delegation of any authority by the Bishop was only permissive;

Held: (1) that whether the church be viewed as a branch of the Roman Catholic Church or as a voluntary association the appointment was valid.

(2) That the question whether the custom was for the junta to appoint was one of fact on which the finding of the lower appellate Court could not be interfered with in second appeal.

[P 825.C 1]

T. R. Ramachandra Aiyar and *K. P. Lakshmana Rao*—for Appellant.

B. Sita Rama Row—for Respondent.

Judgment.—This suit together with an execution petition which turns upon it, was brought by the Reverend Gonsalves, Vicar of the Roman Catholic Parish Church at Kaliapur for arrears of rent due by tenants of Church property. The only defence with which we are concerned is the defence that the plaintiff was not entitled to sue, as his appointment as Manager or Moktessor of the Church property was not a valid one. The Vicar was appointed by the Bishop upon 14th November 1914 and the facts leading up to the appointment were these. The temporal affairs of the Church were ordinarily administered by a body known as the junta, composed of the heads of houses in the village. This body has been in existence for something like 30 years and has claimed and exercised the right to appoint the Moktessor. The last Moktesssor appointed by the junta was a Mr. Louis, who resigned his appointment in 1913. Attempts were then made to get the junta to appoint a successor, but the meeting held was so disorderly that no valid appointment could be made and the Vicar so informed the Bishop. The Bishop thereupon appointed the Vicar to the office of Moktessor pending further arrangements. In that capacity he brought this suit and the validity of his appointment is challenged.

The plaintiff puts his case at its highest on this broad ground. This church is part of the Universal Catholic Church and is bound by its laws, that is to say by the Canon law and it is an unquestioned tenet of the Canon law that the temporalities of the church vest in the Pope whose authority may be regarded as delegated to the Bishops to the extent of their several dioceses. On this view any further delegation of his complete authority over the church property by the Bishop is merely permissive and can be resumed by him at will. On the other side it was argued that the authority of the Canon law is confined to the spiritual side and could not affect rights of property or kindred rights in the temporal possession of the church which would be governed by the law of the land as administered by the Courts.

We may say at once that we think any analogies drawn from the decisions relating to the property of the English Established Church are not really applicable to the present case. The Church of England is properly described as established just because of this unique feature about it, that it is subjected to the ordinary Courts of law not only as to matters temporal but even as to matters of doctrine. This is due to a variety of historical causes which need not now be examined. The Roman Catholic Church is not an established church. It is what is described as a voluntary association in the English cases and the result of those cases, of which the most important are *Long* v. *Bishop of Cape Town* (1) and *Merriman* v. *Williams* (2), seems to be this. If you join a voluntary association, you will be bound by any rules which it has framed for its internal discipline and for the management of its affairs. You may adopt the doctrines of the established or any other church en bloc, but if the voluntary association has adopted rules which differ materially from those of what may be called the parent body the members of that association will not be members of the parent church but will be an independent organization with their own rules. It seems to us that the appellant in this case is in a dilemma. If his church is part and parcel of the Universal Catholic Church as apparently he wishes it to be regarded, he must be assumed to be bound by the law of the church, (i. e.), the Canon law, and if that be so it is clear that the control of temporalities vests in the Bishop, since the Canon law recognizes no distinction between the spiritual and temporal powers of the Papacy and its local representatives the Episcopate.

If this church is to be regarded as an independent voluntary association which while adopting in the main the doctrines of the Roman Catholic Church has yet erected certain rules different from the rules of the Catholic Church in matters

(1) [1863] 1 Moo. P. C. (n.s.) 411.
(2) [1882] 7 A. C. 484.

of discipline and management, then those rules must be proved in the same way that a custom would have to be proved in a Court of Law. Questions of custom may often in the end become questions of law, as in the familiar instances where the Courts have to say whether a custom is reasonable, or is not inconsistent with the law of the land, or with the terms of some document, such as, e. g., a contract. But at the outset they must necessarily be questions of fact. You must first prove that the thing is done before you can go on to inquire whether it legally may be done. Looking at the case from this point of view it seems sufficient to say that the learned Judge has found that the evidence put forward has failed to support the contention that the junta has established a recognized custom of holding in its hands the appointment of a Moktessor. He has found as a fact that such appointments as they have made have been merely permissive as a matter of convenience and that the Bishop has never relinquished his claim to be the final repositary of the power of appointment. We think that even if this be regarded as a voluntary association a person who joins it must be considered as prima facie subscribing to the rules of the Catholic Church as embodied in the canons, unless he can give affirmative proof of an established usage to the contrary. The learned Judge by his finding has negatived the existence of such a rule in the present case and as we do not think he misdirected himself in law in coming to that finding of fact we cannot disturb it. The appeal fails and is dismissed with eosts

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 825

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

S. A. Chellappa Chetty— Defendant—Appellant.

v.

S. Subramania Chetty and *others*—Plaintiffs—Respondents.

Civil Appeal No. 231 of 1917, Decided on 12th July 1918, against the decree of Temporary Sub-Judge, Sivaganga, in O. S. No. 51 of 1916.

(a) Limitation Act (1908), Art. 60—Money deposited for term and repayable on demand after expiry of term—Suit to recover is governed by Art. 60.

A suit for recovery of money deposited for a term which is repayable on demand after the expiry of the term is governed by Art. 60 as the money is still left in deposit after the termination of the term. [P 826 C 2]

(b) Debtor and Creditor—Maral deposit—"Deposit in name of one person maral another"—Meaning of, explained.

"A deposit in the name of one person maral another" means only that the deposit was made on the recommendation or introduction of the latter, and the maral man can neither be regarded as a trustee in respect of the money nor has he a right to operate on it, as by directing the transfer of the deposit in the name of another person. [P 825 C 2]

(c) Custom—Nattukottai Chetties — Money deposited on maral of third party — Maral man not consenting withdrawal—It is open to depositor to sue for recovery in spite of practice that it cannot be withdrawn unless maral man consents.

Though a usage has sprung up among Nattukottai Chetties that, when money is deposited on the maral of a third party, it should not be allowed to be drawn out unless with the consent of the intermediary, the usual remedy by suit is open to the depositor when the maral man declines to give his consent, and the hands of the Court are not tied down by the usage. [P 827 C 1]

K. Srinivasa Aiyangar, C. S. Venkatachariar and *C. V. Rajagopalachariar*—for Appellant.

A. Krishnaswami Aiyar— for Respondents.

Wallis, C. J.—Two questions arise in this appeal. The first question is whether defendants 1 to 5, with whom the suit deposit was made, were justified in acting on the order of defendant 6 to transfer the deposit which was in the name of the plaintiff to the name of the plaintiff's wife, because the deposit had been made with them in the plaintiff's name maral defendant 6. Maral literally means that the deposit had been made on the recommendation on introduction of defendant 6. Defendants 1 to 5 have treated it as if it meant that the money was deposited to the order of defendant 6 so that defendant 6 was authorized to operate on the deposit although it was in the name of the plaintiff. In Appeal No. 17 of 1913 there was some discussion on the meaning of the word maral and it was suggested that it might mean that money could not be withdrawn by the person in whose name it had been deposited without the consent of the person under whose maral the deposit had been made. Some of the evidence in this case including the evidence of one of the defendants' own witnesses, goes to show that that is the meaning. Whether that be so or not the evidence for defendants 1 to 5 altogether

fails to show that a deposit in the name of one man under the maral of another justifies the firm with whom the money has been deposited in acting on the orders of the person under whose maral the deposit has been made without the authority of the person in whose name the deposit stands. We therefore agree with the Subordinate Judge that defendants 1 to 5 were not justified in transferring this deposit from the name of the plaintiff to the name of the plaintiff's wife and in subsequently transferring it to another firm on the order of defendant 6, under whose maral it continued to be when deposited in the name of the plaintiff's wife.

The only other serious question in the case is one of limitation. There is no direct evidence as to the terms upon which this money was deposited, so far as the date of the repayment goes. But in Ex. 1, which is a letter from one member of the defendants' firm to another forwarding a Hundi, Ex.B, it is said that the money was to be credited in the name of the plaintiff under the maral of defendant 6 for six thavanais with interest at a rate exceeding the two months' thavanai interest of E. R. by 1/32 of a rupee and Mr. K. Srinivasa Aiyangar has argued that this shows that the agreement was that the money should be deposited for a term of six thavanais and should be repayable at the end of six thavanias, and consequently it was not money deposited under an agreement that it shall be payable on demand, within the meaning of Art. 60, Lim. Act.

Now in the first place I do not think that that is the effect of the evidence. The surrounding circumstances show that the money was deposited in the name of a minor and in connexion with the marriage of a minor, and it cannot have been the intention of the parties that it should be repayable at the end of six thavanais. The agreement appears to have been that at any rate for six thavanais interest should be payable at a rate exceeding nadappu interest by 1/32 of a rupee. This is also borne out by the way in which the deposit was dealt with after it had been transferred to the name of the plaintiff's wife, because in Ex. 9 we find that interest is allowed at 1/32 of a rupee in excess of the nadappu rate for three thavanais and afterwards at the nadappu rate, so that the agreement seems to have been simply that any rate for six thavanais interest should be paid in excess of the nadappu rate.

Now Mr. Srinivasa Aiyangar contended that it was not open to the plaintiff or those acting on his behalf to demand the money back until the expiration of six thavanais. I am not satisfied that that is so. But on a full consideration of the question I think it makes no difference. Supposing that the agreement was that the money should be deposited for six thavanais and be not repayable until the end of six thavanais and thereafter that it should remain on deposit payable on demand, I think that that would come within the terms of Art. 60, Lim. Act, and I need only refer to what I had already said with regard to the history and meaning of this Article in *Balkrishnudu* v. *Narayanasawmy Chetty* (1), where I pointed out that the legislature in 1877 treated deposits of money repayable on demand as a special class of loans which ought to have a special starting point. Coming, as I do, to the conclusion that this money was intended to be left on deposit after the expiration of the six thavanais, it seems to me that Article 60 is clearly applicable and therefore that the suit is not barred.

In other respects, I agree with the Subordinate Judge, and dismiss the appeal with costs. We do not pronounce any opinion as to the respective rights of defendant 6 and the other defendants inter se.

Seshagiri Aiyar, J.—I entirely agree. Having regard to the fact that the decision in this case rests largely upon the construction to be placed on the tamil word maral, I wish to add a few words. It is not denied that the natural meaning of the term is "through" or "on the recommendation of." The evidence discussed by the Subordinate Judge shows that it is in this sence that Chettis use the expression. No doubt there is also evidence that a usage has sprung up among Chetties that when money is deposited on the maral of a third party, it should not be allowed to be drawn cut unless it be with the consent of the person who is the intermediary. This practice is mainly attributable to the fact that usually third persons intervene to recommend a bank to a depositor who is

(1) A. I. R. 1914 Mad. 51=37 Mad. 176=24 I.C. 852.

a young man and in order that that young man may not waste money, the precaution has been taken by the banks not to allow him to draw it out unless he has the consent of the maral man. Evidence also shows that where the maral man declines to give his consent the usual remedy by suit is open to the depositor; of course, the hands of the Court are not to be tied down by the usage; the necessity for the consent of the maral man is obviated by a decision authorizing the taking away of the money from the bank and the bank is safeguarded. The practice and the evidence shows that the maral man is neither the trustee in respect of the money nor has he any right to operate on it. This conclusion of mine is supported by the judgment which the learned Chief Justice referred to namely, the judgment of this Court in Appeal No. 17 of 1913, of which one of the members had very large and considerable practice in litigation among Chetties. It seems to me therefere that the money on deposit remained as the money of the plaintiff and the defendants were not justified in allowing it to be deposited first in the name of the plaintiff's wife and subsequently in allowing it to be transferred to another firm.

On the question of limitation, the Subordinate Judge has discussed the evidence and has come to the conclusion that the original condition of the deposit was that it should be drawn out on demand. It may be said that the evidence is not very full or conclusive, but even supposing that the only possible conclusion upon the evidence is as spoken to by defendant 2 himself, that there was an agreement that the money should remain with the bank for a year certain (that is six thavanais of two months each) and that it should be drawn out thereafter on demand, I entirely agree with the learned Chief Justice that Art. 60, Lim. Act, is not made inapplicable by that fact. I think the history of the Article given by the learned Chief Justice in *Balakrishnudu* v. *Narayanasawmy Chetty* (1) clearly shows that in such a case it would still be a case of deposit repayable on demand. I therefore agree in holding that the appeal should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 827

ABDUR RAHIM AND SESHAGIRI AIYAR, JJ.

Deputy Collector, Madura—Petitioner—Appellant.

v.

Muthirula Mudali and *others*—Claimants—Respondents.

Appeal Suits Nos. 267 to 270 of 1917, Decided on 16th March 1918, from decrees of Dist. Judge, Madura, in Original Petns. Nos. 622, 624, 625 and 627 of 1916.

Civil P. C. (1908), O. 41, Rr. 22 and 23—Appeal by Collector against part of decree in land acquisition case—Memo of objections against other part of decree may be filed—Land Acquisition Act (1894), S. 54.

Under O. 41, R. 22 a memorandum of objections may be filed against a decree as a whole or against a part of it which may not be the subject-matter of the appeal. [P 828 C 1]

Where the Collector preferred an appeal against the valuation of some of the plots in a land acquisition case fixed by the District Judge:

Held: that it was competent to the claimant to file a memorandum of objections in respect of other plots which were covered by the petition, though not the subject of appeal. [P 828 C 2]

Per *Seshagiri Ayyar, J.*—S. 54, Land Acquisition Act makes no departure from the ordinary rule of the Civil Procedure Code which allows a party to appeal not only against the whole decree but also against parts of it.

A memorandnm of objections need not be confined to the subject-matter of the appeal.

What the appellant objects to is not to be the criterion, but the question in each case must be whether the respondent's rights have in any way been imperilled by the action taken by the appellant. [P 829 C 1]

V. Ramesam—for Appellant.

A. Sambamurthy Ayyar; *C. V. Ananthakrishna Ayyar*, *Subbaraya Ayyar*, *S. Subramania Ayyar* and *W. Kothandaramiah*—for Respondents.

Abdur Rahim, J.—These appeals in my opinion must fail. Objection is taken to the valuation of the District Judge in respect of plots Nos. 611-F, 611-G, 383, A-2. The District Judge has awarded Rs. 1,143 per acre for all these plots. Mr. Ramesam contends that these are back lands and that therefore they ought not to be valued at the same rate as the lands with frontage. But I think the District Judge is right in holding that the purchase by the Madura Mills Company in 1915 of lands similarly situated furnishes a good index of the proper market price. We have considered the question carefully and are not prepared to dissent from the District Judge's esti-

mate. The appeals are dismissed with costs. The time for payment will be three months from this date. A preliminary objection has been taken with reference to the memoranda of objections. The memoranda of objections relate not merely to the plots covered by the appeals but also to other plots, though all the plots to which the memoranda of objections relate are the subject of the same petition to which the appeals relate. I should take it that each petition forms a separate case in the land acquisition proceedings and the award on each petition is a separate decree. S. 54, Land Acquisition Act incorporates by reference the provisions of the Civil Procedure Code applicable to appeals from original decrees. O. 41, R. 22 (1), Civil P. C., provides for memorandum of objections in these words:

"Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate Court within one month from the date of service on him or his Pleader of notice of the day fixed for hearing the appeal, or within such further time as the appellate Court may see fit to allow."

The section is expressed in very general language, but after having heard the matter fully discussed I have little doubt that a memorandum of objections may be filed against the decree as a whole or against a part of it which may not be the subject-matter of the appeal. One of the strongest cases that have been brought to our notice is that reported in *Kamat* v. *Kamat* (1), the judgment of Sargent, C. J. There the appeal was with respect to costs disallowed by the lower Court and the memorandum of objections related to the decree on the merits and it was held that such cross-objections could lie. There is also a Full Bench ruling of this Court in *Munisami Mudali* v. *Abbu Reddy* (2). There by a memorandum of objections a question which affected a co-respondent to the appeal was allowed to be raised. Our attention has also been drawn to a judgment of the Bombay High Court, *Raghunathdas* v. *Secretary of State* (3). The case there arose out of a matter under the City of Bombay Improvements Act. The appeal was with reference to a certain percentage allowed for water cess while the memorandum o objections raised a question as regards the allowance for vacancies, and it was held that such a memorandum of objections was valid. Mr. Ramesam, while conceding that under the Civil Procedure Code it is not necessary that the memorandum of objections should be only with reference to that part of the decree which is the subject-matter of the appeal, argues that S. 54, Land Acquisition Act makes a difference so far as appeals in land acquisition cases are concerned. He lays stress on the provision of that section

"an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceedings under this Act."

and argues that the Legislature in expressly saying that an appeal shall lie from any part of the award wanted to imply that the decree under appeal must be taken to be that part of it to which objection was taken by the appellant. He then argues that the memorandum of objection must be confined to the subject-matter of the appeal itself, as that is the decree that is appealed against within the meaning of S. 54. But what S. 54 enacts is in no way different from the ordinary provisions of the Civil Procedure Code, because an appeal may be filed against the entire decree or any part of it. Once an appeal is filed, a memorandum of objections may be filed by the respondent with reference to any portion of the decree to which he objects. I do not think therefore that S. 54, Land Acquisition Act makes any difference in the law and I hold that the respondents are entitled to press their memorandum of objections. On the merits, I am satisfied that the District Judge has a given a perfectly fair price for the plots referred to in the memorandum of objections and I dismiss them with costs.

Seshagiri Aiyar, J.—I agree. On the merits, although there is this that must be said in favour of Mr. Ramesam's contention that the frontage should be differently valued from the back portion, having regard to the fact that the valuation on which the District Judge has relied was given a year before the proclamation, I agree with my learned brother in holding that the value fixed by the District Judge does not err on the side of giving the claimants too much and that the sppeals must be dismissed.

(1) [1884] 8 Bom. 368.
(2) [1915] 38 Mad. 705=27 I. C. 323.
(3) [1905] 29 Bom. 514.

On the question of the memorandum of objections, my mind had been vacillating a good deal during the course of the argument and after having had the matter fully discussed, I have also come to the conclusion that the respondents are entitled to be heard. There is a great deal to be said in favour of the view taken by Lindley, M. R., in *National Society for the Distribution of Electricity by Secondary Generators* v. *Gibbs* (4). The learned Lord Justice points out that if a cross-notice is given in respect of a matter which is not the subject-matter of the appeal, ordinarily a party should not be heard about it. But the language of the Civil Procedure Code is very wide. Reading O. 41, R. 22, and R. 33 of the same order together, it looks as if the Legislature intended to give a party every means of remedying the injustice which has been done to him by the action of the lower Courts. It is arguable that as the inherent powers vested in the Court by R. 33 are wide enough to cover all cases of injustice, R. 22 should be confined to cases where the objection relates to the subject-matter in appeal; but it is doubtful whether the party's right of invoking the aid of the Court was intended to be less extensive than the right of the Court to move suo motu, having regard to the language of R. 22. In my opinion, it is safe to say that wherever the right of a respondent has been imperilled by the appellant preferring an appeal, it is apparently the intention of the Legislature that every facility should be given to him to get his rights adjusted by filing a memorandum of objections.

The decision to which my learned brother referred in *Kamat* v. *Kamat* (1) is a very strong illustration of this view. The decision in *Munisami Mudali* v. *Abbu Reddy* (2) also seems to point to the fact that what the appellant objects to is not to be the criterion, but the question in each case must be whether the respondent's rights have in any way been imperilled by the action taken by the appellant. As regards S. 54, Land Acquisition Act to which the learned Government Pleader drew our attention, I have little hesitation in holding that it makes no departure from the ordinary rule of the Civil Procedure Code, which allows a party to appeal not only against the whole decree but also against parts of it.

(4) [1900] 2 Ch. 280.

For these reasons I agree that the memorandum of objections should be disposed of on the merits. On the merits, I agree that memorandum of objections must be dismissed.

S.N./R.K. *Order Accordingly.*

A. I. R. 1919 Madras 829

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Seshi Ammal and *another*—Defendants—Appellants.

v.

Vairavan Chettiar and *another*—Plaintiff and Defendant—Respondents.

Appeal Suit No. 419 of 1917, Decided on 24th July 1918, against decree of Addl. Temporary Sub-Judge, Tanjore, in O. S. No. 29 of 1917.

Contract Act (1872), Ss. 263, 249, 251 and 261 — Contract entered into by partners—Debt contracted after death of one partner by surviving partner for performance of contract — Estate of deceased partner is not liable — Creditor can sue surviving partner personally and against partnership assets in his hand.

The estate of a deceased partner is not liable for a debt contracted by the surviving partner to enable him to perform a contract entered into during the former's lifetime. The creditor is entitled to proceed against the surviving partner personally and against the assets of the partnership which the surviving partner has power to pledge in discharge of an obligation created by the partnership. [P 830 C 1, 2]

Per *Wallis C. J.*—S. 263, Contract Act cannot override the express provisions of S. 261.

Per *Seshagiri Aiyar, J.* — Unhampered by authority, the plain interpretation of Ss. 251, 261 and 263, read together would seem to be that a deceased partner's estate would be liable for obligations necessitated by the process of winding up the partnership business. The implication of S. 261 seems to be that the estate should not be answerable for fresh liabilities created solely after the death of the partner. It is difficult to construe S. 263, as not dealing with devolution caused by the death of a partner. The expression "partners" in that section must mean those who constituted the partnership before it was dissolved by the death of one of them and prima facie in the case of dissolution by death the same liability would attach as before death, provided the obligation was incurred for winding up the business. [P 831 C 1, 2]

T. R Venkatarama Sastri — for Appellant.

A Krishnaswami Aiyar and *M. Subraya Aiyar*—for Respondents.

Wallis, C. J. — The main question argued in this appeal is as to the liability of defendants 2 and 3, the representatives of a deceased partner of defendant 1 for an advance of Rs. 2,301 made by the plaintiff to defendant 1 after his part-

ner's death to enable him to take up bills of lading for, and obtain delivery of goods which had been ordered by the partners during the lifetime of the deceased partner but did not come forward until after his death. While S. 249, Contract Act, makes any partner liable for all debts and obligations incurred while he is a partner in the usual course of, business by or on behalf of the partnership, S. 261, provides that the estate of a partner who has died is not, in the absence of an express agreement, liable in respect of any obligation incurred by the firm after his death. The debt now sued for was an obligation incurred by the firm after his death and therefore is covered by the section. It is true that it was incurred by the surviving partner to enable him to perform a contract entered into during the lifetime of the deceased partner, but this is not enough to take it out of the section. S. 263, no doubt, provides that

"after a dissolution of partnership the rights and obligations of the partners continue in all things necessary for the winding up the business of the partnership,"

but these provisions cannot override the express provisions of S. 261 that obligations created by the firm after the death of the deceased partner are not binding on his estate.

"It may be taken as a general proposition that the estate of a deceased partner is not liable to third parties, for what may be done after his decease by the surviving partners."

Lindley on Partnership, Bk. 4, Ch. 3, S. 2, p 708 (Edn. 8). S. 9 Partnerships Act, 1890, makes the estate of a deceased partner liable in a due course of administration for all debts and obligations of the firm incurred while he was a partner. At common law the estate of a deceased partner was not entitled to the benefit of, or liable under, partnership contracts, and equity seems only to have imposed a liability in the case of contracts entered into by the partnership in the lifetime of the deceased partner. It has been held under S. 9, Partnership Act, in *Bagel* v. *Miller* (1) that the representatives of a deceased partner could not be sued in a County Court together with the surviving partner for the price of goods ordered by the partnership during his lifetime but not delivered till after his death on the ground that the obligation to pay was not incurred while he was a partner, though apparently the Court considered some other remedy was available against his representatives on the contract to purchase made during his lifetime, as to which see *M'Clean* v. *Kennard* (2). In this case the suit debt was binding on the partnership assets, which the first surviving partner had power to pledge in discharge of it, and I think, as regards the amount in question, the decree must be against defendant 1 personally and against the partnership assets in his hands. We modify the decree accordingly and dismiss the appeal in other respects. Parties to pay and receive proportionate costs throughout.

Seshagiri Aiyar, J.—I agree. The short and interesting point raised by Mr. Venkatarama Sastriar is res integra in this country and has very meagre authority in favour of it in England. The facts are that a firm consisting of two partners ordered goods during the lifetime of both of them. After consignment and before delivery one of them died. The survivor borrowed money to honour the bill of lading and took possession of the goods. The lender now sues to enforce the liability on the assets of the partnership as well as on the properties of the deceased partner. The learned vakil for the legal representatives of the deceased partner contends that the estate is not liable. The sections of the Indian Contract Act bearing on the point are Ss. 251, 261 and 263. As regards S. 251 it is not denied that the honouring of the bill of lading and the acceptance of the goods are acts "necessary for or usually done in carrying on the business." Therefore if the copartner were alive he and his estate would have been bound. S. 261, refers to obligations incurred after the death of the partner and expressly exempts the estate of the deceased from liability for such obligations. In this case the obligation to pay for and accept the goods was incurred during the lifetime of the deceased partner. It is true that the borrowing was after but the borrowing, in my opinion, is only the substitution of a new liability for an existing one and not the creation of a fresh liabilty. The implication of the section seems to be that the estate should not be answerable for fresh liabilities created solely after the death of the partner. Then comes S. 263. It is difficult

(1) [1903] 2 K. B. 212.

(2) [1874] 9 Ch. 336.

to construe this section as not dealing with devolution caused by the death of a partner. The expression partners must mean those who constituted the partnership before it was dissolved by the death of one of them and prima facie in cases of dissolution by death, the same liability would attach as before death, provided the obligation was incurred for winding up the business. It cannot seriously be argued that the acceptance of the goods ordered and their payment were not necessary for winding up the business. Consequently, subject to the special apportionment of liability between private debts and partnership debts mentioned in S. 262, it seems fairly clear, from the language of S. 263 that the deceased partner's estate would be liable for obligations necessitated by the process of winding up the business. Unhampered by authority, this seems to be the plain interpretation of the sections referred to.

Mr. Venkatarama Sastriar relied strongly on *Bagel* v. *Miller* (1) for his contention already referred to. The decision certainly supports him. The learned Lord Alverstone, C. J., says :

"There may be an obligation, but not the obligation alleged in the present case.

Section 9, English Partnership Act, on which the decision is based, provides that

"after his death his estate is also severally liable in a due course of administration for such debts and obligations."

The judgment may be said to have proceeded upon the unsustainability of the form of action commenced by the plaintiff, and not an a denial of the liability of the estate of the deceased partner to contribute. The observation of Channel, J.

"The plaintiff's remedy is not by means of an action for goods sold and delivered"

supports this suggestion. But the weight of authority is against restricting the principle of the Lord Chief Justice's decision to forms of action alone. Lord Lindley, at p. 708 says :

"With respect to the direct liability of the assets of the deceased to creditors, it may be taken as a general proposition that the estate of the deceased partner is not liable to third parties what may be done after his decease by the surviving partners."

In 22 Halasbury in the note to para. 47 the law is thus stated :

"But though he has authority to pledge the partnership property, this does not enable him to bind his partners personally."

The authority quoted for this proposition, namely, *Blaine* v. *Holland* (3), does not support it. Pollock in his Digest of the Law of Partnership puts the above statement of the law as an illustration to S. 9, Partnership Act. Sir H. H. Shephard in his commentaries upon Ss. 261 and 263, Contract Act inclines to the view that the estate would not be liable. It must be stated that there is practically no difference in language between the sections of the English Partnership Act and those of the Contract Act on this ground. As I felt considerable doubt on the question, with diffidence, I examined the American Law on the subject. In 50 Cyclopaedia of Law and Procedure, p. 634, it is mentioned,

"As a rule however the estate of the deceased partner cannot be made directly liable to third persons by the contracts of the survivor."

In this state of authorities, I feel compelled to hold that the contention of the learned vakil for the appellant should be accepted. The result of this view would be to restrict the operation of S. 263 so as to give the surviving partner alone, and not the creditor, a right to proceed against the estate of the deceased partner in regard to an obligation incurred for winding up the business of the partnership. This does not, in my opinion, stand in the way of the creditor proceeding against the assets of the partnership. The surviving partner is before the Court, and he represents the partnership effectually, and a decree against him can be executed against the assets of the partnership in his hands. I would modify the decree by directing that for the sum of Rs. 2,300 odd borrowed after the death of the husband of defendant 2, the assets of the partnership in the hands of defendant 1 would be alone liable. The latter will also be personally liable as mentioned by the learned Chief Justice. I agree in the order as to costs.

S.N./R.K. *Appeal allowed.*

(3) [1889] 60 L. T. 285.

A. I. R. 1919 Madras 831

WALLIS, C. J. AND SPENCER, J.

Thangathamma—Appellant.

v.

V. A. A. R. Arunachallam Chettiar and *others*—Plaintiffs—Respondents.

Civil Appeals Nos. 80 and 155 of 1917, Decided on 25th April 1918.

Hindu Law—Debts—Father—Son's liability—Sureties of three kinds are recognised, surety for appearance for assurance and for payment—Surety by father—Sons are liable only if it is for payment.

There are three kinds of suretyship according to the Mitakshara, for appearance, for assurance and for payment. The surety by way of assurance consists of a general warranty of credit, but a surety for payment is one who says "if he does not pay, then I myself will pay." When a surety for appearance or a surety by way of assurance dies, his sons are under no obligation to pay, but in the case of a surety for payment they are bound to pay.

A Hindu father entered into a suretyship obligation in the following words: "I shall make V pay the amount due under the said promissory note within two months from this date. In default of payment as aforesaid by the said person within the said time, I shall pay the amount of principal and interest on the said promissory note and get back the said promissory note and the surety bond and the title-deeds:"

Held: that this was a suretyship for payment (done) and the surety's son was liable for the obligation created by the said contract.

[P 832 C 2]

R. Kuppuswami Aiyar, *S. Krishnaswami Aiyangar*, *K. R. Rangaswami Aiyangar* and *V. Pattabhirama Aiyar*—for Appellants.

T. Rangachariar, *K. S. Ganesa Aiyar*, *A. Krishnaswami Aiyar* and *M. Patanjali Shastri*—for Respondents.

Judgment.—*A. S.* 80 *of* 1917.—At the hearing of this appeal, two contentions were raised: (1) that the Varthamanam or guarantee (Ex. M) alleged to have been written by defendant's husband Audinarayana Pillai was not genuine; (2) that owing to the nature of the transaction which Ex. M evidences the heirs of the guarantor are notliable under Hindu law.

On the first point, we do not find the least reason to doubt the correctness of the learned Subordinate Judge's finding of fact. The circumstance that during Audinarayan's lifetime a notice of demand setting out his liability under the Varthamanam was sent to him and he did not repudiate his liability, tells strongly against the present theory that it is a forgery. It was again mentioned in the subsequent promissory note (Ex. Q), in a sentence which may have been written after the stamp was affixed but not necessarily after Audinarayana had signed across the stamp. The attempts made to prove an alibi for defendant 1 on the day when Ex. M was executed by means of certain post cards do not, in our opinion, in the least detract from the genuineness of that document. The determination of the second point depends upon the application to the facts of this case of the Hindu law as to the liability of sons of persons who have stood sureties for others. Verses 53 and 54 of Yajnavalkya which are translated by Mr. Gharpure in his collections of Hindu law texts thus:

Suretyship is ordained for appearance, assurance and for payment. The first two, however should be made to pay in case of default while in the case of the last, even the sons (should be made to pay). Where a surety for appearance or a surety by assurance dies, the sons of such a one must not pay; (but) in the case of a surety for payment, they should pay. It is argued that defendant 5 was under Ex. M a surety for assurance (pratyaye) and not for payment (dane) and that the fact that the money had already been lent to the debtor when the surety bond was executed is an indication of this. According to the illustration given in the Mitakshara when commenting upon the above verses, the surety by way of assurance consists of a general warranty of credit, but a surety for payment is one who says: "If he does not pay, then I myself will pay." The distinction between these two classes of sureties is further explained in Colebrook's Digest, Vol. 1, p. 164, and that has been discussed fully by Ranade, J., in *Tukarambhat* v. *Gangasam Mulchand Gujar* (1). In *Rasik LalMandal* v. *Singhaswar Roy* (2) it was held that a surety obligation for payment was binding on the son even where the creditor's claim against the principal debtor did not arise out of a loan from the creditor to the debtor. In Ex. M the promise which Audinarayana Pillai made was in these words:

"I shall make the said Veera Pillai pay the amount due under the said promissory note within two months from this date. In default of payment as aforesaid by the said person within the said time, I shall pay the amount of principal and interest on the said promissory note and get back the said promissory note and the surety bond and the title-deed."

There could hardly be a more definite promise to pay, if the debtor failed to pay, than this, and therefore this falls under Cl. 3 of suretyship, that for payment (done), and it makes no difference that the money had already been lent to

(1) [1899] 23 Bom. 454.
(2) [1912] 39 Cal. 843.=14 I. C. 147.

the debtor when the surety executed the bond. Defendants 5 and 9 are therefore liable to pay out of the family assets in their hands. The appeal is dismissed with costs of plaintiff and defendant 8 (two sets).

A. S. No. 155 *of* 1917.—We agree with the Subordinate Judge that Ex. C covered past as well as future advances. The participle used, as the Subordinate Judge has observed, is without time and is equally applicable to past as well as future borrowings. The fact that a deposit of title-deeds had been taken at the time of the earliest advance of Rs. 2,000 under Ex. A, shows that it could not have been the intention of the parties to exclude under Ex. C the money already borrowed on the security. As regards the other points, we agree with the Subordinate Judge that the sum of Rs. 3,000 was intended to apply to advances of principal and that the property mortgaged was made security under the terms of the document not only for the principal sums not exceeding Rs. 3,000 in all but also for the interest thereon. The appeal is dismissed with costs.

S.N./R.K. *Appeals dismissed.*

A. I. R. 1919 Madras 833

WALLIS, C. J., OLDFIELD AND SESHAGIRI AIYAR, JJ.

G. P. Mallappa—Plaintiff—Appellant.

v.

Matam Naga Chetty — Defendant — Respondent.

Letters Patent Appeal No. 191 of 1917, Decided on 30th July 1918, against judgment and decree of Bakewell, J., in Second Appeal No. 851 of 1916.

Evidence Act (1872), Ss. 58 and 92 (4) — Mortgage registered—Subsequent agreement for payment of less than stipulated consideration is inadmissible—(Per *Wallis C. J. and Oldfield, J.*), (*Seshagiri Aiyar, J.*, contra)—**Oral agreement admitted in pleadings however need not be proved.**

A subsequent agreement to take less than is due under a registered mortgage is an agreement modifying the terms of a written contract, and, if it has to be proved, oral evidence is inadmissible under proviso (4), S. 92. [P 833 C 2]

Per *Wallis, C. J.* and *Oldfield, J.* (*Seshagiri Aiyar, J.*, dubitante).—Where however the oral agreement is admitted in the pleadings of the other party it need not be proved, as no question of the admissibility of evidence, oral or documentary, arises when proof is dispensed with in consequence of an admission in the pleadings either under S. 58, Evidence Act, or under the provisions of the Code of Civil Procedure.

[P 834 C 1]

Per *Wallis, C. J.*—The plain language of S. 58 should not be unduly restricted by reference to considerations of public policy. The admission of a party in his pleadings as to an oral arrangement modifying a written contract gets rid of the danger which it is intended to guard against, by the prohibition against the admission of oral evidence contained in proviso 4, S. 92.

[P 834 C 1]

Per *Oldfield, J.* — The acceptance of a statement in an unregistered writing as evidence of the modification of a registered contract is contrary to public policy, as tending to defeat the provisions of the Registration Act, though the language of S. 58, Evidence Act, is unqualified.

[P 834 C 1]

Per *Seshagiri Aiyar, J.*—There is no justification in principle for not applying proviso (4), S. 92 to all cases other than those in which there has been a perfected discharge by payment.

[P 835 C 1]

C. S. Venkatachariar—for Appellant.

L. S. Veeraraghava Aiyar — for Respondent.

Wallis, C. J. — A subsequent agreement to take less than is due under a registered mortgage is clearly an agreement modifying the terms of a written contract, and if it has to be proved, oral evidence is inadmissible under proviso 4, S. 92, Evidence Act, which is designed to protect parties to registered instruments from false cases of subsequent modification of the original contract being set up and supported by oral evidence. If the subsequent agreement in this case has to be proved, oral evidence is clearly inadmissible. The contention however is that it has not to be proved, as it is admitted in the pleadings. Part 2, Evidence Act, deals with proof, and Ch. 3, which is Ch. 1, Part 2, with "facts which need not be proved." Under S. 58 of this Chapter among the facts which need not be proved are facts admitted in the pleadings, such as the subsequent agreement now in question. Evidence is tendered in proof of facts in issue, and no question of the admissibility of evidence, oral or documentary, arises when proof is dispensed with in consequence of an admission in the pleadings either under S. 58 or under the provisions of the Code of Civil Procedure. Where, as in *Chenbasappa* v. *Lakshman Ramchandra* (1), the legislature had enacted not only that an unstamped promissory note should not be receivable in evidence but also that it should not be "acted on," it was held that the Court was precluded from acting on the note by giving a decree on

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(1) [1894] 18 Bom. 369.

it, even though execution was admitted. It has not been shown that, in giving effect to the subsequent agreement admitted in the pleadings in the present case, we should be contravening any express statutory provision such as that contained in the Stamp Act, and I do not think that in the present case we are at liberty to restrict the operation of the plain language of S. 58, Civil P. C., by reference to considerations of alleged public policy. Here the subsequent agreement is one by the mortgagee to take less than was due to him under the terms of the mortgage, and I do not think we should be justified in refusing to give effect to the section merely because, if the plaintiff had not admitted the subsequent agreement but put the defendant to the proof of it, there does not appear to be any admissible evidence by which it could have been proved. Further, I do not consider that in a case of this kind there is any public policy in refusing to give effect to the subsequent written agreement, because I think that the plainliff's admission in the pleadings gets rid of the danger which it was intended to guard against by the prohibition of oral evidence in proviso 4, S. 92. Different considerations might arise if the admission were that more than was provided for in the mortgage bond should be due under it. I would agree with Bakewell, J., and dismiss the appeal with costs.

Oldfield, J.—With all due deference, I cannot follow the judgment just delivered, so far as it lays down that acceptance of a statement in an unregistered writing as evidence of the modification of a registered contract is not contrary to public policy, as tending to defeat the provisions of the Registration Act. Those provisions are, as I understand them, intended to facilitate the investigation of titles by compelling their registration and by fixing the offices, in which they must be registered and to which therefore investigation can be restricted. This intention would be frustrated, if the investigation had to be wider ; and nonetheless so, if it had to be extended not only beyond those Registration Offices, but also to pleadings in the records of Courts. This however does not affect the validity of the broader ground of decision, which is available, the unqualified nature of the language used in S. 58, Evidence Act, and I therefore concur in dismissing the appeal with costs.

Seshagiri Aiyar, J. — I agree with the conclusion at which the learned Chief Justice has arrived. The suit is on two mortgages executed by the defendant to the plaintiff. In or about March 1914 plaintiff threatened to sue on the bonds. Then certain mediators intervened. An oral agreement was come to by which the plaintiff agreed to accept in full satisfaction Rs. 1,400 in cash. Rs. 1,000 was paid within a week's time and the other Rs. 400 within three months thereafter. There was a further stipulation that if Rs. 400 was not paid within three months, an additional sum of Rs. 100 was to be paid by the defendant. This settlement was not reduced to writing. The question for consideration is whether this arrangement is admissible in evidence. There is a further question whether the admission contained in the counter statement of the plaintiff is not sufficient for the disposal of the case.

On the first question I feel no doubt that the admission of the oral arrangement would contravene proviso 4, S. 92, Evidence Act. The effect of the arrangement is to alter the terms of the two documents in question and as the original documents were in writing and registered, oral evidence of the arrangement is within the mischief of proviso 4. The decision of this Court in *Karampalli Unni Kurup* v. *Thekku Vittil Muthorakutti* (2), which was followed by the learned Chief Justice and Benson, J., in *Kattika Bapanamma* v. *Kattika Kristnamma* (3), covers this point. Sitting with Kumaraswami Sastri, J., I acted on the principle enunciated in the above decisions *Namagiri Lakshmi Ammal* v. *Srinivasa Aiyangar* (4). The contention of the learned vakil for the respondent that the admission would not vary the document is unsupportable. The cases he drew our attention to all relate to actual payments under documents which discharged the liability thereunder. An agreement which in future will have the effect of putting an end to .the liability must be regarded as a subsequent agreement modifying the original contract. I am in entire agreement with the view

(2) [1903] 26 Mad. 195.
(3) [1907] 30 Mad. 231.
(4) [1915] 27 I. C. 269.

enunciated by Boddam, J., in *Goseti Subba Row* v. *Varigonda Narasimham* (5). The learned Judge says referring to proviso 4, S. 92 :

"The words of the proviso are perfectly clear and, in my opinion, apply to any agreement, whether executory or executed."

I am unable to see any justification in principle for not applying the proviso to all cases other than those in which there has been a perfected discharge by payment. I agree with Sadasiva Aiyar, J., on this question. On the second question I felt doubts whether S. 58 and the Chapter in which it appears should not be restricted to admissions in pleadings which do not contravene the express provisions as to the mode of proof contained in the other sections of the Evidence Act. At the same time, I realize the force of the learned Chief Justice's observation that the language of the section takes the facts admitted in the pleadings out of the category of proof altogether. The rule of law enunciated in *Slattori* v. *Pooley* (6), which accepted oral admissions of every kind as proving documents, has no doubt been departed from in India: see S. 22, Evidence Act, and Ss. 59 and 65 (*b*). It is open to argument that admissions in pleadings are in the nature of secondary evidence and that the prohibitions in S. 22 applies equally to pleadings as well. Otherwise parties may compel a Court by statements in pleadings to pronounce judgment upon evidence which is not legally admissible. There is the further fact that, notwithstanding the admission in the pleadings, the Court may call upon the party to prove a fact. In such cases the proof must be restricted to the modes mentioned in the Act. It is therefore with hesitation that I agree in the conclusion arrived at by the learned Chief Justice on this point.

S.N./R.K. *Appeal dismissed.*

(5) [1904] 27 Mad. 368.
(6) [1840] 6 M. & W. 564.

A. I. R. 1919 Madras 835

OLDFIELD AND SADASIVA AIYAR, JJ.

K. Nanu Nair and *another*—Appellants.

v.

K. M. Kundan Asthamurthy Nambudripad—Petitioner—Respondent.

Appeal No. 99 of 1917, Decided on 8th March 1918, against appellate order of Temporary Sub-Judge, Palghat, in O .S. No. 106 of 1917.

(a) Malabar Compensation for Tenants' Improvements Act (1900), S. 3 (2)—"Ejectment" includes 'redemption".

The word "ejectment" in S. 3 (2) includes "redemption" or recovery of possession of the land mortgaged. [P 836 C 2]

(b) Malabar Compensation for Tenants' Improvements Act (1900), S. 6 (3)—Distinction between preliminary and final decrees is unknown to decrees passed under S. 6—Such decrees are only decrees in ejectment though liable to be revised by executing Court.

The distinction between preliminary and final decrees made in Rr. 7 and 8, O. 34, Civil P. C., is unknown to decrees passed under S. 6 (1), Malabar Compensation for Tenants' Improvements Act. The latter Act provides only for one decree which is a decree in ejectment though that decree is liable to be revised by orders passed by the executing Court under S. 6 (3) of the Act. [P 837 C 1]

(c) Malabar Compensation for Tenants' Improvements Act (1900), S. 6 (3)—Tenant making improvements after decree—Application for enhancement of compensation—Application is not for final decree—Order for re-valuation can only be passed by executing Court and order on it is appealable—Civil P. C., S. 47.

An application for enhancement of the value of improvements owing to further improvements effected by the defendant after the date of the decree cannot be treated as an application for a final decree, nor can the order thereon be deemed to be the final decree in the suit. An order for re-valuation of improvements can only be passed by the executing Court: [P 837 C 1]

Where an appeal was preferred against an order for re-valuation of improvements which was followed by the passing of what was called a final decree and the appeal was dismissed on the ground that no appeal lay:

Held: (1) that the application of the decree-holder, though styled as one for the passing of a final decree, was in substance, one for the execution of the decree already passed.

(2) that the Court should have ordered the amendment of the application as one in execution and passed its order thereon, in which case the order for re-valuation would fall under S. 47, Civil P. C., and be appealable;

(3) that the appellate Court could make the amendment itself and pass the necessary orders after the amendment. [P 838 C 1]

T. Eromani Unni—for Appellants.

P. V. Parameswara Aiyar—for Respondent.

Sadasiva Aiyar, J.—This is an appeal by two of the judgment-debtors-mortgagees and tenants under the Malabar Compensation for Tenants' Improvements Act, the respondent being the mortgagor landlord who brought this suit for ejectment and obtained a decree. Under S. 3, Cl. (2), Malabar Compensation for Tenants' Improvements Act (Madras

Act 1 of 1900) "ejectment" includes "redemption" or recovery of possession of the land mortgaged. The revised decree in the suit passed by the Subordi-Judge (the lower appellate Court) on 14th February 1913 was to the following affect: that on plaintiff's depositing into Court on or before 14th August 1913 the amount shown above as due to various defendants less the arrears of rent and costs and future rent till the date of deposit, the defendants do surrender the plaint properties with all improvements thereon and if such payment is not made on or before the said 14th August 1913 the property shall be sold.

This decree seems to have been substantially confirmed by the High Court on 9th February 1915. The decree expessly mentions the value of improvements due to the respective defendants as required by S. 6, Cl. (1). Malabar Compensation for Tenants' Improvements Act and does not order the taking of any accounts either as regards the amount which may be found due under the mortgage on the date fixed for redemption as in an ordinary mortgage decree or as regards improvements. The Malabar Compensation for Tenants' Improvements Act was passed in 1900 when the old Civil Procedure Code of 1882 was in force. Under that Code (according to the law as finally settled in this Court) only one decree is passed in an ordinary mortgage suit for redemption in districts even other than the Malabar District: see *Mallikarjunadu* v. *Lingamurti Pantulu* (1). The Malabar Compensation Act by S. 6, Cl. (1), treated a suit for redemption in Malabar as a suit in ejectment and provided for only one decree which, of course is a decree in ejectment. As regards decrees in ejectment there is no question of preliminary decrees and final decrees. As regards decrees for redemption passed in other districts under the Transfer of Property Act and the old Civil Procedure Code, there was only an order absolute for foreclosure or for sale provided for after the simple decree for redemption was passed. There was under these Acts no preliminary decree and no final decree as distinguished from the simple decree for redemption, which was dated on the day that the judgment was pronounced in the suit. The Malabar Compensation Act however made departures from the Transfer of Property Act and the old Civil Procedure Code as regards the procedure in a suit for ejectment brought against tenants which term includes mortgagees: see S. 3, Cl. (1), by (1) providing in sub-Ss. 3 and 4, S. 6, for the passing of an order as to re-valution of improvements even after decree and before ejectment by an order of Court executing the decree, (2) by providing for the varying of the decree (originally passed) in accordance with the said order of the Court executing the decree revaluing the improvements (3) by providing that the matters relating to revaluation and to variation of the decree in accordance with such a re-valuation shall be deemed to be question relating to the execution of the decree within the meaning of Cl. (1), S. 244, of the old Civil P. C., and (4) by not providing for the passing of an order for sale either nlsi or absolute in such suits: see repealed S. 88, 89 92 and 93, T. P. Act. The new Civil Procedure Code of 1908 by O. 34, R. 7; (see marginal note) styled the only decree passed in a suit for redemption in other districts under the old Code as a preliminary decree and provided newly by O. 34, R. 8 for the passing of a final decree in a redemption suit in stead of the order absolute for sale provided for in the Transfer of Property Act, the provisions in which as regards decrees in mortgage suits were repealed by the new Civil Procedure Code. The new Civil Procedure Code however makes no reference to the Malabar Compensation Act, S. 6, under which decrees in suits against mortgagees of Malabar are directed to be passed in a particular form which makes no provision for the two kinds of decrees, "Preliminary" and "final." The new Civil Procedure Code S. 4, Cl. (1), says:

"In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred or any special form or procedure prescribed by or under any other law for the time being in force."

It is thus clear that notwithstanding the passing of the new Civil Procedure Code, as far as suits in Malabar against mortgagees are concerned, there could be only one decree passed in a suit under S. 6, Cl. (1), Malabar Compensation

(1) [1902] 25 Mad. 244 (F.B.)

for Tenants' Improvements Act, and not two decrees, "preliminary" and "final." Provisions like directions for sale in default, allowing time to pay moneys declared as due and so on, not inconsistent with the Improvements Act and directed or allowed by the new Civil Procedure Code to be mentioned in decrees for redemption or ejectment, can, of course, be mentioned in decrees passed in suits falling under the Compensation Act also. I am therefore of opinion that the decree passed in the present suit though passed in 1913 after the new Civil Procedure Code came into force, was not a preliminary decree under O. 34, R. 7, new Civil Procedure Code, to be followed by a final decree under R. 8, but that it is only the one decree which has to be passed under S. 6, Cl. (1), Malabar Compensation Act, though this one decree is liable to be revised by orders passed by the executing Court under S. 6, Cl. 3.

I shall now proceed to set out the several irregularities which have been committed in this case. The plaintiff in ejectment (the decree holder), instead of treating this decree as the only decree in ejectment, treated it as a preliminary decree passed under the Civil Procedure Code and applied under O. 34, R. 8, on 31st July 1915, to the District Munsif for a final decree for redemption. On 27th August 1915 the contesting defendants appeared and without objecting to the petition to pass a final decree as one not provided for by law contended that the value of improvements mentioned in the decree should be enhanced before they are ejected, and then on 10th September 1915 filed a statement showing the further improvements made by them between 1913 and 1916. It is clear from S. 6, Cl. 3 of the Act, that it is only the Court executing the decree that can revalue the improvements. Unless the application to pass a final decree is treated as an execution application, the Court considering that application cannot be called a Court "executing the decree" and hence had no jurisdiction to pass orders, as regards the re-valuation of improvements.

The District Munsif, however, (neither party objecting) appointed a Commissioner to re-value the improvements, and the Commissioner's report made in April 1916 and the objections thereto were considered by the District Munsif on 30th October 1916, when he pronounced a partial judgment dealing with most of the matters argued before him in view to pass a final decree as prayed for by the plaintiff. At the end of that judgment of 30th October 1916, he allowed the plaintiff a week's time to deposit the balance payable by him for the value of the excess improvements and adjourned the matter for one week, that is, to 6th November 1916 in order to complete his judgment before passing the final decree in accordance with such judgment, as some minor questions (as to costs as to the rights to gather the second crops on some lands, the liability for payment of revenue. etc.) had still to be disposed of. Then on 6th November 1916 he completed his judgment by expressing his opinion on these points also. In accordance with this judgment of 7th November 1916 a formal final decree, dated the same day 6th November 1916, seems to have been drawn up in the Munsif's Court.

Against the order of the District Munsif of 6th November 1916 increasing the value of improvements, an appeal was filed to the Sub-Court at Palghat. The temporary Subordinate Judge dismissed the appeal, on a preliminary objection taken by the respondent to the effect that the appeal was misconceived, because the appeal was filed not against the final decree but against the order passed on an interlocutory petition made by the judgment debtor for the enhancement of the value of improvements, though that interlocutory petition was made as an answer to the decree-holder's petition for the passing of a final decree. The learned Subordinate Judge further held that an application for a final decree is not an application arising in execution of the decree and held therefore that no appeal lay under S. 47, Civil P. C. I think that no serious notice need be taken of another contention urged before us by Mr. Parameswara Aiyar for the respondent that the appeal ought to have been against the incomplete judgment of 30th October 1916 (and not against the complete order of 6th November 1916). The appeal before us is against the order of the Subordinate Judge dismissing the appeal to him on the preliminary point above stated. I think that the order having been followed up by the drawing up of a final decree, the technical objection upheld by the lower appellate Court

that the appeal to it was made against the order and not against the final decree and therefore incompetent is unsubstantial, the grounds urged in appeal against the order applying of course to the final decree.

Further, on the view which I have expressed above, there being no final decree contemplated by the Malabar Compensation Act, the application of the decree-holder, though styled as one for the passing of the final decree, was in substance one for execution of the decree already passed. As it was however not in proper form, the learned District Munsif ought to have directed it to be amended by quoting the proper order and rule applicable and then passed his orders in execution. The order altering the compensation value, would, under the Compensation Act, fall within the description of an order passed by the executing Court in execution and would be deemed to have fallen under S. 244 of the old Civil P. C. if that Code was in force and would, after the present Code came into force, fall under S. 47 thereof (see S. 8, General Clauses Act). Hence an appeal lay against such an order. If the decree is altered in accordance with such order and if the order itself is set aside on appeal, the alteration of the decree is cancelled ipso facto, just as when a preliminary decree in the plaintiff's favour is set aside on appeal and the suit is dismissed, the final decree drawn up pending the appeal loses all its legal effect.

This appeal and the memorandum of objections have, therefore to be allowed and I would set aside the Sub Judge's order and remand the case to him with directions to him to order the plaintiff to amend his application for the passing of a final decree as an application in execution (the amendment may be made by filing a separate paper in the proper form prescribed for an execution application), to treat, after such amendment is made, the order of the District Munsif of 6th November 1916 as an order passed by the executing Court for re-valuing the improvements, to treat the appeal and the memorandum of objections filed before him (the Subordinate Judge) as an appeal and as an objection memorandum against that order filed against an order passed under S. 47 and to dispose of them in due course according to law. The parties will bear their respective costs in this appeal.

Oldfield, J.—I agree.

S.N./R.K. *Case remanded.*

A. I. R. 1919 Madras 838

SESHAGIRI AIYAR AND NAPIER, JJ.

Narayanaswamy Mudali—Plaintiff—Appellant.

v.

Gangadhara Mudali and *another*—Defendants—Respondents.

Second Appeal No. 1062 of 1917, Decided on 22nd April 1918, from decree of District Judge, Chingleput, in Appeal Suits Nos. 553 and 5629 of 1915.

(a) Limitation Act (1908), S. 19—Reference to arbitration—Agreement to be bound by amount settled by award amounts only to conditional acknowledgment.

A request to arbitrators to settle accounts coupled with an undertaking to be bound by whatever sum is fixed as payable by their award, amounts only to a conditional acknowledgment of liability which will not save limitation under S. 19, Limitation Act, if the arbitration falls through and the reference does not fructify into an award. 33 *Cal.* 1047 (*P. C.*), *Expl.* 10 *Mad.* 259, *Cons.* [P 839 C 1, 2]

(b) Limitation Act (1908), Arts. 106 and 120—Suit for dissolution of partnership is governed by Art. 120 and not by Art. 106.

A suit which is virtually for dissolution of a partnership, though in form one for accounts, is governed by Art. 120 and not by Art. 106. [P 839 C 2]

Ramachandra Aiyar—for Appellant.

Ananthakrishna Aiyar—for Respondents.

Judgment.—The suit in terms is one for dissolution of partnership. The Courts below have come to the conclusion that it is barred by limitation, applying Art. 106, Limitation Act. Two points have been raised before us by the learned vakil for the appellant. One is that in the reference to the arbitrators, there was a request to settle the accounts, that is equivalent to an acknowledgment of liability and that, consequently, the suit is not barred by limitation. The other is that to the suit as framed Art. 120 applies. As regards the first of these points, the question is as to whether Ex. D dated 1st December 1912 contains an acknowledgment of liability. It is true that the document says that the account should be looked into, the loss and profits between the parties should be ascertained and that the parties will be bound to take whatever may be settled by the arbitrators. But the reference never fructified into an award, Some of

the arbitrators died and as the result the reference came to an end. Whether in these circumstances the letter to the arbitrators could amount to an acknowledgment depends upon the interpretation to be placed on the decision of the Judicial Committee in *Maniram* v. *Seth Rupchand* (1). The Committee pointed out that there were three classes of acknowledgments: the first is an unconditional undertaking to pay, the second is an unconditional acknowledgment of liability, and the third is a conditional acknowledgment of liability. As regards the third class it is pointed out that if the condition is not fulfilled there will be no acknowledgment at all: and the case of reference to arbitrators was specially regarded by the Judicial Committee as a case of conditional acknowledgments. This is what is stated by Sir Alfred Wills at p. 1058:

"There can be no reason for giving a different meaning to an acknowledgment that there is a right to have the accounts settled, and no qualification of the natural inference that, whoever is the creditor shall be paid, when the condition is performed by the ascertainment of a balance in favour of claimant;"

that is to say, until there is an ascertainment of the balance by the party to whom the accounts have been referred there will be no acknowledgment of liability. Reliance is placed for this statement of law upon decision of Mellish, L. J., in *River Steamer Co , In re; Mitchell Ex parte* (2). In the present case, as we pointed out, the reference fell through and consequently the condition attaching to the enforcement of acknowledgment never was fulfilled. *Bollapragada Ramamurthy* v. *Thammanda Goppayya* (3), two learned Judges of this Court have construed the case of *Maniram* v. *Seth Rupchand* (1) in the sense in which we interpreted it. Mr. Ramachandra Aiyar relies strongly upon the decision of this Court in *Sitayya* v. *Rangareddi* (4). There was an award which the Court set aside. But the learned Judges referred to the reference itself as containing an acknowledgment of liability. No doubt this case is in favour of the appellant, and although the Judicial Committee in the case of *Maniram* v. *Seth Rupchand* (1) referred to this case, their Lordships did not regard it as having any reference to a conditional acknowledgment. In this view we would have upheld the decision of the District Judge, but for the fact that we do not agree with him that Art. 106, Limitation Act, applies to the present case. As we stated at the outset, the suit is in terms one for dissolution of partnership and under O. 20, R. 15, it is the Court that has to fix the time from which partnership shall cease to xist. Mr. Ananthakrishna Aiyar has contended that the parties all through understocd the plaint as having declared that the partnership had been put an end to and containing a claim for an account of a dissolved partnership. But in the face of the language of the plaint it is impossible to uphold such a view. It may be that Mr. Ananthakrishna Aiyar is justified in saying that this is altogether a new case which was not considered by either of the Courts below; and we cannot say that the point was clearly put in the grounds of second appeal here. In these circumstances, while we think that we cannot uphold the conclusion of the Courts below that Art. 106 is applicable, we must hold that Mr. Ananthakrishna Aiyar is entitled to his costs in this Court and that the question as to limitation should be tried in the light of our observation. We reverse the decree of the District Judge and remand the appeals to him for disposal according to law. The appellant must pay the costs of the respondent in this Court. Further costs will be provided for in the decrees of the Court below.

S.N./R.K. *Appeal allowed.*

(1) [1906] 33 Cal. 1047=33 I. A. 165=2 N. L. R. 130. (P. C.)
(2) [1871] 6 Ch. 822.
(3) [1916] 40 Mad. 701=35 I. C. 575
(4) [1887] 10 Mad. 259.

A. I. R. 1919 Madras 839

SADASIVA AIYAR AND NAPIER, JJ.

Ambalam Ibrahi and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 317 of 1918, and Criminal Revn. Petn. No. 252 of 1918, Decided on 20th August 1918, from judgment of Sub-Divl. Magistrate., Ramnad, in Criminal Appeal No. 7 of 1918.

Criminal P. C. (5 of 1898), S. 554 (2) (c) —Criminal Rules of Practice, R. 188—Application for copy of judgment of Tahsildar Magistrate—Search fee cannot be levied.

No search fee can be levied along with an application for a copy for a judgment of a Tahsildar

Magistrate. O. 173 of the Standing Orders of the Board of Revenue does not apply to such an application which is governed by R. 188 of the Criminal Rules of Practice framed by the High Court under S. 554 sub-S. 2 Cl. (c). [P 840 C 1]

S. Swaminadhan—for Petitioners.

C. Narasimha Chariar — for the Crown.

Order.—This must be taken as a petition of revision directed solely against the order of the Tahsildar Magistrate refusing to give a copy of the Magistrate's judgment, the refusal having been based on the ground that the petitioner ought to pay eight-annas search fees along with his application for copy under the Board's Standing Order No. 173. The application for copy was made to the officer as a Magistrate (a criminal Court) by an accused convicted by him and the Board's Standing Order has absolutely no relevancy to such an application. An application of that kind is governed by R. 188 of the Criminal Rules of Practice framed by the High Court under the powers vested in the High Court by S. 554 sub-S. (2), Cl. (*c*), Criminal P. C.

The Magistrate is, therefore directed to give the copy applied for without further delay.

S. N./R.K. *Order reversed.*

A. I. R. 1919 Madras 840

ABDUR RAHIM AND OLDFIELD, JJ.

Kuppusami Iyer and *another*--Appellants.

v.

K. Kuppusami Iyer and *others*—Respondents.

Appeal No. 70 of 1916 and Civil Revn. Petn. No. 866 of 1916, Decided on 15th August 1918, against decree of Dist. Judge., Tanjore, in Appeal Suit No. 754 of 1914.

(a) Civil P. C. (1908), S. 47 and O. 21, Rr. 2 and 53 (6)—Adjustment after attachment does not bind attaching-creditor whether or not notice of attachment is given to judgment-debtor—Application hy decree-holder to record adjustment — Attaching creditor can ask to be brought on record—Order on application is appealable under S. 47.

Where a decree, which is under attachment at the instance of the decree-holder's creditor, is adjusted after the attachment, the adjustment does not bind the attaching creditor, whether notice of the attachment has been issued to the judgment-debtor or not under the provisions of O. 21, R. 53 (6), Civil P. C. [P 843 C 1, 2]

In such a case, if an application is made by the decree-holder to record the adjustment, it would be open to the attaching creditor to come in and object to the entering of satisfaction and any order passed by the Court would be appealable as one covered by S 47, Civil P. C.

If the attachment was after the adjustment, the attaching creditor has no locus standi and and it would not be open to him to raise any question within the meaning of S. 47. [P 841 C 1]

(b) Civil P. C. (1908) O. 21, R. 53 — Attaching creditor.

Per *Abdur Rahim, J.*—The words "either through Court or otherwise" in O. 21, R. 53, refer to "payment or adjustment" and not to "notice" preceding it.

The attachment of a decree is complete without notice to the judgment-debtor and the holder of the decree has no right to deal with it after attachment. [P 843 C 1, 2]

Quare—Whether the Court could suo motu make the attaching creditor party to the satisfaction or adjustment proceedings. [P 840 C 2]

S. T. Srinivasa Gopalachariar—for Appellants.

Viswanatha Aiyar—for Respondents.

Judgment.—The question we have got to determine is whether an appeal lay to the District Judge from the order of the District Munsif. The District Judge has held that there was no appeal as the order in question was nct under S. 47 Civil P. C. It appears that there was a decree against a certain person, and the decree-holder made an application to the Court for recording satisfaction of the decree which he held against the judgment-debtor. That decree was attached at the instance of two attaching creditors of the decree-holder and the question that arose was whether the attaching creditors had acquired a right to the decree and therefore the recording of satisfaction was of no effect against them. It appears that when the application was made for satisfaction of the decree by the decree-holder, the District Munsif of his own accord, finding that the decree had been attached, issued a notice to the attaching creditors and had them brought on the record. Then the question which we have stated was raised. It may be doubtd whether the District Munsif wasrighte in making the attaching creditors parties to this application on his own motion. However that may be the attaching creditors have been made parties and there can be no doubt that the question whether the decree was properly satisfied is one that affects their interest. R. 2, O. 21, sub-R. 1, Cl. Civil P. C., does not provide for any notice being given to the judgment-debtor of an application made by the decree-holder for recording satisfaction and in fact the judgment-debtor in this

case was not made a party. No notice was issued to him and he was not on the record either in the Munsif's Court or before the District Judge or even before us. But all the same, the question that was raised was as to the satisfaction of the decree, and that is a question which arises between him as a party to the suit and the attaching creditors who claim an interest in the decree. O. 21, R. 53, sub-R. (3), Civil P. C., says that:

"the holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-R. (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof,"

and sub-R. (6) lays down that:

"on the application of a holder of a decree sought to be executted by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through Court or otherwise. shall be recognised by any Court so long as the attachment remains in force."

If the attachment of the decree was before adjustment, then there can be no doubt that the attaching creditor would be justified in coming in and objecting to the entering of satisfaction, thereby raising a question covered by S. 47, Civil P. C. On the other hand, if the attachment was after the adjustment, then he would have on locus standi and it would not be open to him to raise any question within the meaing of S. 47. None of the lower Courts have recorded any clear finding on this matter. We therefore call for a finding on the evidence on record from the District Munsif whether the attachment was before or after the adjustment and also whether the judgment-debtor had notice of the attachment, if it was before judgment. Two months will be allowed for findings and ten days for objections.

Finding.

1. I am asked to record findings on the following two issues:

(1) Whether the attachment of the decree in Original Suit No. 343 of 1906 on the file of this Court by the decree-holder in Original Suit No. 5 of 1912, on the file of the Kumbakonam Sub-Court was before or after the adjustment set up by the holder of the decree attached; and

(ii) Whether the judgment-debtor under the decree had notice of the attachment if it was "before judgment"?

I think their Lordships of the High Court mean "before adjustment." In the order of remand sent by the High Court, issue 2 is stated as follows:—

Whether the judgment-debtor in original Suit No. 5 of 1912 on the file of the Court of the Subordinate Judge of Kumbakonam had notice of the attachment if it was "before judgment?" The judgment-debtor in Original Suit No. 5 of 1912, Kumbakonam Sub-Court, is the holder of the attached decree and the question wether he had or had not notice before judgment in Original Suite No. 5 of 1912 is immaterial. The real question is whether the judgment-debtor in original Suit No. 343 of 1906, who is the person liable to pay the amount due thereunder to the attaching creditor, had notice of the attachment before he effected the adjustment with his judgment-creditor?

2. Turning to the first question, the alleged adjustment is evidenced by Ex. A, which is dated 10th October 1913. There were two attchments effected by the decree-holder in Original Suit No. 5 of 1912, Kumbakonam Sub-Court, one before judgment in that suit and the other after judgment. The first of these attachments was of 2/3 Nos. of the decree in Original Suit No. 343 of 1906 and that was applied for on 28th February 1912. The order to attach seems to have been passed on the same day and the processs made returnable on 12th March 1912. Then after several adjournments the same attachment was made absolute on the 16th April 1912 (see Ex. 1).

3. The decree in Original Suit No. 5 of 1912, Kumbakonam Sub-Court, was passed on 31st March 1913. It was afterwards transferred to the Sub-Court, Negapatam, on a change of jurisdiction. Then at the instance of the decree-holder therein the whole decree in Original Suit No. 343 of 1906 was attached by that Court. This application was made on 2nd December 1913, the order was passed some days afterwards, and it was recieved by this Court on 17th December 1913 (see Ex. 1b).

4. The decree-holder in Original Suit No. 343 of 1906 then applied to this Court to record satisfaction of it relying on the above-mentioned receipt, Ex. A. The petition was presented on 23rd December 1913. This Court held that the alleged adjustment was false and dismissed

the petition. In the appeal against the order the District Judge, Tanjore, held that no appeal lay. The same decree-holder thereupon filed C. M. S. A. No. 70 of 1916 in the High Court, and it is in connection with this second appeal that the two issues above referred to have been sent down.

5. The evidence on record does not show that a formal notice of either of the above-mentioned attachments was given to the judgment-debtor in Original Suit No. 343 of 1906, but I think there is sufficient evidence to show that the adjustment under Ex. A was made after the second attachment by the Negapatam Sub-Court. A sum of Rs. 1,600 is said to have been paid in cash on the date of Ex. A by the judgment-debtor to the decree-holder in Original Suit No. 343 of 1906, a portion of the balance being set off against a certain partnership amount said to be due to the same judgment-debtor and the other portion, viz Rs. 200, being relinquished in his favour. It is admitted that the above sum of Rs. 1,600 was obtained by the decree-holder by a sale of his lands to one Muhamadali, and that the sale-deed in his favour was executed 2 or 3 months after Ex. A (vide petitioner's 1st witness Anantarama Iyer). If therefore the said sum of Rs. 1,600 was paid on the date of Ex. A, it is clear that Muhamadali must have paid the consideration for the sale prior to the execution of the sale-deed—an event which, in my opinion, is extremely improbable. The two or three months mentioned by the above witness take us to December 1913 or January 1914. The sale-deed in quetion has not been produced and Muhamadali has not been examined. It is therefore probable that no money was paid to the decree-holder on 10th October 1913, the date which is seen on Ex. A, and the receipt itself must have been executed in January 1914, i, e., sometime after the attachment by the Negapatnm Sub-Court was effected. This view is supported by the evidence of witnesses 2 and 3 on the side of the respondents, to the effect that the judgment-debtor Anantharam Iyer offered to sell the same properties to the son-in-law of witness 2 and that the negotiations for the sale were carried on at Mannargudi in the month of Karthigai 1913, i. e., December 1913. Witness 3 further states that Anantharama Iyer wanted the sale to be effected soon, as a certain decree had to be certified as satisfied before the Courts closed for the Christmas vacation that year. The negotiations fell through ultimately, but there is, in my opinion, no reason to discredit these witnesses. In these circumstances, I find that Ex. A was executed after the second attachment by the Negapatam Sub-Court and after also the present petition was put in to record satisfaction.

6. The next question is whether Anantharama Iyer had notice of the two attachments mentioned above. I have already stated that no formal notice appears to have been given through Court, but the circumstances show that he was aware of them and that he entered into the transaction in question collusively and with a view to defeat the decree-holder in Original Suit No. 5 of 1912. Witness 1 on the side of the respondents, who is the eldest son of the said decree-holder, swears that he met Anantaram Iyer at the Mayavaram railway station in February or March 1913 and that the latter told him in the course of a conversation that the attachment before judgment effected by the witness' father was a good thing for himself. The witness' father, who obtained the decree in Original Suit No. 5 of 1912, and who effected the attachment before judgment, died on 3rd November 1913 (see Ex. II) and Anantarama Iyer went to the witness' house in December 1913 for purposes of condolence.

Then there was a talk about discharging the decree in Original Suit No. 5 of 1912, and Anantarama Iyer is stated to have asked for permission to sell the hypotheca in Original Suit No. 343 of 1906 and for a remission of part of the amount due under the decree in Original Suit No. 5 of 1912. The witness did not consent to the remission or to the sale of the hypotheca in the way proposed, as it was in his opinion worth much more than the price mentioned by Anantarama Iyer. The witness is a M. A. and B. L. of the Madras University and a practising lawyer in Kumbakonam. Anantarama Iyer is alive, but has not come forward to deny the fact of these two conversations. The second attachment by the Negapatam Sub-Court was effected at about the time of this condolence meeting, and I have already shown that the proposal to sell Anantarama Iyer's lands to the respondents' witness' 2 son-in-law

also took place at about the same time, and that the same lands were sold to Muhamadali about a month afterwards. In these circumstances, I find that Anantaram Iyer had notice of both the attachments at the time whan the adjustment in question was effected and that Ex. A was antedated purposely.

[After the return of the finding of the Court of 1st instance upon the issues referred by this Court for trial.]

Appeal Against Appellate Order No. 70 *of* 1916.

Abdur Rahim, J.—The case arises out of an application by a holder of a decree to enter satisfaction under the rules of the Civil Procedure Code. That decree was attached by certain judgment-creditors of the decree-holder and these attaching croditors have been made parties to the application by the District Munsif and they are on record. The adjustment or payment was made after the decree had been attached, but it appears that no notice of such attachment was issued to the judgment-debtor. The decree-holder must have and, in fact, did have notice of the attachment. The position taken up on behalf of the decree-holder is that until notice has been issued to the judgment-debtor upon an application made by the attaching creditor, the judgment-debtor is entitled to make any payment or adjustment he likes and when once such payment or adjustment is made, the Court is bound under O. 21, R. 2, to record satisfaction, whether the application therefor is made by the judgment-debtor or by the decree-holder and whatever the rights of attaching creditor may be. Reliance is placed in support of the argument on Cl. 6 of R. 53, O. 21. That clause says:

"no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force."

The clause is not very happily worded and I am inclined to think on the whole that the words "either through the Court or otherwise" refer to "payment or adjustment" and not to "notice." It is contended thereupon that the adjustment in this case must be held to be valid and effective. I do not think however that this necessarily follows. It is not a case merely between a judgment-debtor and decree-holder but the attaching creditors of the decree-holder have also been made parties. The question before us is not merely whether the Court shall or shall not record satisfaction under O. 21, R. 2. We have got to decide upon the right of the parties. Here the appellant's decree was undoubtedly attached and he had notice of it. He purports to deal with that decree in spite of the attachment. Supposing instead of a decree, this case was of an ordinary property, moveable or immovable. The owner of it, after attachment, would have no rights to deal with it and any such dealing would be invalid or ineffective as against the attaching creditor. That is the general law and I do not find anything in R. 53, O. 21, which has necessarily the effect of overriding it. The notice to the judgment-debtor is not necessary for the purpose of completing the attachment. The attachment is complete before any such notice is issued. The Court has to issue the notice if an application to that effect is made by the decree-holder, but without notice, the attachment is undoubtedly complete. Then it is difficult to conceive that the decree-holder whose decree has been attached could by dealing with it affect the rights of his own creditor in the attached decree. This appeal must fail and is dismissed with costs.

Oldfield, J.—I agree. I have some doubt regarding the proper construction of O. 21, R. 53 (6), and I prefer to express no opinion in this case on the question whether as between judgment-debtor and decree-holder, notice from the Court is essential to support an objection to the recording of satisfaction. I however adopt unreservedly the broad ground of decision on which my learned brother's conclusion rests.

Civil Revision Petition No. 866 *of* 1916.

The civil revision petition is also dismissed. There will be no separate costs.

S.N./R.K. *Order accordingly.*

A. I. R. 1919 Madras 843

BAKEWELL AND PHILLIPS, JJ.

Lachakkammal—Appellant.

v.

Sokkayya Naick—Respondent.

Second Appeal No. 462 of 1917, Decided on 8th January 1918.

Limitation Act (1908), Arts. 75 and 132—Stipulation for payment by instalments—Penal clause for recovery of full amount at enhanced interest on default first instalment when demanded—Mortgagee enforcing clause on second default and sued for whole amount

with enhanced interest—**Suit held governed by Art 132 and not by Art. 75—Contract for instalments subsisted—Interest at enhanced rate could not be claimed—Contract Act (1872), S. 74.**

Defendant executed a mortgage-deed in favour of plaintiff stipulating to repay the amount advanced thereunder by monthly instalments. There was a penal clause binding the mortgagor to pay the full amount at an enhanced rate of interest on his failure to pay the first instalment whenever the mortgagee required. After the second instalment became due, the plaintiff enforced the penal clause and sued for the whole amount with enhanced interest.

Held, (1) that the suit was governed by Art. 132 and not by Art. 75, (2) that as the plaintiff failed to exercise the option to enforce the penal clause, the contract for instalments subsisted, and (3) that plaintiff was not entitled to claim enhanced interest. [P 844 C 1]

Ramachandra Iyer—for Appellant.

A. Srinivasa Aiyangar—for Respondents.

Judgment.—The Subordinate Judge is mistaken in applying Art. 75, Lim. Act. The document sued on is a mortgage and Art. 132 applies. It has not been shown that the appellant availed herself of the penal clause of the bond, which gives an option of requiring payment of the whole amount of the mortgage money at an enhanced rate of interest upon the failure of the respondent to pay the first instalment. Her case in fact was that the first instalment had been paid. The words in the default clause "whenever you require" in our opinion give the appellant an option and since that option has not been exercised, the contract for payment by instalments subsists. The case is similar to *Narna* v. *Ammani Amma* (1). The appellant however is not entitled to the enhanced interest, because she does not appear to have made any demand until both instalments had become due and the option had thereafter expired. The case must be remanded to the lower appellate Court for disposal on the quistion of consideration. Costs to abide the result.

S.N./R.K. *Appeal allowed.*

(1) [1916] 39 Mad. 981=35 I. C. 418.

A. I. R. 1919 Madras 844

KUMARASWAMI SASTRI, J.

Virupakshi Gowd —Petitioner.

v.

Bandappa—Opposite Party.

Civil Revn. No. 147 of 1918, Decided on 1st October 1918.

Civil Procedure Code (1908), O. 9, R. 8 and O. 47—Dismissal of suit for default—Application for review is maintainable where no petition for restoration is field.

A plaintiff can apply for review of judgment under O. 47, when his suit has been dismissed for default under O. 9, R. 8 and he has not applied under R. 9 of the Order to set aside the order: 38 *I. C.* 53, *Dist, from.*

Where there is nothing in the Code to limit a party to one particular mode of procedure, the fact that he can get a longer period of limitation by adoption of a particular course is no ground for refusing relief. [P 844 C 2]

Koti Reddi—for Petitioner.

C. Veeraraghava Aiyar—for Opposite Party.

Judgment.—The only question is whether a party can apply for a review of judgment under O. 47, Civil P. C., when his suit has been dismissed for default under O. 9, R. 8, and he does not apply under R. 9 to set aside the order.

There is so far as I can see nothing in O. 47 which prohibits a party from applying for a review in casese where he has another remedy provided for him in the Code. In *Raj Narain Purkait* v. *Ananga Mohan Bhandari* (1) it was held that a plaintiff whose suit was dismissed under S. 102, Civil P. C., was entitled to apply for review without applying for restoration under S. 103. In *Lala Chet Narain Sahi* v. *Rampal Manjhi* (2) it was held that a defendant against whom an ex parte decree has been passed can apply for review without proceeding under O. 9, R. 13, Civil P. C. I have been referred to *Deodip Singh* v. *Gopal Singh* (3), where a contrary view was held, but with all defence it seems to me that where there is nothing in the Code to limit the parties to one particular mode of procedure, the fact that they can get a longer period of limitation by adoption of a particular course is no ground for refusing relief. Probably in a very large majority of cases a party whose suit has been dismissed for default cannot urge any of the grounds which the law requires for granting a review, but there is no reason for holding that an application for review will not lie in cases of dismissal of a suit for default. I set aside the order of the lower Court and remand the petition for disposal on the merits. Costs of this civil revision petition to abide and follow the result.

S.N./R.K. *Order set aside.*

(1) [1899] 26 Cal. 598.
(2) [1912] 15 I. C. 554.
(3) [1917] 1 P. L. J. 547=38 I. C. 53.

A. I. R. 1919 Madras 845

SADASIVA AIYAR AND NAPIER, JJ.

Ramalingam Ayyar and *others*—Defendants—Appellants.

v.

S. Subbaier—Plaintiff—Respondent.

Second Appeal No. 821 of 1917, Decided on 20th March 1918, from decree of Dist. Judge, Tinnevelly, in Appeal Suit No. 618 of 1915.

Limitation Act (1908), Ss. 4 and 14—Expiry of Limitation on holiday—Plaint presented in wrong Court on succeeding day is barred—Civil P. C. (1908), S. 20.

Section 4, Lim. Act is a particular statutory provision not for the purpose of computing the period of limitation prescribed as in S. 14, but allowing in certain circumstances the filing of suits after the period has expired.

The section can be availed of only if the suit, appeal or application is filed in the proper Court when the time for doing so has expired on a holiday: 12 *I. C.* 58 *Foll.*

Section 14, Lim. Act, only prescribes a certain rule to be observed in computing the period of limitation prescribed for a suit, appeal or application, i. e., in reckoning the number of days if time has expired the period allowed by the section may be deducted from the period that has actually expired. [P 845 C 2]

Where a plaintiff instituted a suit on the day after the last day of limitation, the last day being a holiday in a Court within whose jurisdiction one only of the defendants resided and the Court declining to give leave under S. 20 (b), Civil P. C., returned the plaint for presentation to the proper Court, which was subsequently done:

Held: that the plaint not having been presented to a proper Court on the day after the last day of limitation, the suit was barred.

The institution of a proceeding in a Court with a view to prompt realisation of the claim from the defendant, who is an officer of that Court, is not a proceeding lacking in good faith within the meaning of S. 14. [P 845 C 2]

K. R. Guruswami Aiyar—for Appellants.

B. Sitarama Row—for Respondent.

Facts.— The plaintiff presented his plaint in the Court of the District Munsif, Ambasamudram, as the first executant of the bond resided there. The other executants resided in different jurisdictions. The District Munsif acting under S. 20, Cl. (b), Civil P. C., declined to give leave for the institution of the suit in that Court, in consequence of which the suit was subsequently filed in the Court of the District Munsif of Tinnevelly. The District Munsif of Ambasamudram gave the following reasons for returning the plaint in his order returning it;

"The plaintiff is living in Tinnevelly. The bond was executed in Tinnevelly"..... [This latter statement is not quite correct as it was executed in a different place.] Defendants 2 to 4 are nearer to Tinnevelly than Ambasamudram. The only reason alleged for filing the plaint in my Court is that defendant 1 is here. I think that the balance of convenience is in favour of the plaint being presented to the District Munsif exercising jurisdiction in Tinnevelly town. I decline to give permission for suit being filed here."

The suit was then filed in the Tinnevelly Munsif's Court. Defendant 1 was Head Clerk of the Ambasamudram Munsifs Court.

Napier, J. (after stating facts as above)—With regard to the question whether the suit was bona fide filed in the Court of the District Munsif of Ambasamudram, I do not think that the fact that he thought he would be more likely to get his money paid by defendant 1 if he sued him in the Court of which he was an officer shows want of bona fides. A man has a perfect right to endeavour to get the payment of his money, and I see nothing improper in suing his debtor where he thought he would be more willing to discharge the debt. But the real difficulty in the way of the plaintiff seems to me to lie, in the language of the section, as follows: "In computing the period of limitation prescribed for any suit," that is to say, in reckoning the number of days to see if time has expired you may deduct from the period that has actually expired the period allowed by S. 14, namely;

"the time during which the plaintiff has been prosecuting with due diligence another Civil proceeding"

in a Court which is unable to entertain the suit. But the right by which the plaintiff can file his suit the day after a holiday is given by S. 4, which is:

"where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens."

that is to say, although the period of limitation has expired a suit may be filed after the expiration of the period of limitation. That is how I read the section. It is a particular statutory provision, not for the purpose of computing the period of limitation, but allowing, in certain circumstances, the filing of suits after the period has expired. If that is so, then S. 14 will not help the plaintiff because, as I have pointed out, it begins with the phrase: "In computing the period of limitation prescribed for any suit," prescribed, of course, having re-

ference to the articles. If this plaint had been presented in a proper Court on the day after that on which the limitation expired, that day having been a holiday, then the plaintiff would have been able to take advantage of the specific provision in S. 4, but as he has not done so, in my opinion, he is not entitled to take advantage of that provision. That seems to me to be the view taken by Spencer, J. in *Mira Mohideen* v. *Nallaperumal* (1) and I agree with him in that view. I would therefore allow the appeal and dismiss the suit against defendants 5 to 7 also. There will be no costs in any Court.

Sadasiva Aiyar, J.—I agree.

S.N./R.K. *Appeal dismissed.*

(1) [1913] 36 Mad. 131=12 I. C. 58.

A. I. R. 1919 Madras 846

KUMARASWAMY SASTRI, J.

Gurumurthi Chetti — Accused—Petitioner, In re.

Criminal Revn. No. 270 of 1918, and Criminal Revn. Petn. No. 213 of 1918, Decided on 27th September 1918, from Judgment of Subdivisional Magistrate, Cuddalore, in Criminal Appeal No. 3 of 1918.

(a) Explosives Act (1884), S. 4 (1) and (2)—China crackers are explosives.

China crackers are explosives within the meaning of Cls. (1) and (2), S. 4. [P 846 C 2]

(b) Explosives Act (1884) — Rules under, R. 3—Person in possession of explosives must show that they are toy fireworks.

The onus is on the person in possession of explosives to show that they are toy fireworks under R. 3 of the rules framed under the Act. 5 *I. C.* 911 and 37 *I. C.* 491, *Dist.* [P 846 C 2]

(c) Explosives Act (1884)—Permit for possession of explosives granted for certain quantity to be possessed at specified period and particular place—Permission to import larger quantity for longer period must be read as subject to quantity in possession being exhausted or reduced below maximum for which possession is permitted.

The whole scheme of the rules framed under the Explosives Act is to require a separate license for possession, at any one time and place, of explosives in addition to a license to import during a particular period. Where a permit for possession is granted limiting the quantity to be possessed at any specified period or at any particular place, the permission to import a large quantity during the longer period must be read subject, to the quantity in possession being exhausted or reduced below the maximum for which possession is permitted. [P 847 C 1]

T. V. Gopalaswamy Mudaliar—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The petitioner obtained in Appil 1917, a license Ex. C which licensed him to possess and sell fireworks. It limited the maximum quantity possessed at any time to (fifty) 50 lbs. In August 1917 he obtained the permit Ex. B to possess fireworks not exceeding 1,000 lbs. for a period of seven days from 7th November 1917 to 13th November 1917. In October 1917 he got a license Ex. A to import 10,000 lbs. of fireworks, the license being valid till 31st December 1917. He was charged and convicted for possessing 2,325 lbs. of China crackers on 7th November 1917 and thus contravening the terms of the license Ex. B. His plea before the Magistrate was as follows: 'I admit what I did is wrong I did so misunderstanding the rules. I am guilty.' He was sentenced to pay a fine of Rs. 100 which, on appeal, was reduced to Rs. 50. Two points are urged in revision. It is argued (1) that China crackers are not explosives, and (2) that the license to import being for 10,000 lbs,, he is not guilty of any offence.

As regards the first point, S. 4, Cls. 1, and 2, Explosives Act 4 of 1884, are wide enough to include crackers and the only question is, whether the crackers in the possession of the accused fall under R. 3 of the rules framed, which exclude toy fireworks from the operation of the Act. The onus is on the accused to show that the fireworks in his possession fall within the description of toy fireworks. This is in all cases a question of fact and, in the present case, I do not see how in the absence of any evidence I con hold that the crackers are toy fireworks, especially when he took the trouble of getting licenses for crackers on the footing that they fell under the Explosives Act. *Emperor* v. *Rachapa Gurappa Hattarvat* (1) and *Emperor* v. *Bansidhar* (2) referred to by the petitioner's vakil proceeded on the nature of the fireworks in question in those cases, and cannot be taken as authorities to show that crackers are as a rule to be excluded from the category of explosives.

The second objection is that the possession of the import license superseded the terms of the licensee Exs. B and C. I am unable to agree with this contention, the effect of which will be to enable an

(1) [1917] 37 I. C. 491.
(2) [1910] 8 P. R. 1910 Cr.=5 I. C. 911

importer to keep in his possession at one time and in one place quantities of fireworks more than 1,000 lbs. R. 71 states that a permit may be granted to a holder of a license in forms A, B, C or D to possess any quantity of manufactured fireworks not exceeding, 1,000 lbs., and R. 35 states that an explosive shall not be possessed except in accordance with the conditions of a license granted under the rules. An exception is made in cases of permits granted under Rr. 68, 69, 70 or 71. I am of opinion that the whole scheme of the rules is to require a separate license for possession, at any one time and place, of explosives in addition to a license to import during a particular period. Where permit for possession is granted limiting the quantity to be possessed at any specified period or at any particular place, the permission to import a larger quantity during the longer period must be read subject to the quantity in possession being exhausted or reduced below the maximum for which possession is permitted. The permission to import a larger quantity is given for purposes of preventing a separate application each time the stock is reduced or exhausted and it will be unreasonable to suppose that, while the rules framed under the Act fixed 1,000 lbs. as the maximum in the case of manufacturers or retail dealers, it left importers from any restrictions as to the quantity they can keep or store so long as they did not exceed the maximum quantity they were allowed to import during any year. Public safety was the reason for fixing the maximum quantity which a person can possess and the public danger is the same whether the explosives are stocked by an importer or retail dealer. The rules framed are not quite clear but the construction placed by me seems to follow from the various provisions and safeguards as to possession of explosives. I see no grounds to interfere and dismiss the petition.

S.N./R.K. *Petition dismissed.*

*** A. I. R. 1919 Madras 847 (1)**

SADASIVA AIYAR AND NAPIER, JJ.

Marappa Goundan, Petitioner, In re.

Criminal Misc. Petn. No. 141 of 1918, Decided on 8th July 1918, to quash commitment of Accused, by Sess. Judge, Coimbatore, D/- 3rd April 1918, in Sessions Case No. 21 of 1918.

*** Criminal P. C. (1898), S. 436—Magistrate trying minor offence—Offence triable by Sessions Court disclosed during trial—Prosecution not pressing for framing charge under graver offence—Commitment to Sessions on graver offence is illegal.**

Where a Magistrate takes cognizance of a minor offence against an accused, and a graver offence triable by the Sessions Court is disclosed in evidence but the prosecution does not press for the framing of a charge in respect of such offence, a commitment to the Sessions Court in respect of the graver offence is illegal: 24 *Mad.* 136, *Expl.* [P 847 C 2]

T. Richmond—for Accused.

E. R. Osborne—for the Crown.

Order. — The decision in *Krishna Reddi* v. *Subbamma* (1) goes only to this extent, that where the prosecution had pressed for the framing of a charge of a higher offence triable by the Sessions Court, even if the Subordinate Magistrate had originally taken cognizance only of a charge relating to a lesser offence, the refusal of the Magistrate to frame the charge for the higher offence might be treated as an order of discharge in respect of that offence and that S. 436, Criminal P. C., would in those circumstances, give the District Magistrate jurisdiction to direct the Subordinate Magistrate to commit the accused to the Sessions on the graver charge.

In the present case the offence of attempt at rape was not mentioned in the police charge sheet on which the Subordinate Magistrate took cognizance of the case and the prosecution did not press for the framing by that Magistrate of a charge against the accused in respect of that offence. The Sessions Judge was, therefore justified in holding that the decision in *Krishna Reddi* v. *Subbamma* (1) could not not be extended so as to cover this case, and we accordingly accept the reference. Quashing the commitment we direct the Subordinate Magistrate of Mettupalayam to proceed with the trial of the charges for the minor offences framed by him against the accused.

S.N./R.K. *Commitment quashed.*

(1) [1901] 24 Mad. 136.

A. I. R. 1919 Madras 847(2)

PHILLIPS AND KRISHNAN, JJ.

Ranga Pillai—Plaintiff—Appellant.

v.

Narasimma Aiyangar and *another*—Defendants—Respondents.

Second Appeal No. 749 of 1917, Decided on 19th March 1918.

Mortgage — **Stipulation in mortgage to redeem in any Chittirai month at end of 10 years — There was not implied personal covenant.**

A mortgage-deed contained a stipulation that the amount due thereunder might be paid "at any cultivation season in the month of Chittirai after the stipulated period of 10 years":

Held: that there was no implied personal covenant to pay at the end of 10 years, which the mortgagee could enforce at once at the expiry of the period. [P 848 C 1]

T. V. Muthukrishna Aiyar—for Appellant.

K. S. Ramabadra Aiyar.—for Respondents.

Judgment.—It is contended for appellant that the words:

"at whatever cultivation season in the month of Chittirai in any year after the stipulated period of 10 years, I may pay the principal amount, you shall at that time receive the amount"

contain an implied covenant to pay at the end of 10 years. This stipulation as to payment is one entirely for the benefit of the mortgagor, for it allows him to choose his own time for payment if he wishes to pay. To construe this as a personal covenant to pay at the end of 10 years which the mortgagee could enforce at once would be to destroy the whole benefit of the stipulation so far as the mortgagor is concerned. We are not therefore prepared to read into the words a covenant which would destroy the whole effect of the express arrangement between the parties. There are no other recitals in the deed to suggest that there was any personal covenant and therefore we agree with the Subordinate Judge's finding that there is none. As this is the only point argued the second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 848 (1)

SADASIVA AIYAR AND NAPIER, JJ.

Public Prosecutor—Appellant.

v.

Settigiri Narayana Reddi and *others*—Accused—Respondents.

Criminal Appeals Nos. 146 to 184 of 1918, Decided on 6th August 1918, against the acquittal of the Accused by Court of Bench Magistrate, Tirupati.

Madras District Municipalities Act (1884), Ss. 207, 217 and 264 A—Non-compliance with notice under S. 207—Prosecution—Construction of latrines by Municipal Council or notice to party to provide moveable receptacles are not conditions precedents.

Before prosecuting a person under S. 264 A for failure to comply with a notice issued under S. 207, it is not necessary that the Municipal Council should have called on him to provide moveable receptacles under S. 217 or should have constructed the latrines themselves under S. 264 (1) [P 848 C 2]

The Public Prosecutor—for Appellant.

A. Ramchandra Aiyar—for Respondents.

Judgment.—The notices so far as they require persons having no backyards to their houses to provide latrines in their non-existing backyards, are clearly bad and we dismiss the appeals in which the respondents are owners of houses having no backyards. Criminal Appeal No. 176 of 1918 is also dismissed, the respondent being dead. It appears that the respondents in the 12 Appeals Nos. 158, 164 to 167, 171, 174, 175, 177, 181, 182 and 184 of 1918 do own backyards to their houses and could have complied with the notice issued under S. 207, District Municipalities Act (4 of 1884) to provide latrines in their several backyards. We are unable to follow the reasoning of the majority of the Bench that the Municipal Council ought to have called upon the accused to provide moveable receptacles under S. 217 of the Act before proceeding to take action under S. 264 A. We are also unable to accept the arguments of the respondents' learned Vakil that the Municipal Council ought to have constructed the latrines themselves under S. 264 (1) before prosecuting under S. 264A for failure to comply with the notice under S. 207. We are unable to find any such duty imposed by the Act on the Council as a necessary condition precedent to the institution of prosecutions under S. 264A. We therefore convict the respondents in these 12 appeals and impose a fine of one rupee on each of them, dismissing the other appeals.

S.N./R.K. *Order accordingly.*

A. I. R. 1919 Madras 848 (2)

AYLING AND SESHAGIRI AIYAR, JJ.

Ponnusami Pillai—Defendant—Appellant.

v.

Singaram Pillai and *others*—Plaintiff and Defendants—Respondents.

Civil Appeal No. 149 of 1917, Decided on 20th February 1918 against the decree of Sub-Judge, Trichinopoly, in Original Suit No. 74 of 1916.

(a) Evidence Act (1 of 1872), S. 33—Evidence recorded in another suit cannot be admitted except under S. 33—Consent of parties cannot make it admissible.

Evidence recorded by a Court or by a person authorized by law to take it cannot be treated as evidence in a subsequent judicial proceedings merely because the parties consent to such a course, unless the case falls under S. 33, Evidence Act. The consent of parties cannot take the place of the statutory direction in S. 165 that judgments must be based on facts declared by the Act to be relevant or duly proved: 21 *I. C.* 319, *Diss from.* [P 849 C 2]

(b) Evidence Act (1 of 1872). S. 165—Evidence recorded by Sub-Registrar admitted by consent of parties—Judgment based on such evidence is void.

Where, therefore the parties to a suit agreed to treat the evidence recorded by a Sub-Registrar in a proceeding before him as evidence in the case and the Court based its judgment on such facts:

Held, that the judgment was void under the provisions of S. 165. [P 849 C2]

Swaminthan—for Appellant.

T. V. Muthukrishan Aiyar and *Muthuswami Aiyar*—for Respondents.

Judgment.—Appellant in this case takes the preliminary ground that the judgment cannot be supported in view of the provisions of S. 165, Evidence Act.

The suit was brought under S. 77, Registration Act to enforce registration of a will which both the Sub Registrar and District Registrar had declined to register. The Subordinate Judge says (para. 4 of his judgment):

"The parties filed the evidence adduced before the registering authorities as evidence in this case by mutual consent. None of them wanted any furtner evidence to be adduced in this Court. They were content to argue the case on the evidence adduced before the registering authorities."

The evidence in question on a consideration of which the case was decided included the statements of 9 witnesses for plaintiff and 8 witnesses for defendant recorded by the Sub-Registrar. These statements could duly become relevant evidence in the present case, if the conditions prescribed by S. 33, Evidence Act were found by the Subordinate Judge to exist. There is nothing even to suggest, and it cannot be contended, that the Subordinate Judge has applied his mind to the question decided (for instance) that the presence of the witnesses could not be obtained without unreasonable delay and expense; his judgment shows that he proceeded solely on the ground of the consent of parties. That is to say, the statements recorded by the Sub-Registrar were not relevant under S. 33, Evidence Act, and the learned vakil for respondent is unable to suggest any other section under which they would be relevant. But S. 165, Evidence Act lays down that judgment must be based upon facts declared by this Act to be relevant and duly proved; and the consent of the parties cannot take the place of a declaration of the Evidence Act.

Our attention has been drawn to a decision of this Court in *Sri Rajah Prakasarayanim Garu* v. *Venkata Rao* (1), in which it might appear that the consent of parties was held to be sufficient. But the attention of the learned Judges does not seem to have been drawn to the stringent provisions of S. 165, Evidence Act above quoted; with all respect, we think we are justified in declining to follow their decision. We must, therefore set aside the decree and judgment of the lower Court and direct that the suit be restored to file and disposed of according to law. In view of the fact that appellant has raised this plea after consenting to the course adopted by the Subordinate Judge, we direct him to bear his own costs in this Court. Respondents' costs in this Court will be costs in case as well as all costs hitherto incurred by both sides in the lower Court.

S.N./R.K. *Appeal allowed.*

(1) [1913] 38 Mad. 160=21 I. C. 319.

A. I. R. 1919 Madras 849

AYLING AND SESHAGIRI AIYAR, JJ.

Parvataneni Venkataramayya and *others*—Plaintiffs—Appellants.

v.

Lanka Rambrahman and *others*—Defendants—Respondents.

Appeal Suit No. 161 of 1917, Decided on 20th February 1918, against decree of Temporary Sub. Judge, Masulipatam, in Original Suit No. 24 of 1916.

Vendor and Purchaser—Sale deed containing indemnity clause — Vendor agreeing to clear disputes at his own cost — Tenants claiming occupancy rights—Tenant's claim upheld by High Court—Suit by vendee suing vendor for cancelling sale-deed and damages—Indemnity clause is continuing covenant —Cause of action arose when it was held that vendor had no kudivaram rights and was governed by Limitation Act (1908), Art. 115.

Covenants which provide for a continuous exercise of obligations should be regarded as continuing covenants so long as the subject-matter in respect of which the duty is cast subsists. Therefore, though a cause of action may arise on th

date of the covenant or as soon as there is a breach, the injured person is not bound to sue once and for all for present and prospective damages for the breach of the covenant. He is entitled to wait until he has exhausted all possible means of obtaining reparation before he has recourse to the covenantor. He will then be entitled to sue for consolidated damages caused to him by the act of the intervener and for the expense he has been put to in attempting to vindicate his title against that party.

A deed of sale of land contained the following clause: "Should disputes of any kind arise at any time touching the said land on the part of anybody, we will clear them all with our own funds and allow this sale to continue to you uninterruptedly without any kind of loss to you." On attempting to obtain possession, the vendee was resisted by the tenants, who asserted occupancy rights in the land. The vendee thereupon sued the tenants, whose claim was finally upheld by the High Court. In a suit by the vendee against the vendor for cancellation of sale and damages brought more than six years after the date of the sale:

Held, (1) that the provision in the sale-deed was an indemnity clause and should be construed as a continuing covenant;

(2) that the cause of action for the suit arose when it was held that the plaintiff's vendor had no Kudivaram right in the property and the suit was therefore within time under Art. 115.

[P S50 C 2]

K. Srinivasa Aiyangar, W. Chakrapani Nayudu and *B. Narayanaswami Nayudu* —for Appellants.

P. Narayanamurthi—for Respondents.

Judgment. — Defendant 1 sold the property in suit to the plaintiff on 8th December 1906. The document purports to convey both the melvaram and kudivaram rights in the property. It is common ground that possession of one of the items namely, a house site was delivered to the plaintiff. He was unable to get physical possession of the rest of the property as the tenants asserted an occupancy right. Thereupon, he sued the tenants in the District Munsif's Court. He obtained a decree in ejectment on 30th December 1909. There was an appeal by the tenants. The lower appellate Court reversed the Munsif's decision and dismissed the plaintiff's suit on 13th September 1910. The High Court confirmed that decree on 23rd August 1912. The present suit was instituted on 22nd August 1915 for cancellation of the sale or for damages in the alternative.

The Subordinate Judge has dismissed the suit on the ground that the cause of action arose on the date of the sale and that as the suit was filed more than 6 years after that date, it was barred by limitation. In this Court, reliance was mainly placed upon a clause in the deed of sale which is in these terms:

"Should disputes of any kind arise at any time touching the said land on the part of anybody, we will clear them all with our own funds and allow this sale to continue to you uninterruptedly without any kind of loss to you."

In our opinion this is an indemnity clause and should be construed as a continuing covenant. As was pointed out by Stirling, J., in *Jacob* v. *Down* (1), covenants which provide for a continuous exercise of obligations should be regarded as continuing covenants so long as the subject-matter in respect of which the duty is cast subsists. The instance of covenants for repairs is cited for this purpose. In our opinion, the clause in the deed which we have quoted is of the same character as a clause providing for continuous repairs; and consequently we hold that it is a continuous covenants. In this view, although a cause of action may arise on the date of the covenant or as soon as there is a breach, the injured party is not bound to sue once and for all for present and prospective damages for the breach of the covenant. The plaintiff is entitled to wait until he exhausts all possible means of obtaining reparation, before he has recourse to the covenantor. He will then be entitled to sue for consolidated damages caused to him by the act of the intervener and for the expenses he has been put to in attempting to vindicate his title against that party; we must, therefore, hold that the suit will be in time if it was brought within 6 years of the date on which it was held by a Court of law against him that neither he nor his vendor had any kudivaram rights in the property. The language of Art. 115, Lim. Act supports this view. See also *Secy. of State* v. *Pemmaraju Venkayya Garu* (2).

But there is one difficulty in this case to which apparently the attention of the Court below was not invited. The indemnity clause imposes the duty in the first instance on defendant 1. There is no issue on the question whether defendant 1 was aware of the opposition by the tenants and whether he was asked to carry out his promise contained in the covenant. If the plaintiff had chosen to go to Court without calling upon the defendant to fulfil his undertaking, it may

(1) [1900] 2 Ch. 156.
(2) [1917] 40 Mad. 910=35 I. C. 254.

be that he is not entitled to any damages Moreover the question as to when the defendants' duty arose and whether there was an understanding that the plaintiff should wait until recourse to law was had, are considerations which ought to be taken into account before deciding the question of limitation finally. For these reasons, we are unable to accept the conclusion of the Subordinate Judge; we would draw his attention to the decision in *Hari Tiwari* v. *Raghunath Tiwari* (3), which seems nearer to the present case than all the other decisions quoted by him. Having regard to the fact that the real points in dispute have not been adjudicated upon, we have indicated the general principles on which questions of this kind should be tried. It may be necessary to recast the issues and to add additional issues in the view we have taken of the rights of the parties. The Subordinate Judge will hear applications in that behalf and pass the necessary orders.

We must reverse the decree of the Subordinate Judge and remand the suit to him for disposal in the light of the above observations. Costs in the appeal and in the memorandum of objections will abide.

S.N./R.K. *Appeal allowed.*

(3) [1888] 11 All. 27.

A. I. R. 1919 Madras 851

KUMARASWAMI SASTRI, J.

P. J. Mellor — Complainant — Petitioner.

v.

A. M. Muthiah Chetty—Accused—Opposite Party.

Criminal Revn. Case No. 675 of 1917, and Criminal Revn. Petn. No. 534 of 1917, Decided on 6th June 1918, from order of Chief Presidency Magistrate, Egmore, D/- 8th October 1917.

(a) Criminal P. C. (1898), Ss. 253 and 439 —Revision against order of discharge—High Court shall apply same principles as are applicable in revision against acquittal.

In dealing with revision petitions against orders of discharge of accused persons by Magistrates, the High Court will apply the same principles as are applicable to cases of petitions to revise orders of acquittal. In either case the High Court will not interfere where there is no clear error or defect in the proceedings of the lower Courts which has resulted in grave injustice but the question is merely one as to the appreciation of doubtful evidence. [P 853 C 1, 2]

(b) Criminal P. C. (1898), S. 439 — Alien enemy trading under license is competent to complaint or move High Court in Revision—Internment of alien subject after revision filed will not stay hands of High Court.

It is competent to an alien enemy residing in British India by license of the King to complain against crimes directed against his person or property and to apply in revision to the High Court against any order of a Magistrate discharging the accused on the materials placed before him. [P 852 C 2]

The internment of an alien subject, after he has filed a revision petition, does not necessarily stay the hands of the High Court. *Porter* v. *Freudenberg*, (1915) 1 *K. B.* 857, *Expl.* [P 852 C 2]

(c) Criminal Trial — Confessions — Extra-judicial confessions by accused have very little evidencial value.

Evidence as to extra-judicial confessions of his guilt by an accused person is by itself of very little importance, as such evidence is easy to adduce and difficult to rebut. [P 854 C 1]

T. Richmond—for Petitioner.

Nugent Grant—for Opposite Party.

Order.—This is an application to revise the order of the Chief Presidency Magistrate discharging the accused under S. 252, Criminal P. C. Both the complainant and the accused were diamond merchants, the former carrying on businass in Bombay and the latter in Madras. The case for the prosecution is that complainant ueed to send on approval diamonds to the accused in parcels bearing prices, weights in carats, and numbers, that accused used to communicate his acceptance of the price or make counter-offers, that in the event of the parties agreeing as to the price the same was paid by the accused either in cash or by means of hundis according to the terms under which they carried on business, and that the accused got from the complainant four packets of diamonds marked 4695, 4696, 4665 and 4666 which were sent to him at his request, which packets he pledged before any property in them passed to him without the knowledge or consent of the complainant. It is also alleged that the accused was in a hopelessly insolvent condition when he asked for the diamonds and that he asked the complainant to send them to him, not for any bona fide purpose of his trade, but to raise money thereon for his own benefit and that he was guilty both of criminal breach of trust and of cheating. The Chief Presidency Magistrate was of opinion that no case had been made out which would justify his calling upon the accused to enter upon his defence and discharged him under S. 253, Criminal P. C.

He held that it had not been shown that the accused was in insolvent circumstances when he asked the complainant to send him the diamonds and that it had not been proved that the diamonds sent by the complainant had been pledged by the accused.

The learned Magistrate also was of opinion that the complainant knew that the accused was dealing with the diamonds sent before prices had been settled and that the complainant, with a view to pushing on his trade, threw all caution to the winds. A preliminary objection has been taken that the complainant, who is an alien enemy now interned, has no right to invoke the aid of the Court and that the criminal revision petition filed by him ought to be dismissed. No objection was taken in the lower Court as to his competence to file the complaint, the objection being raised for the first time when the criminal revision petition was taken up by me for disposal. There is no dispute as to the facts. The complainant who is an enemy subject was carrying on business in Bombay under licence both when he filed the complaint in the Presidency Magistrate's Court and the revision petition in the High Court. His license was cancelled by an order of Government dated 8th December 1917, and the business carried on by him was directed to be wound up. On 5th February 1918 Mr. Mellor as custodian of enemy property applied to the High Court for permission to be brought on record and to continue proceedings in the High Court, and permission was granted by Bakewell, J., on 8th February 1918. There is, so far as I can see, nothing to warrant the view that an alien enemy has no right to complain against crimes directed against his person or property or that a subject of His Majesty the King-Emperor can with impunity violate the provisions of the Indian Penal Code simply because the offence is committed in respect of an alien enemy In criminal cases it is the King Emperor who prosecutes in vindication of his peace and though the complainant brings the facts to the cognizance of those charged by the Crown to administer justice, it is the Crown that prosecutes. I do not think that Courts exercising criminal jurisdiction, whether original or appellate, can decline to exercise it simply because the offence is committed against the person or property of an alien enemy.

So far as criminal revision petitions to the High Court are concerned, Ss. 437 and S. 439, Criminal P. C., empower the High Court to proceed either suo motu or on the facts being brought to its notice by any persons not necessarily the complainant. There is therefore nothing to prevent the High Court from revising the order of the Chief Presidency Magistrate discharging the accused on the application of the custodian of enemy properties, where the offence is committed in respect of property which would in law vest in him. It is also clear that the complainant was living and carrying on business in India under a trading license both when he filed the complaint and the criminal revision petition. When an alien enemy resides in the country by license of the King and under his protection, he stands on the same footing as an alien friend or an ordinary subject so far as the right of maintaining actions is concerned, the right of suit being incidental to the right of protection. *Porter* v. *Freudenberg* (1), *Volkl* v. *Rotunda Hospital* (2 *Princes of Thurn and Taxis* v. *Moffitt* (3) and *Rex* v. *Vine Street Police Superintendent* (4) are authorities clearly in point. The complaint and revision petition were therefore instituted by a person legally competent to do so.

As a criminal revision petition is not in the nature of an appeal, which under the Code of Criminal Procedure must necessarily be filed by the accused in the case of a conviction or by the Government in the case of an acquittal, and as under Ss. 437 and 439 of the Code the High Court can act in revision where facts are brought to its notice by any person and not necessarily by a party to the original proceeding, the internment of the complainant after the filing of the criminal revision petitions does not necessarily stay the hands of the High Court. All that was decided in *Porter* v. *Freudenberg* (1) was that the appeal filed by an alien enemy plaintiff before the war should be suspended till the restoration of peace. The position of a person who was residing and carrying on business in the country under a license from the

(1) [1915] 1 K. B. 857.
(2) [1914] 2 K. B. Ir. 543.
(3) [1915] 1 Ch. D. 58.
(4) [1916] 1 K. B. 268.

Crown and so entitled to file a criminal appeal or revision but whose license has been revoked before the appeal or revision petition comes on for trial could not be worse. In any view the revision petition cannot be dismissed as contended for by the Crown Prosecutor and Counsel for the accused. It can at the most only be ordered to lie over till the end of the war. For the reasons already given, I am of opinion that it is open to the High Court to dispose of the criminal revision petition against the order of discharge on the application of the custodian of enemy property. I overrule the preliminary objection and shall proceed to deal with the case on the merits.

As the learned Chief Presidency Magistrate heard all the evidence adduced by the prosecution and has written an order giving his reasons for not acting on the prosecution evidence, oral and documentary the order though not technically an order of acquittal should in my opinion be dealt with on the same principles as would be applied to a case of acquittal. There is in my opinion very little difference in substance between the case of a person who has been discharged after all the prosecution evidence has been taken and weighed by the Magistrate and that of a person who is acquitted after a charge has been framed. In the former case the Magistrate considers that the prosecution evidence is so weak that there is nothing for the accused to meet and in the latter case the evidence, though sufficiently strong to call upon the accused to meet it, has, in the opinion of the Magistrate, been met by the defence. There is no reason why different tests should be applied in revision or why an accused against whom the prosecution evidence is weak should be in a worse position than one against whom it is strong enough to warrant a charge being framed. The observations in *Emperor* v. *Kiru* (5) are in point.

In the case of revision petitions against orders of acquittal Courts have been either unwilling or very reluctant to interfere in revision at the instance of private parties. *Thandavan* v. *Perianna* (6), *Heera Bai* v. *Framji Bhikaji* (7), *Sheikh Aminuddin*, In the matter of (8), *Emperor* v. *Madar Bakhsh* (9) and *Faujdar Thakur* v. *Kasi Choudhuri* (10). It is well settled that Courts will not interfere, when there is no clear error or defect in the proceedings of the lower Courts which has resulted in grave injustice but the question is merely one as to appreciation of doubtful evidence. I need only refer to *Sinnu Gounden*, In re (11), *Emperor* v. *Madar Bakhsh* (9), *Faujdar Thakur* v. *Kasi Choudhuri* (10), *Natesa Padayachi*, In re (12), *Emperor* v. *Lakshminarayana Aiyar* (13), *Ahmedabad Municipality* v. *Maganlal Kushaldas* (14) and *Vellayanambalam* v. *Solai Servai* (15). I am of opinion that a rule equally strict should be applied to cases of revision against orders of discharge based on a consideration of all the prosecution evidence, when no evidence has been shut out and there is no illegality or irregularity in the procedure adopted by the Court.

Applying these considerations to the facts of the present case, I do not think I ought to interfere with the order of discharge. So far as the charge of cheating is concerned, I do not think it has been satisfactorily established before the Magistrate that the accused, when he asked the complainant to send the diamonds, was unable to pay for them. The arrangement between the parties was that he was to have credit for £7,000 and that he was to pay Rs. 6,000 a week. The complainant admits that till February 1917 the accused was making payments regularly and that in February complainant raised accused's credit to £7,000 and gave him additional facilities for payment. It is not alleged that when the accused asked the complainant to send him the parcels which formed the subject-matter of the complaint, he had dishonoured any of the Hundis drawn on him by the complainant. The fact that he was in financial difficulties in July would not necessarily show any dishonest intention in April, especially as the accused to the knowledge of the complainant used to sell diamonds to other parties

(5) [1911] 11 I. C. 132 (F. B.).
(6) [1891] 14 Mad. 363.
(7) [1891] 15 Bom. 349.
(8) [1902] 24 All. 346.
(9) [1902] 25 All. 128.
(10) [1915] 42 Cal. 612=27 I. C. 186.
(11) A. I. R. 1914 Mad. 628=38 Mad. 1028=23 I. C. 188.
(12) [1915] 29 I. C. 830.
(13) 5 Criml. Law Review 78.
(14) [1907] 9 Bom. L. R. 156.
(15) [1915] 39 Mad. 505=30 I. C. 152.

and remit moneys out of the sale-proceeds when the Hundis fell due.

As regards the charge of criminal misappropriation in respect of parcels 4695 and 4696, these diamonds are melee or small diamonds. There is nothing particular by which they can be identified. It is difficult from the complainant's evidence or the documents filed by him to arrive at any date from which it can be reasonably certain that the diamonds pledged by the accused are the diamonds which were sent by the complainant in packets numbered 4695 and 4696. I attach very title importance to the evidence adduced by the complainant as to the accused having orally admitted his having pledged the diamonds. Such evidence is easy to adduce and difficult to rebut. I agree with the Chief Presidency Magistrate that no prima facie case has been made out as regards parcels 4695 and 4696.

Turning to parcels 4665 and 4666 the learned Magistrate, though admitting that the case was somewhat stronger, was not prepared to accept the evidence of the complainant that the parcels pledged with P. W. 1 were the diamonds sent by him. He observes:

"In Court P. W. No. 2 (the complainant) has been put to several tests to see if he can identify the stones now before the Court as those described in his mixture book, but I am bound to say that though he has made a good bid for it, he has failed to satisfy me that he can with absolute certainly describe his own diamonds, and even the prosecution does not press this point in the identification of stones."

The Magistrate also believed that the letters of hypothecation were genuine and was of opinion that there was a difference between the number and weight of the stones sent by the complainant and those pledged by the accused. The case as regards those stones was fully argued by both sides, and giving it my best consideration I cannot say that there is any such error or defect in this judgment of the Magistrate as would justify me in setting aside the discharge and sending the case back for inquiry. If I had to try the case as an Original Court, I would probably have on the materials placed before me framed a charge and put the accused on his defence; but the question is whether, sitting in revision, I would be justified in setting aside the order of the trial Judge who had the advantage of seeing the demeanour of the witnesses and who was not favourably impressed with the complainant's evidence. As a civil suit will probably be filed, I do not think it expedient to go into the facts in detail or give my opinion as to the various points that have been urged. It is sufficient for me to say that the present case has not satisfied the requisites laid down by the cases above referred to and I do not think it proper to reopen the inquiry.

I therefore dismiss the petition. The diamonds which are with the pledges will be kept by them on the same terms as at present till 15th July.

S.N./R.K. *Petition dismissed.*

** A.I.R. 1919 Madras 854
Full Bench

WALLIS, C. J., OLDFIELD AND SESHAGIRI AIYAR, JJ.

Vitta Tayaramma—Plaintiff—Appellant.

v.

(*Chatakondu*) *Sivayya* and *others*—Defendants—Respondents.

Second Appeal No. 484 of 1917, Decided on 30th July 1918, against decree of Dist. Judge, Cuddapah, in Appeal Suit No. 196 of 1914.

** **Hindu law — Succession — Widow becoming Mahomedan and marrying Mahomedan forfeits by re-arriage her interest in her first husband's estate—** (Per *Wallis, C. J.* and *Oldfield, J.*—*Seshagiri Aiyar, J.* contra) **Hindu Widow's Re-marriage Act (1856), S. 2—Caste Disabilities Removal Act (1850).**

Held, per *Wallis, C. J.* and *Oldfield, J.* (*Seshagiri Aiyar, J.* dissenting).—A Hindu widow, who becomes a Mahomedan and marries a Mahomedan, forfeits, by the re-marriage, her interest in her first husband's estate under the general principles of Hindu law. [P 859 C 2]

Per *Wallis, C. J.*, *Oldfield* and *Seshagiri Aiyar, JJ.*, dissenting).—The forfeiture is also entailed by reason of S. 2, Act 15 of 1856: 1 *Mad.* 226, *Foll*: 44 *I. C.* 299, **Overruled.** [P 860 C 2]

Per *Wallis, C. J.* –Act 21 of 1850, though it relieved the widow of a Hindu from forfeiture of her widow's estate on her abjuration of Hinduism, did not enlarge the nature of that estate, so as to relieve her from forfeiture in the event of her renouncing her status of widow by re-marriage. [P 860 C 2]

The words "any widow,.....upon her re-marriage," in S. 2, Act 15 of 1856 are wide enough to cover the case of any widow of a Hindu re-marrying, whether or not her marriage would otherwise be prohibited by any custom or interpretation of Hindu law and whether the re-marriage was to a Hindu or to a member of another religion. [P 860 C 2]

Per *Oldfield, J.*—Act 15 of 1856 is not applicable to cases of re-marriage after apostacy, and the forfeiture is entailed only by reason of the

incompatibility between the renunciation of a widow's status and the retention of a widow's estate. [P 862 C 1]

Per *Seshagiri Aiyar*, J.—The rule of Hindu law that a widow, who re-marries and is thus not true to the bed of her deceased husband, cannot inherit to his estate can be applied only when she is within the pale of Hindu law. Her re-marriage after apostacy cannot divest her of the right to inherit which subsisted to her at the date of her conversion to another religion. [P 862 C 1]

M. O. Parthasarathy Aiyangar and *M. O. Tirumalachariar*—for Appellants.

T. V. Subba Row—for Respondents.

Order of Reference.

Phillips, J.—In this case the sole question for decision is whether a Hindu widow, who becomes a Mahomedan and is then married to a Mahomedan, forfeits by her re-marriage her right to her first husband's estate. There is no reported decision of this Court directly in point and the views held by the Calcutta and Allahabad High Courts are conflicting. In *Matungini Gupta* v. *Ram Rutton Roy* (1) a Bench of five Judges of the Calcutta High Court (one dissenting) answered the question in the affirmative, by reason of S. 2, Hindu Widow's Re-marriage Act (15 of 1856), whereas the decisions of the Allahabad High Court are to the contrary effect [vide *Abdul Aziz Khan* v. *Nirma* (2)], on the ground that S. 2, Act 15 of 1856 is applicable only to Hindu widows as such and is not applicable to Hindu widows who have ceased to be Hindu. It has also been held in Allahabad that S. 2, Act 15 of 1856 does not apply to the re-marriage of Hindu widows, who are permitted by the rules of their caste to re-marry [in *Gajadhar* v. *Kaunsilla* (3) and in *Mula* v. *Partab* (4)]. In the latter case the Judges had hesitation in accepting the view, but followed the uniform course of decisions in their Court. Upon this latter point, this Court has taken a different view, and so long ago as 1877 it was held in *Murugayi* v. *Viramakali* (5) that a widow of the Maraver caste, in which caste re-marriage is allowed, who has re-married, has no claim to the property of her first husband. This decision was based not on S. 2, Act 15 of 1856, but upon the general principles of Hindu Law. The principle relied on in that case was that a widow takes the life-interest of her deceased husband upon the fiction that she is a surviving portion of her husband. This decision was followed by Sundara Aiyar, J., in *Doraiswamy Theran*, In re (6), but he relied upon Act 15 of 1856, and the same view was held in *Rasul Jehan Begum* v. *Ram Surun Singh* (7) and in *Vithu* v. *Govinda* (8).

In a recent case in this Court (Second Appeal No. 510 of 1916), *Karnam Chowdappa* v. *Karnam Narasamma* (9), Seshagiri Aiyar and Napier, JJ., have followed the decision in *Abdul Aziz Khan* v. *Nirma* (2) and declined to follow *Matungini Gupta* v. *Ram Rutton Roy* (1), as being opposed to the ruling of the Privy Council in *Moniram Kolita* v. *Keri Kolitani* (10) that a widow does not forfeit her estate by reason of subsequent unchastity. If however the principle of Hindu law relied on in *Murugayi* v. *Viramakali* (5) is to be applied, i. e., that a widow continues to be a surviving portion of her husband, her re-marriage, by which she becomes a portion of her new husband, does far more to remove the fiction than mere unchastity. The question of whether a widow, who had been degraded or outcasted on account of unchastity, forfeits her interest was left undecided. The decisions in *Murugayi* v. *Viramakali* (5) and subsequent cases do not appear to have been referred to in Second Appeal No. 1510 of 1916 [*Karnam Chowdappa* v. *Karnam Narasamma* (9)], which was apparently decided solely on the construction of Act 15 of 1856, and therefore I think it is advisable that the general question before us should be referred to a Full Bench of this Court for decision. I would like to add with respect that it appears to me that even under S. 2, Act 15 of 1856 a Hindu widow who re-marries as a Mahomedan loses her rights to her first husband's property. There is nothing in S. 2 which restricts its provisions to the re-marriage of Hindu widows as such, and I can see no reason for importing these words into the section merely because the Act as a whole deals with re-marriage of Hindu

(1) [1892] 19 Cal. 286 (F. B.).
(2) [1913] 35 All. 466=20 I. C. 335.
(3) [1909] 31 All. 161=1 I. C. 761.
(4) [1910] 32 All. 489=6 I. C. 116.
(5) [1876] 1 Mad. 226.
(6) [1912] 15 I. C. 602.
(7) [1895] 22 Cal. 589.
(8) [1898] 22 Bom. 321.
(9) [1918] 44 I. C. 299.
(10) [1880] 5 Cal. 776=7 I. A. 115=4 Sar. 103 =3 Suth. 765 (P. C.).

widows. While the Act as a whole is intended to legalise widow re-marriages, S. 2 specifically provides that re-marriage, though, legal, shall entail a certain disability, and this disability is not in terms restricted to a re-marriage contracted while still a Hindu. But for the widow's conversion to Mahomedanism, her re-marriage would entail forfeiture and there is nothing in the Act to suggest that such conversion is to remove her disability. If it were not for the decision in Second Appeal No. 1510 of 1916 [*Karnam Chowdappa* v. *Karnam Narasamma* (9)] I would, with all respect, follow the decision of the Calcutta High Court: but in view of that decision of this Court, I would refer the following question to a Full Bench:

"Does a Hindu widow, who becomes a Mahomedan and marries a Mahomedan, by her re-marriage forfeit her interest in her first husband's estate?"

Krishnan, J.—In the suit from which this second appeal arises, plaintiff sued for a declaration of his title to a house and for the recovery of its possession. The house originally belonged to one Pullayya, a kapu by caste, and on his death his widow, defendant 5, inherited a widow's estate in it under the Hindu law. Some 10 years before suit she became a Mahomedan and soon after, married, a Mahomedan husband in the nikka form. It may be mentioned here that kapus do not allow re-marriage of widows in their caste; but defendant 5 married a Mahomedan. Plaintiff's title is based on a sale-deed executed to him by defendants 4 and 5. The defendant 4 was the sole next reversioner of Pullayya at the time of plaintiff's sale, but at the time defendant 5 remarried, he and his brother, the father of defendants 2 and 3, now deceased, were the next reversioners equally entitled. The contesting defendants claim under defendants 2 and 3. The question, therefore arises whether by her re-marriage defendant 5 forfeited her rights in her first husband's property; for if she did, the plaintiff has got only defendant 4's half share in the property; otherwise he will be entitled to at least a life-estate in the whole property and his suit in ejectment must be decreed in full. The lower Courts held that defendant 5's re-marriage had worked a forfeiture and gave a decree only for half the property; plaintiff has appealed to us and has contended that there was no such forfeiture.

The point for decision is thus, as stated by my learned brother,

"whether a Hindu widow who becomes a Mahomedan and contracts a valid marriage according to Mahomedan rites forfeits her rights in her Hindu husband's estate?"

It is conceded that her conversion did not per se affect her rights injuriously as they were saved by Act 21 of 1850. But it is argued for the respondents that a forfeiture was caused either by S. 2, Act 15 of 1856 or if that did not apply, by the ordinary Hindu law. The applicability of S. 2 may be considered first. In doing so, it must be borne in mind that there are two different classes of widows with reference to whom the question has been considered in the decided cases—the one class consisting of Hindu widows who belong to castes which permit re-marriage of widows in the caste itself, the other class consisting of widows who originally belonged to a caste which did not permit such re-marriage, but who subsequently obtained the right of re-marriage by conversion to a different religion. The cases of these two classes do not seem to be parallel and different considerations apply. The widows of the 2nd class could have remarried only under the Act so long as they remained Hindus, but they could no longer do so after their change of religion; whereas the widows of the 1st class need not, and usually do not, take advantage of the Act to justify their re-marriage at any time though there is nothing to prevent them from doing so. Judicial opinion has differed as to whether when the latter class re-marries under a caste custom, the Act and particularly S. 2 thereof apply to them at all; vide *Har Saran Das* v. *Nandi* (11), *Ranjit* v. *Radha Rani* (12), *Gajadhar* v. *Kaunsilla* (3) and *Mula* v. *Partap* (4) holding that they do not apply and *Vithu* v. *Govinda* (8) and *Duraisawmy Thevan* In re (6) to the contrary. This question need not, however be decided in the present case as it is one of a widow of the 2nd class. The above authorities have thus no direct bearing on the case except in so far as they construe the language of S. 2.

In the case before us we have to consider whether S 2 applies to the case of

(11) [1889] 11 All. 330.
(12) [1898] 20 All. 476.

widows of the second class re-marrying according to their new religion and if so, whether we should adopt a strictly literal construction of the section or a limited one confining it to cases of re-marriage under the Act. The authorities bearing on the point are (1) a Full Bench decision of the Calcutta High Court in *Matungini Gupta* v. *Ram Rutton Roy* (1), where a majority of Judges held that S. 2 applied and the subsequent marriage caused a ferfeiture, (2) a decision of a Bench in Allahabad in *Abdul Aziz Khan* v. *Nirma* (2) and (3) a decision of a Bench of our own Court in Second Appeal No. 1510 of 1916 [*Karnam Chowdappa* v. *Karnam Narasamma* (9)] (not yet reported), both of which held that S. 2 did not apply. After a careful consideration I am inclined to follow the latter view.

It seems to me that having regard to the scope and object of the Act as stated in the preamble and seeing that it is a purely enabling Act, its provisions should not be applied to affect the property of persons who do not and could not take advantage of it. Defendant 5 having remained as a Mahomedan had nothing to do with the Act. But it is argued that though this may be so, the language of S. 2 is wide enough to make it applicable independent of the Act itself. Ordinarily the provisions of an Act must be construed with reference to its scope and object. We must therefore see whether the language of S. 2 is clear enough to justify a departure from this rule. If we turn to the section it speaks of forfeiture on "re-marriage". Does it mean re-marriage in any form whatever or only re-marriage under the Act? I am inclined to think it is the latter. It will be seen from its language that a strictly literal construction of the section will make it applicable even to a Christian or Mahomedan or other non-Hindu widow who was never a Hindu at all, but who happened to inherit by virtue of a will of her husband or other testamentary disposition a limited interest in his property, without an express permission from him to re-marry. I take it no one will contend that the section should be construed in this very wide manner to include persons who were never Hindus at all. It is clear therefore that some limitation must be placed on the words of the section and the only logical way to do it is seems to me, to take the scope and object of the Act and construe the section accordingly. We must look to the scheme of the Act generally to see what its scope and object are—See Maxwell on Interpretation of Statutes, Edn. 5, p. 69 et seq. It is clear, as already stated, that the Act is an enabling one intended to remove disabilities of certain persons in the matter of re-marriage and to give them new rights regarding it. A reference to the various sections of the Act shows that the scheme of the Act is that after authorizing re-marriage under S. 1, it deals with the conditions and consequences of such re-marriage in the following sections. The word "re-marriage" in S. 2 should therefore I think be reasonably read as referring only to a re-marriage under the Act and not to any re-marriage whatsoever. In the judgment of the Full Bench in *Matungini Gupta* v. *Ram Rutton Roy* (1), there is no discussion of the question at all. The learned Chief Justice merely says:

> "Section 2 includes all widows who are within the scope of the Act, that is to say, all persons who being Hindus become widows."

Though this case was followed in *Rasul Jehan Begam* v. *Ram Surun Singh* (7), the learned Judges there based the forfeiture on the Hindu law and not on the Act. The reasoning in the Full Bench case in *Vithu* v. *Govinda* (8) has no doubt, a bearing on this part of the case, though that case itself is one relating to the first class of widows. Ranade J., says that S. 2 should be construed literally, because

> "so far as the section is concerned, the law has only declared what was an universal practice, and this fact must have been present to the mind of the legislature and explains the omission of all qualifying words."

With all deference I am unable to follow this method of interpretation, nor am I satisfied that the practice of widows forfeiting their right in their first husband's property on re-marriage is so universal in India as is stated. If there are castes which allow widows to re-marry and keep their estates at the same time, and I am not sure there are not any, I can see no reason to think that the legislature in enacting Act 15 of 1856 intended to interfere with the rights of such widows. If S. 2 is taken to cover such cases, we cannot escape the conclu-

sion that such rights are abrogated. I think clearer and more direct language should be required before such an inference can be drawn. With all respect, I am unable to adopt the reasoning of the learned Judge. As already stated, I am inclined to follow the ruling of our own High Court in Second Appeal No. 1510 of 1916 [*Karnam Chowdappa* v. *Karnam Narasamma* (9),] and of the Allahabad Court in *Abdul Aziz Khan* v *Nirma* (2), in so far as they hold that S. 2 does not apply to a Hindu widow re-marrying after conversion; but with all respect, I am not prepared to follow them when they hold further that no forfeiture at all was caused by the re-marriage for I am inclined to think that a forfeiture is caused under the Hindu law. I shall now consider this question.

My learned brothers in the above second appeal hold that the decision of the Privy Council in *Moniram Kolita* v. *Keri Kolitani* (10) is conclusive on the matter as they treat the widow's re-marriage as amounting at the highest only to "being false to the bed of her husband," and they decided that no forfeiture was therefore caused. With all respect I am unable to follow this view. The authorities cited to us are all against it and they have not been considered by my learned brothers. The case of *Murugayi* v. *Viramakali* (5) held on a consideration of the principles of the Hindu law that in the case of a Maravar widow re-marrying, she forfeited her life estate, there being no custom to the contrary in the caste. This view was followed by the referring Judges, Wilson and Banerji, JJ., *Matungini Gupta* v. *Ram Rutton Roy* (1), who state their reasons for their view in full and I agree with them and need not re-state those reasons. In fact S. 2 of the Act is based upon a recognition by Legislature the at a Hindu widow's estate is ordinarily forfeited under the Hindu law by her re-marriage. This view and the Madras case were both followed by another Bench in Calcutta in *Rasul Jehan Begum* v. *Ram Surun Singh* (7). For some reason not apparent, the Allahabad High Court has not considered this position at all. The Bombay decision in *Vithu* v. *Govinda* (8), as already pointed out, expressly proceeded on the footing that the usual practice among Hindus was to treat the widow's estate as terminated by re-marriage. The authorities, except the second appeal above referred to are all in favour of the view I am taking.

I shall now examine the reasons given in Second Appeal No. 1510 of 1916 *Karnam Chowdappa* v. *Karnam Narasamma* (9) for the view taken in it. The Privy Council case will no doubt be conclusive on the matter if the view that the widow's re-marriage amounts at the highest only to the adoption of a life of unchastity is correct. With all respect I am entirely unable to endorse this view of her position. I think it is wrong to treat the life of a re-married woman as necessarily a life of unchastity and nothing more. There is a clear and broad distinction between unchastity and re-marriage; the former is an uncertain and changeable course of conduct while the latter is a definite legal step by which the woman ceases to be any longer the widow of the deceased. This is pointed out by both Wilson and Banerji, JJ, in *Matungini Gupta* v. *Ram Rutton Roy* (1). An obversation in *Gagadhar* v. *Kaunsilla* (3) may also be referred to. It was suggested that the effect of the re-marriage should be considered from the point of view of the Hindu law and as that law does not recognize or sanction the marriage of a Hindu widow with a Mahomedan, such marriage should be treated as having no effect in changing the widow's status. It seems to me that this is an erroneous way of looking at the question. The status of an individual has to be decided with reference to his personal law at the time. There can be no doubt that after her conversion defendant 5 was governed by the Mahomedan law as to her marriage—See S. 16, Civil Courts Act.—and therefore her second marriage was a perfectly valid one. She can therefore, no longer be treated as a widow. A woman cannot be a married woman for certain purposes and a widow for others. I am therefore of opinion that her widowhood was terminated for all purposes and she cannot be treated as an unchaste widow under the Hindu law.

On this view the Privy Council case is easily distinguishable, as their Lordships were not dealing in it with a case of re-marriage at all. All that was not a necessary condition for the continuance of the widow's estate after it had become vested, but it was not decided that the continuance of widowhood itself was not necessary. Relying on the observations of Prinsep, J., in *Matungini Gupta* v. *Ram*

Rutton Roy (1), it was next urged that as the determination of the widow's estate under the Hindu law on re-marriage is based on the legal fiction that she takes her estate as the surviving half of her husband's body and as conferring spiritual benefits on him by her acts and as this fiction comes to an end on her conversion, it can no longer be relied on to divest her estate. The answer to this seems to me to be that the Hindu widow's estate is by its very nature an estate subject to limitations, one of which is a liability to forfeiture on re-marriage or cessation of widowhood. The condition is inferred from the origin of the estate and is one that attaches itself to the estate from its very commencement. Unless therefore the condition is abrogated by some subsequent event, it must continue to attach to the estate in the widow's hands always. Act 21 of 1850 which saved the estate from forfeiture on conversion had no effect on this condition and nothing else has been shown as affecting it. It is therefore not necessary to apply the legal fiction at the time of the forfeiture. It is true as pointed out by Prinsep, J., in the same case that there is an anomaly in a widow losing her estate by her remarriage when she does not do so by leading a uotoriously unchaste life. But this anomaly exists equally in the case of marriage under Act 15 of 1856 and under the caste custom. The existence of the anomaly does not seem to me to be an argument against forfeiture on re-marriage. Such a forfeiture is consistent with the notions of the Hindus generally.

For the above reasons I am of opinion that defendant 5, the widow in this case, lost her rights in the plaint house on her marrying her Muhammadan husband, the forfeiture being caused under the Hindu law and not by S. 2, Act 15 of 1856. The question is an important one on which there has been a considerable difference of opinion, and in fact we are differing from the view in Second Appeal No. 1510 of 1916 *Karnam Chowdappa* v. *Karnam Narasamma* (9) as to the final result. I therefore agree to the order of reference to the Full Bench proposed by my learned brother.

Opinion

Wallis, C. J.—I agree with the conclusion of Krishnan, J. in his Order of Reference that, independently of S. 2, Act 15 of 1856, the widow of a Hindu forfeits her husband's estate on re-marriage. This was in my opinion, decided by this Court in *Muragayi* v. *Viramakali* (5), a decision which, as I shall show has been repeatedly approved in this and other High Courts. That decision did not, as was contended before us, proceed on any proof of a custom of forfeiture on re-marriage in the particular caste, but on general principles of Hindu Law, though in support of its conclusion the Court referred, as the Bombay Court did in a later case, to the fact that the extensive inquiry, the results of which are recorded in Steele's Hindu Castes showed that among the very numerous classes of Hindus who practised re-marriage in the Deccan such a forfeiture was an invariable incident of re marriage. Following and relying on the decision of this Court, Wilson and Banerji, JJ., [*Mutungini Gupta* v. *Ram Rattan Roy*] (1) in their Orders of Reference, to which they adhered in their subsequent judgments, expressed the opinion that S. 2, Act 15 of 1856 was merely declaratory, and the same view was expressed in *Rajul Jehan Begum* v. *Ram Suran Singh* (7) and by Ranade, J., delivering the judgment of the Full Bench of the Bombay Court in *Vithu* v. *Govinda* (8). In *Har Saran Das* v. *Nandi* (11), which was followed in *Ranjit* v. *Radha Rani* (12), it was held that a widow, who according to the custom of her caste was entitled to remarry, did not forfeit her husband's estate on re-marriage on the ground that the case was not governed by S. 2 Act 15 of 1856. The contention that the estate was liable to forfeiture independently of the section was not raised in those cases. When it was raised by Pandit Sunder Lal in *Gajadhar* v. *Kaunsilla* (3), Stanley, C. J., and Banerji, J., were inclined to accept it but for the earlier decisions, as to which they again expressed their doubts in *Mula* v. *Partab* (4), and *Abdul Aziz Khan* v. *Nirma* (2) only followed the earlier decisions without comment. The dicision in *Murugayi* v. *Veeramakali* (5) has therefore been approved by the Calcutta and Bombay Courts, and would have been approved by Stanley, C. J., and Banerji, J., in Allahabad but for the earlier decisions of that Court.

I think we should be very slow to interfere with a decision which has stood so

long and is supported by so much authority, and with great respect I cannot agree with the conclusion of a Bench of this Court in Second Appeal No. 1510 of 1916 *Karnam Chowdappa* v. *Karnam Narasamma* (9) that it must be considered to have been overruled by the decision of the Privy Council in *Moniram Kolita* v. *Keri Kolitani* (10) that a Hindu widow does not forfeit her widow's estate by reason of unchastity committed after succeeding to the estate. In *Mutungini Gupta* v. *Ram Rutton Roy* (1) that contention was overruled by Wilson and Banerji. JJ., with whom I respectfully agree. No question of re-marriage was raised before the Privy Council and, as observed by Wilson, J., there is a very broad distinction between misconduct on the part of a widow as a widow, and her ceasing to be a widow. In this state of the authorities I think the decision in *Murugayi* v. *Veeramkali* (5) ought not to be overruled by this Court. Considering the question apart from authority, I am of the same opinion. In his principles of the Hindu Law, p. 173 (Edition 1), Mr. Ghose cites a text of Manu, 9, 191,

"But if two (sons) begotten by two (different men) contend for the property (in the hands) of their mother, each shall take, to the exclusion of the other, what belonged to his father."

And he also cites another text to the same effect attributed to Vishnu but not to be found in the recension that has come down to us. These texts can hardly refer to the estate which the widow took only in default of male issue. But whatever may have been the rule in archaic times when re-marriage was permitted, I think, considering the ideas which in later Hinduism underlay the prohibition of widow re-marriage as far as possible and the encouragement of Sati, that the retention by a widow of her deceased husband's estate is altogether incompatible with her renunciation of her status as his widow: and I respectfully agree with the opinion of the Bombay High Court in *Vithu* v. *Govinda* (8) that the invariable rule among so many castes in the Deccan that re-marriage, when permitted entailed the forfeiture of the first husband's estate, is merely an illustration of that essential incompatibility which was again recognized by the Legislature when it enacted Act 15 of 1856. As regards Act 21 of 1850 I agree with the opinion of Wilson, J., in *Matungini Gupta* v. *Ram Rutton Roy* (1) that though that Act relieved the widow of a Hindu from forfeiture of her widow's estate on her abjuration of Hinduism it did not enlarge the nature of that estate, so as to relieve her form forfeiture in the event of her renouncing her status of widow by re-marriage.

The construction of S. 2, Act 15 of 1856 is not free from difficulty and has occasioned much difference of opinion but on the whole I hesitate to differ from the liberal construction put upon the section by the Full Benches of the Calcutta and the Bombay Courts. The words "any widow. . . . . upon her re-marriage" in S. 2 are I am inclined to think wide enough to cover the case of any widow of a Hindu re-marrying whether or not her marriage would otherwise be prohibited by any custom or interpretation of Hindu law and whether the re-marriage was to a Hindu or to a member of another religion. As observed by Wilson, J., the Legislature was well aware of the existence of such re-marriages by the widows of Hindus, and must I think have considered that the case for enforcing the forfeiture on re-marriage was is in the first case as strong as and in the second case much stronger than in the case for enforcing it as regards the re-marriages which were legalized by S. 1. The words "any widow" in S. 2 are certainly wider than was necessary, if it was intended to confine the operation of the section to the last mentioned class of marriages only. Having regard to the generality of the language, the fact that the section was in substance though not in form declaratory, and the incongruity which would result from holding re-marriages by the widows of Hindus to persons of another religion to be outside its scope I think the more extensive and beneficial construction should be adopted. On both grounds therefore I would answer the question in the affirmative.

Oldfield, J.— We have been asked to answer the question referred in the affirmative (1) with reference to S. 2, Act 15 of 1856, and (2) with reference only to Hindu law. I regret that I cannot concur in the judgment just delivered and adopt the first of these grounds of decision. The section is worded generally

as dealing with the rights and interests of "any widow." One construction of this expression that it includes widows of whatever nationality or creed, has not been pressed and is excluded alike by the language of the preamble of the Act to which I return and the incongruity of the results which it would involve. We have then to assume that the widows in question were originally Hindu widows and to choose between the contentions that the section relates only to those who re-marry as such or that it deals also with re-marriages after apostacy, solemnized by the rites of other creeds.

It would follow from the latter construction that the Legislature intended to deal in Act 15 of 1856 with the problem not only of Hindu widow re-marriage but also of disability due to "renunciation of or exclusion from the communion of any religion" with which it had dealt recently in Act 21 of 1850. Yet the later Act contains no reference, express or implied to the earlier although the former declares and the latter exempts from forfeiture and although re-marriage the event contemplated in the one would in many cases be connected closely with the renunciation or exclusion dealt with in the other. So also the preamble to Act 15 of 1856, which is full refers only to Hindu widows to the advisability of enabling Hindus who may be so minded to adopt the custom of re-marriage and to the justice of relieving such Hindus and removing obstacles to the re-marriage of Hindu widows and the references to Hindus in Ss. 1, 3 and 6 are clear the last in which Hindu ceremonies are prescribed being particularly unambiguous. The wider construction for which plaintiff contends has in fact been based on no explicit extension of the subject-matter of the Act to widows in the other sections which no doubt include S. 2 and only on the general references in them. In the circumstances, these references must in my opinion be read as qualified by the contaxt. The conjecture of Wilson, J., in *Matungini Gupta* v. *Ram Rutton Roy* (1) that theywere intended to apply to the class of widows who might change their faith seems to me (with all respect) unwarranted, since, as the learned Judge observes, the Legislature knew, not only of the existence of such widows, but also that they could already marry again without its assistance; and there is no reason for the assumption that it intended to deal with their position in an enactment passed statedly to give such assistanco to widows, who required it. I am, therefore constrained to hold that the Act is inapplicablo to the present case and to turn to the general law as a ground of decision.

The Hindu Law is, as this and other High Courts have held since *Murugayi* v. *Viramakali* (5), that a widow's re-marriage entails forteiture of her husband's etsate. And I respectfully agree with the learnel Chief Justice that there is no reason for departure from this long current of authority. But those cases dealt with re-marriage by the widow as a Hindu; and it is argued that re-marriage, even after the widow's conversion, with the ceremonies of her new faith must be regardel, as it would be by Hindu Law, as no marriage and the widow's conduct as mere unchastity, which with reference to *Moniram Kolita* v. *Keri Kolitani* (10) entails no forfeiture. This view has been taken lately by a Bench of this Court in Second Appeal No 1510 of 1916 [*Karnam Chowdappa* v. *Karnam Narasamma* (9)] and is regardel by Seshagiri Aiyar, J, in his judgment, which I have had the advantage of reading, as consistent with the decision in *Sundari Letani* v. *Pitambari Letani* (13). But with all respect, I cannot follow this application of the authorities. The last cited dealt with a case of real unchastity, since the person concerned was not a widow, but had gone through a Mahomedan ceremony of marriage after being deserted, not divorced, by her Hindu husband, who was still alive. And in *Moniram Kolita* v. *Keri Kolitani* (10) there was no question of a re-marriage, which could on any view be regarded as legal, but only of a temporary illicit connection. The judgment is based on the ancient texts and considerations of convenience. But the former were not dealing, and in the state of contemporary society could have no occasion to deal, with non-Hindu re-marriages, and the latter, based on the insecurity of titles created by the widow, if they could be disturbed on proof of immorality, which is essentially secret and which the reversioners would be interested to promote, are irrelevant, when the question is of a connection, contract-

(13) [1905] 32 Cal. 871.

ed publicly and authorized by the general law. I need offer no general opinion at present regarding the effect of the marriage of a Hindu with a non-Hindu woman on the position of their issue. In the case before us, authority being wanting, it is sufficient for me to express my respectful concurrence in the ground of decision proposed by the learned Chief Justice, the incompatibility between renunciation of a widow's status and retention of a widow's estate; and I do so the more willingly, because I can thus avoid the conclusion that a marriage invalid for one purpose, although it is valid for all others.

I would answer the question in the affirmative.

Seshagiri Aiyar, J.—I regret I am unable to agree with the conclusion of the learned Chief Justice and Oldfield, J. I do not wish to add much to the judgment of myself and of Napier, J. in Second Appeal No. 1510 of 1916 [*Karnam Chowdappa* v. *Karnam Narasamma* (9)], on the question whether S. 2 Act 15 of 1856 would deprive a Hindu widow, embracing Mahomedanism and afterwards marrying a Mahomedan, of the estate which she inherited from her Hindu husband. I agree generally with Oldfield, J., on this question. The belief that a Hindu widow adds insult to the injury to the memory of her deceased husband by apostacy first and by subsequent marriage with a person belonging to the different faith, is not a ground for reading into S. 2, Act 15 of 1856 words which are not to be found there. The Act was intended to give relief to a certain class of people and not to panalise others; and Courts are not at liberty to supply a defect of this kind by indirect legislation. I, therefore adhere to the view that I took in Second Appeal No. 1510 of 1916 [*Karnam Chowdappa* v. *Karnam Narasamma* (9)] on this question.

On the question of the applicability of Hindu law, I wish to make a few observations in addition to what I stated in the second appeal already referred to. It is said that the Hindu law does not countenauce inheritance by a person who has not been true to the bed of her deceased husband. I do not dissent from this view so long as it can be said that the party against whom this rule of Hindu law is to be applied is within the pale of that law. There is a great deal to be said for the position taken up by Banerji, J., in *Matungini Gupta* v. *Ram Rutton Roy* (1) on the question of Hindu law. But it need scarcely be added that the Hindu widow who has embraced Mahomedanism and has married a Mahomedan is not subject to Hindu law. In *Sundari Letani* v *Pitambari Letani* (13), the Court had to consider the case of a Hindu daughter who had become a Mahomedan and had subsequently married a Mahomedan. The point was whether her children were legitimate and could inherit to the estate of their Hindu grandfather: "The woman was abandoned but not divorced by her husband." Her position was thus stated by the learned Judges: "She is in the position of an unchaste daughter who could not inherit according to Hindu law." I think the same principle is applicable to the widow in the present case.

There are three incidents in the life of this woman. The first was when she inherited the estate of her husband after his death. In the Order of Reference, Krishnan, J., says that S. 2, Act 15 of 1856 is based upon a recognition by legislature that a Hindu widow's estate is ordinarily forfeited under the Hindu law by her re-marriage. Even if I assent to this view, I fail to see how this conclusion touches a re-marriage while the widow has become a Mahomedan convert. It was contended that the right of a Hindu widow to inherit her husband's property is dependent upon a text of Brahaspati to this effect:

"He who has left a widow surviving him has got the half of his body verily alive, and when half of his body is alive, who else shall take his property."

The metaphor is undoubtedly picturesque. But it would not be safe to deduce principles of law by parity of reasoning from such a figure of speech. Granting that the reason of a widow inheriting to her deceased husband in preference to divided members of the co-parcenary is based solely on this principle, it can only apply to a state of things which came into existence on the death of her husband. At that moment either by reason of this figure of speech or by reason of the more prosaic statement of the law contained in Yagnyavalkya Smriti which is to the following effect:

"Wife (widow), daughter, father, mother, brothers, their sons Gotraja (of the same family),

> Bandhus, disciples and Brahmacharins of the same school, each succeeding one is, heir in the absence of the persons immediately preceding him in the order of enumeration—this is the law in respect of the inheritance to the property of a sonless deceased person of whatever caste,"

the widow inherited the estate. The second stage in her life was her conversion to Mahomedanism which is found to have been subsequent to the death of her husband. If the Hindu law had not been legislated upon, there could hardly be any doubt that conversion to a different faith would have entailed forfeiture of the estate inherited by the woman. But Act 21 of 1850, which was designed to preserve the rights of persons who exercised their liberty of conscience in entering the fold of another religion, maintained the rights of the widow to continue in possession of her deceased husband's property. S. 1 distinctly says:

> "So much of any law or usage within the territories of the East India Company as inflicts on any person forfeiture of rights or property or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing or having been excluded from the communion of any religion ceases to be enforced as law in the Courts of the East India Company."

So under this Act the widow who had embraced Mahomedanism could not be deprived of the rights which she possessed prior to her conversion. Her inheritance subsisted. The third stage in her career was her marrying a Mahomedan. I fail to see how this step can deprive her of what she obtained under the Hindu law and what the legislature preserved to her under Act 21 of 1850. I am unable to find anything in the Hindu law or in Act 21 of 1850 which can have this effect. It is hardly necessary to refer to cases in which it has been held that under the Hindu law properties once vested in a male or a female cannot be divested by reason of the fact that if the subsequent state of life had existed at the time of the devolution of interest he or she would not have inherited the property. The well-known case of *Moniram Kolita* v. *Keri Kolitani* (10) laid down that principle in unequivocal terms. One sentence from the judgment may be quoted as bearing upon conversion:

> "The widow has never been degraded or deprived of caste. If she had been, the case might have been different, subject to the question as to the construction of Act 21 of 1850; for upon degradation from caste, before that Act, a Hindu, whether male or female, was considered as dead by the Hindu law, so much so that libations were directed to be offered to his manes as though he were naturally dead."

Following this decision all the High Courts have held that property once vested, under similar circumstances, cannot be divested. In *Abilakh Bhagat* v. *Bhekhi Mahto* (14), which was a case of a person becoming insane after inheritance had vested in him, Ghose, J., said that the principle of *Moniram Kolita* v. *Keri Kolitani* (10) was applicable to that case. In *Sanku* v. *Puttamma* (15) the same principle was followed. *Deo Kishen* v. *Budh Prakash* (16) is also to the same effect. It was a decision of five Judges and they affirm the proposition that under Hindu law subsequent conduct does not put an end to the rights once properly acquired. *Murli Singh* v. *Jai Singh* (17) follows this ruling. Much reliance was placed in the argument before us on *Murugayi* v. *Viramakali* (5). The judgment is based upon custom. It was the case of a person who was within the pale of Hinduism. I fail to see how that case affects the present question. I may draw attention to the observations of Mr. Ghose in his book on Hindu law wherein he says that Manu does not lay down that re-marriage while still a Hindu would deprive a Hindu widow of the inheritance once vested in her. Although the principle of stare decisis must be respected, I am not satisfied that in the present case we would be violating the rule of law laid down in *Murugayi* v. *Viramakali* (5) by holding that the widow marrying a Mahomedan does not forfeit the estate which came to her from her Hindu husband. Moreover cases of this description are of rare occurrence, and when a very important principle relating to the applicability of Hindu law is debated, I fail to see how a decision passed 40 years ago on a different set of circumstances, can be regarded as binding authority with reference to facts of a totally different character. For all these reasons in my opinion the answer to the question must be in the negative.

S.N./R.K. *Answered in the affirmative.*

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(14) [1895] 22 Cal. 864.
(15) [1891] 14 Mad. 289.
(16) [1883] 5 All. 509.
(17) [1908] 5 A. L. J. 115.

A. I. R. 1919 Madras 864 (1)

PHILLIPS AND KUMARASWAMI SASTRI, JJ.

Anantha Bhatta — Plaintiff:— Appellant.

v.

Mavinamale Anantha Bhatta and *others*—Defendants—Respondents.

Second Appeal No. 376 of 1917, Decided on 4th September 1918 against decree of Sub-Judge, South Canara, in Appeal Suit No. 88 of 1916.

Decree — Execution—Mulgeni tenant in South Canara—His claim to compensation for improvements cannot be attached and sold.

The rights of a Mulgeni tenant in South Canara are the same as the rights of a tenant in Malabar, and his claim to compensation for improvements, which is an inchoate right and becomes perfected only at the time of eviction cannot be attached and sold in execution of a decree. [P 864 C 1]

H. Balakrishna Row and *Ramanath Sujjir*—for Appellant.

B. Sitarama Row—for Respondents.

Judgment —The question is whether the right to improvements of a Mulgeni tenant can be attached and sold in execution. It is conceded that his rights are the same as the rights of a tenant in Malabar, and it has been hold by this Court in *Achuta* v. *Kali* (1) and *Eressa Menon* v. *Shamu Patter* (2) that a right to compensation for improvements is merely an inchoate right which only becomes perfected at eviction. It is a right to be enforced only at the time of eviction and the extent of the right is dependent on what may be the relations between the landlord and tenant at that time and also on the number and nature of the improvements in existence then. In the present case the lease, being permanent, the right may never mature. This being so, we must hold that such a right cannot be attached. Whether individual improvements can be attached and sold is a question which does not arise in this case and need not be discussed. The second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1884] 7 Mad. 545.
(2) [1898] 21 Mad. 138.

A. I. R. 1919 Madras 864 (2)

AYLING AND KRISHNAN JJ.

Public Prosecutor—Appellant.

v.

Sennimalai Gounden—Accused.

Criminal Appeal No. 503 of 1918, Criminal Revn. 235 of 1918 and Referred Case No. 35 of 1918, Decided on 27th November 1918 against order of Sub-Divl. First Class Mag. Coimbatore, in Criminal Appeal No. 15 of 1918.

Penal Code (1860), S. 225 (b)—Escape from custody is offence—Consent of custodian is immaterial.

An escape from lawful custody is nonetheless an offence under sections 225-B, because the escape was effected with consent of the custodian. For the purposes of the section, the consent and neglect of the custodian are placed on the same footing. 18 *Mad.* 401 and 31 *Mad.* 271 *Foll.* 7 *I. C.* 392, *not Appr.* [P 864 C 2]

Public Prosecutor—for Appellant.

Judgment.—We are bound by the authority of *Queen-Empress* v. *Muppan* (1) and *Public Prosecutor* v *Ramaswami Konan* (2), both of which place the consent and neglect of the custodian on the same footing. These rulings have been distinguished by Krishnaswami Aiyar, J. in *Public Prosecutor*, In re (3), but with all respect we do not think the ground of distinction is sound. We may refer to the wording of S. 221, I P. C. as illustrative of the meaning to be given to the word "escape" in S. 225 B. S. 221 speaks of a public servant who "intentionally suffers such person to escape." This strongly suggests that an escape is nonetheless an escape, though effected with the consent of the custodian. Under the terms of the warrant in this case, the process server was only authorized to release the judgment-debtor on actual receipt of the decree amount. We must set aside the order of the Sub-Divisional Magistrate and restore the conviction; but we reduce the sentence to the term of imprisonment already undergone which is, in our opinion, sufficient.

S.N./R.K. *Conviction restored.*

(1) [1895] 18 Mad. 401.
(2) [1908] 31 Mad 271.
(3) [1910] 7 I. C. 392.

A. I. R. 1919 Madras 865

SADASIVA AIYAR AND NAPIER, JJ.

Chinnaswami Pillai and *another*—Plaintiffs—Appellants.

v.

Appaswami Pillai and *another*—Defendants—Respondents.

Second Appeal No. 2145 of 1917, Decided on 26th July 1918, against decree of Dist. Judge, Trichinopoly, in A. S. No. 376 of 1916.

Hindu Law—Widow—Surrender by widow and daughter in favour of next reversioner with reservation for maintenance is valid.

A surrender by a Hindu widow and her daughter of their life-interest in the property of the last male owner in favour of the next reversioner, with a condition that they should be maintained by the latter, is valid and operative and accelerates the inheritance of the reversioner making him full owner of the property on that date. [P 865 C 2]

Per *Sadasiva Aiyar, J. (Napier, J. dubitante).*—The principle that onerous obigations attached to a surrender by a widow will invalidate the surrender does not apply to the case of a daughter who inherits as next heir. The only condition which can be imposed on principle upon any female heir other than the widow is that the surrender should be of the whole estate. The act of a daughter who, being the next heir, surrenders the whole estate, vests the absolute inheritance in the next male heir, even if she reserves as consideration for her surrender the full enjoyment of the property during her lifetime. [P 866 C 2]

Per *Sadasiva Aiyar, J.*—A stipulation for her own maintenance by the widow will not affect the legal result of the surrenders. A Hindu female who surrenders an estate does not become civilly dead from the date of the surrender for any purpose, except for making the person in whose favour the surrender is made heir to her husband's estate. [P 866 C 1]

Per *Napier, J.*—A surrender by a limited female owner need not necessarily be in favour of the next heir if that heir agrees to be passed over, and it is immaterial whether the next heir is a party to the deed of surrender or executes a deed of surrender for herself or simply consents to being passed over. [P 867 C 1]

Where an arrangement made at the time of surrender, though retaining a benefit for the person surrendering or even conferring a benefit on some person not entitled, is an obviously fair and just arrangement for the maintenance and benefit of the person surrendering, then the surrender is not vitiated by the arrangement. [P 867 C 2]

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar*—for Appellants.

P. Nagabhusanam—for Respondents.

Sadasiva, Aiyar J.—The plaintiffs are the appellants. On the date of the suit they were the reversionary heirs of one Chandram Pillai who died in about 1890, leaving a widow as his next heir and a daughter as the next expectant heir after the widow. A son was born to the daughter in 1893. When he was a year old the widow and the daughter executed the surrender deed Ex. 1, dated 2nd April 1894, in his favour, he being represented by his father and guardian, defendant 1. That document was a complete surrender of all the rights of the two executants in the estate of the last male owner Chandram Pillai. But there is a provision in the document that defendant 1 as guardian of his infant son and the infant himself after he attained majority, should protect the two executants meaning evidently that they should be maintained. The infant died about two years afterwards, say in 1896, and the plaintiffs now sue for the recovery of the properties from defendant 1 the widow and the daughter having died. The question is, whether the deed of surrender, Ex. 1, accelerated the inheritance to Chandram Pillai's estate of defendent 1's infant son and made him the full owner of the property on that date.

That a widow could surrender her limitted interest in her husband's estate to the next reversioner so as at once to vest the property in the next reversioner is now settled law, provided that the whole estate is surrendered. The point argued for the appellants is, that the present case is not a surrender by the widow to the next reversionary heir but it is a surrender by the widow and the next reversionary heir, who is also a female, to the second reversionary heir. Even regards the question I think there are observations in *Mulugu Kotayya* v. *Mandigonda Chandramowli Sastri* (1) : see also *Protab Chunder Roy Chowdhry* v. *Sreemutty Joy Monee Dabee* (2) which establishes the rule of law that a surrender by a widow with the consent of the next female heir to the secondary male heir can be treated as a joint surrender by both and that such a joint surrender might be treated as a surrender by the widow to the next female heir, which vests the property in the next female heir for a moment, and an immediate surrender of the property so vested for a moment in the next female heir by the latter to the next male heir, the result being to vest an absolute title in the secondary male heir. Next, it is objected that if the widow reserves any benefit for

(1) [1916] 36 I. C. 407.
(2) [1864] 1 W. R. 98.

himself when making the surrender the surrender is not one made in good faith in consonance with the principles of Hindu law and hence it is invalid. In the present case the widow stipulated that the male reversioner's guardian and the male reversioner after attaining majority should support himself and her daughter. Taking first the provision for her own maintenance I do dot think that a stipulation for her own maintenance by a widow can affect the legal result of the surrender. The language of the judgment in *Sriramulu Naidu* v. *Andalammal* (3) suggests that if a widow making a surrender imposes on the reversioner nothing more onerous than the obligation to maintain the widow, such a surrender would be valid and would vest the title in the reversioner. This is also in conformity with the principles of Hindu law a surrender being allowed by that law, as stated by Seshagiri Aiyar, J., in *Nachiappa Gounden* v. *Rangasami Gounden* (4), in order to give relief to female heirs (supposed to be incapable of prudent management) in respect of the management of the property.

The theory that a widow becomes civilly dead when she makes a surrender has no basis in any text of Hindu law. The loose expressions in some judgments as to a widow being civilly dead, when read with the context, can mean only that the next reversioner succeeds in such a case as if the widow died at the moment of surrender. She neither actually nor civilly dies then. This is also clear from the expression about civil death being followed in one of the judgments by the illustration based upon the widow's remarriage. A woman who surrenders is clearly not civilly dead for any other purpose than for the purpose of bringing in the next reversioner as heir at once to her husbands's estate. She continues to own her Stridhanam and the obligation of all persons who takes her husband's estate to maintain her, which is an absolute obligation thrown by the Hindu law, cannot be destroyed by her surrender thereof. She does not become a Sanyasi, because she surrenders her husband's estate. She is entitled to acquire properties, to retain her Stridhanam and to bring suits, and she remains competent to enter into contractual and other legal obligations.

Then coming to the provision for the maintenance of the daughter, the daughter is not (like the widow) under the Hindu law obliged even as a moral obligation to starve and stint herself because her father is dead and she inherits her father's property. The extension of the doctrine of the so called life-estate from the widow to the other female heirs is itself an unwarrnted extension of the commentators which however being the present law could not be criticized to any useful purpose. When a daughter surrenders to the next reversioner, it is arguable that even she should surrender the whole estate and should not retain any portion of the estate of the last male owner to herself in order to vest the full ownership in the next reversioner. But the principle on which it was held in *Sriramulu Naidu* v. *Andalammal* (1) that if the widow imposes any onerous obligations upon the surrenderee for her own benefit or for the benefit for her servants or for charity, the surrender is not valid, does not apply to the daughter who inherits as heir. The only condition which can be imposed on principle upon any female heir other than the widow is that the surrender should be of the whole estate. Whether therefore the case in *Challa Subbiah Sastri* v. *Palury Pattabhiramayya* (5), which went further than the decision in *Sriramulu Naidu* v. *Andalammal* (3) and which held that the imposing of an obligation upon a reversioner tc convey back a portion of the property to the widow's brother did not invalidate the surrender, can be supported or not—in parenthesis I may here state that that case and the case of *Kareti Brahmanaikudu* v. *Kareti Mahalakshmi* (6) have been followed even to that extent by a very recent case: *Gopala Krishnayya* v. *Gangayya* (7), decided by Abdur Rahim and Srinivasa Aiyangar, JJ.—I am clear that the act of a daughter who, being next heir, surrenders the whole estate, vests the absolute inheritance in the next male heir even if she received consideration for her surrender of the full enjoyment of the property during her lifetime. It follows that the second appeal fails and is dismissed with costs.

(3) [1907] 30 Mad. 145.
(4) [1915] 26 I. C. 757 (F. B.).

(5) [1908] 31 Mad. 446.
(6) [1913] 17 I. C. 487.
(7) Appeal No. 373 of 1915.

Napier, J.—I agree that this second appeal fails. I have had considerable difficulty during the hearing of this appeal in ascertaining what are the true limits laid down in the cases to the right of surrender. I think that it is clear on the latest authorities that the surrender need not be definitely to the next heir if that next heir agrees to be passed over. That has been decided in *Mulugu Kotayya* v. *Mudigonda Chandramowli Sastri* (1) and in *Satyalakshmi Narayana* v. *Jagannadham* (8), and it seems to me to be immaterial whether the next heir is a party to the deed of surrender or executes a deed of surrender for herself or simply consents to being passed over. The difficulty I have found is on the question whether an agreement for maintenance by the person who is passed over is sufficient to invalidate the transaction. Now, it is perfectly clear that according to the school of thought which is to be found in the reasoning of Sankaran Nair, J., in *Challa Subbiah Sastri* v. *Palury Pattabhiramayya* (5), it is absolutely immaterial what reservations are made at the time of surrender by a widow or indeed by any person surrendering. The view taken by him is that you have to treat the document of surrender by itself and when once the estate is vested, it is immaterial whether or not by a contemporaneous agreement provision is made for returning even a greater portion of the estate to a person who may not even be in any way connected with the original holder. Sankaran Nair, J., treats it as being analogous to an adoption with a contemporaneous agreement to transfer. Whether that analogy is sound,—and arguments by analogy are frequently dangerous—I cannot but view with alarm the proposition which comes to this, that a person holding a limited interest can enter into an arrangement with the then existing next heir, who may be in impecunious circumstances and prepared to lend himself to any arrangement for the sake of some ready money, by which the greater part of the property will be diverted from the person who at the falling in of the estate would be entitled to the whole.

As my learned brother has pointed out, this view has been accepted in the cases reported as *Karetti Brahmanaikudu* v. *Kareti Mahalakshmi* (6) and in *Gopala Krishnayya* v. *Gangayya* (7). Speaking for myself, if such an invasion on the whole doctrine of surrender is to receive the sanction of the Court, I should like to see it so laid down by a Full Bench of this Court. There is however a modified rule to be spelt out from these cases which might be that where the arrangement, although retaining a benefit for the person surrendering or even conferring a benefit on some person not entitled, is an obviously fair and just arrangement for the maintenance and benefit of the person surrendering, then the doctrine that such a surrender is not vitiated by the arrangement should be upheld. But that is not the view taken by a very eminent Hindu Judge of this Court, Subramania Aiyar, J., in *Sriramulu Naidu* v. *Andalamal* (3). He never considers this aspect of the case at all and he lays down that if the surrender is coupled with onerous conditions thrown on the person whose estate is accelerated, liabilities which are not such as would naturally devolve on him in connexion with persons to be benefited, that surrender is bad. The cases he mentions are conditions not only for the maintenance of the transferor, who was in that case a widow, but also a condition to pay a sum of money to certain dependants and to maintain a charity for all time at a certain expense and on her death to make payments of different amounts aggregating to one-fourth of the estimated value of the properties. This, as far as I gather from the language used by him in his judgment in *Challa Subbiah Sastri* v. *Palury Pattabhiramayya* (5), would have been upheld by Sankaran Nair, J., as a good surrender. Taking therefore this narrower view of Subramania Aiyar, J., and applying it to this case as we are asked to do, do the fact? fall within the mischief of the doctrines My learned brother is of opinion that a surrender by a daughter reserving the right of maintenance would be good, although there is not the direct legal liability for the support of a daughter incumbent on the estate.

I hesitate to express a definite opinion on that point. But the facts of this case being that the reservation was made by both the widow and the daughter in the deed of surrender and that it was for the protection and maintenance of the mother of the infant child in whose favour the

(8) [1909] 4 I. C. 939.

surrender was made, I am inclined to think that such a reservation is not within the mischief of the doctrine laid down by Subramania Aiyar, J., and it would certainly be covered by the suggested modification of the rule laid down in *Challa Subbiah Sastri* v. *Palury Pattabiramayya* (5). For these reasons I concur in holding that the appeal should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R 1919 Madras 868 (1)

OLDFIELD, J.

Venkamamidi Mahalakshmamma — Defendant—Petitioner.

v.

Venkammamidi Rajamma and *another* —Plaintiff and Defendants — Opposite Parties.

Civil Revn. Petn. No. 478 of 1915, Decided on 2nd March 1917, from order of Temporary, Sub Judge, Guntur, in I. A. No. 1115 of 1914.

Civil P. C. (1908), O. 20, R. 12—Partition suit—Profits prior to plaint and subsequent to it—How to be decreed stated — Inquiry ordered for later profits without notice to opposite party—High Court can interfere.

In a partition suit the award of profits prior to plaint should be made in the decree which gives possession, that is, the final decree and the profits after it may be the subject of a direction in that decree for an inquiry and of a separate final decree after its conclusion. Where an inquiry is ordered for later profits without notice to the opposite party specifically, it is competent to the High Court to interfere under S. 115.

[P 868 C 1, 2]

P. Naghabushanam—for Petitioner.

T. Prakasam—for Opposite Parties.

Judgment, — The preliminary and final decree passed by the lower Court seem to me to have been at least irregular in the provision they made respectively regarding profits before and after the beginning of Fasli 1317. The suit was no doubt for partition. But it is not disputed that O. 20, R. 12 applies. Under that rule the profits prior to plaint should be decreed in the decree which gives possession, that is, in a partition suit in the final decree; and the profits after it may be the subject of a direction in that decree for an inquiry and of a separate final decree after its conclusion. The lower Court certainly erred in dealing with the earlier profits in its preliminary decree, though it may have been open to it to deal with the later profits either prior to or after the final decree. Two consequences follow. Firstly no inference in favour of a conclusion that the later profits had been refused should have been drawn by petitioner from the irregular award of the earlier. But secondly, on the view of the Court's procedure most favourable to respondent, as it took one of two alternative courses in awarding the later profits and that not the one indicated by any issue already framed, it should have given petitioner clear notice of its inquiry. This it did not do. For the general notice relied on merely that which the parties had of the proceedings as pending in no way gave warning that the trial of an issue as to these profits was to take place at once and was not to be postponed until a direction for it had been given in the final decree. The failure to give this notice seems to me a material irregularity, which justifies the application of S. 115, Civil P. C.

It is argued that this Court is asked to revise the lower Court's order rejecting petitioner's application for an amendment of the decree, not the decree itself, and that the remedy of appeal was open to her. But owing to the lower Court's procedure she had no notice that the decree contained or was likely to contain anything she could object to. Her petition no doubt should have been worded and dealt with as for review of the decree, not an amendment. But it contained all the allegations necessary to justify a review and they have been considered by the lower Court.

The result is that the lower Court's order is set aside and it is directed to readmit I. A. No. 1115 of 1914 and deal with it as a review petition in the light of the foregoing with reference to the allegation that new and important evidence, which petitioner was not disabled from adducing by any fault of her own is now available. Costs in this Court and the lower Court to date will be costs in the cause.

S.N./R.K. *Petition allowed.*

A. I. R. 1919 Madras 868 (2)

BAKEWELL, J.

L. Abdul Sukur Sahib—Plaintiff.

v.

Secretary of State—Defendant.

Original Civil Suit No. 325 of 1917. Decided on 10th January 1918.

(a) Income-tax Act (2 of 1886), S. 31 (3) as amended by Act (5 of 1916)—Effect of amendment is not only change in rate—It authorizes re-assessment.

The change introduced by Act 5 of 1916 is not only of the rates of tax, but under the Amending Act a re-assessment of income may be made. [P 869 C 1, 2]

(b) Income-tax Act (2 of 1886), S. 31 (3)—Effect of Cl. 3 added by Act 5 of 1916 stated—Agreement subsists as to sums accrued due but not paid—Section is limited to sums not become payable.

The effect of the new sub-S. 3, which was added to S 31, Income-tax Act (2 of 1886), is that a subsisting agreement for composition is put an end to on that date and any future agreement is put an end to when any further change of the rate of tax is made, The agreement still subsists as to sums which have become payable but have not been actually paid at the date of the change of rate. The words 'as regards any tax not already due thereunder limit the operation of the section to sums which have not become actually payable, [P 869 C 2]

L. A. Govinda Raghava Aiyar and P. Tirumalachari—for Plaintiffs.

Advocate General—for Defendant.

Judgment.—The question in this case is what is the true construction of sub-S. 3, S. 31, Income-tax Act of 1886 which was added to that section by Act 5 of 1916. The plaintiff entered into an agreement for a composition of the tax payable by him prior to the amendment of the section and maintains that the agreement is still subsisting, at least to some extent, and that he is not liable to a re-assesment of his income. It has been argued that the amount of tax entered in the agreement was determined with regard to the vicissitudes of plaintiff's trade, which might yield less profits in one year than in another and that hardship is caused by exacting the tax for only a portion of the term fixed by the agreement, which itself provides for a change of rate of tax, and that it must have been intended by the legislature only to alter the rate of tax and not to disturb the basis of the agreement, or in other words, not to require a re-assessment of income. As pointed out by the learned Advocate-General, the change made by the Act of 1916 is not only of the rates of tax but the new schedule prescribes new scales of taxation, so that the effect of the construction contended for would be to render the new scales inapplicable. The subsection provides that

"any agreement . . . shall be determined.....by any change. .... in the rates at which the tax is assessable,"

and the ordinary legal meaning of the word "determined" is "put an end to." If the argument of the learned vakil for the plaintiff were adopted the word "determined must be read as "modified," "varied," or "limited" and I do not think that any reason has been shown for adopting such a construction.

The object of the agreement of compromise is to avoid re-assesment in each year of the term mentioned in it, and the tax is thus fixed for future years as well as for the year in which the agreement is made, and the agreement ascertains the tax payable in each year and fixes the date of payment. The tax therefore "becomes due" under the agreement on a certain date. The Act of 1916 came into force on 1st April 1916, and the effect of the subsection is that a subsisting agreement is put an end to on that date, and any future agreement is put an end to when any further charge of the rate of tax is made: but the words "as regards any tax not already due thereunder," i. e., under the agreement, limit the operation of the section to sums which have not become actually payable, so that the agreement still subsists as to sums which have become payable but have not been actually paid at the date of the change of rate. By this construction all the words of the section are given full effect, and the fact that hardship may be caused to the plaintiff is no reason for adopting a forced construction. I answer issue 5 in the affirmative. On this ruling it is unnecessary to consider the other issues in the case. The suit must be dismissed with costs. By agreement of the parties Suits Nos. 326, 334 and 333 of 1917 are decided in accordance with this judgment and they are also dismissed with costs.

S.N./R.K *Suits dismissed.*

A. I. R. 1919 Madras 869

ABDUR RAHIM, J.

(*Kamandur*) *Krishnamacharlu*—Petitioner.

v.

B. Danoji and others — Opposite Parties.

Civil Revn. Petn. No. 1004 of 1917 Decided on 12th August 1918 to revise order the of Court of Dist. Munsif, Tirupati.

(a) Civil P. C. (1908), O. 21, R. 91—Cancellation of execution sale under R. 21 without notice to persons in whose favour

ratable distribution is made—High Court cannot interfere.

Where an execution sale is cancelled under the provisions of O. 21, R. 91, without notice to persons having an order in their favour for rateable distribution of the property, the Court, in passing the order, cannot be said to have failed or declined to exercise a jurisdiction vested in it by law and the High Court cannot interfere with the order in revision. [P 870 C 2]

(b) Civil P C. (19081), S. 15, Error in interpreting section is not failureof juri sdiction.

A mere error in the interpretation of a section is not a failure to exercise jurisdiction within the meaning of S. 115. [P 870C 2]

(c) Civil P. C. (1908), O. 21. Rr. 92 and 93 —Persons having order of rateable distribution — Order behind their back does not bind them for R. 93.

Semble.—Persons who have an order for rateable distribution in their favour are persons affected by an application to set aside the sale within the meaning of O. 21, R. 92, and an order made behind their backs cannot bind them for the purposes of O. 21, R. 93. [P 870 C 2]

A. Ramachandra Iyer—for Petitioner.

T. M. Krishnaswami Aiyar—for Opposite Party.

Judgment. — This petition raises a somewhat difficult question of law on the interpretion of Rr. 92 and 93, O. 21, Civil P. C. The petitioner before the High Court bought certain properties at an auction sale and afterwards applied to have the sale set aside under R. 91 of O. 21, Civil P. C. on the ground that the judgment-debtor had no saleasble interest in the properties sold. He succeeded in his application, but he didnot make parties to the proceeding the respondents before me who had obtained orders for rateable distribution of the sale proceedsof the property of the judgment-debtorbefore the application was made by the petitioner to set aside the sale under R. 91 of O. 21, Civil P. C., The District Munsif held that under R. 92, O. 21, persons having an order in their favour for rateable distribution were entitled to notice as persons affected by the application to set aside the sale and that therefore the respondents were not bound by the order made in their absence on the application of the petitioner.

It is argued before me by the learned vakil for the petitioner that once there was order made under R. 92, it binds all persons affected thereby, although they were not made parties to the proceedings, and all that the Court has to do under R. 93, when it finds that such an order has been made, is to direct any person to whom the purchase-money has been paid to refund it. The question is not covered by any authority, and as I have already stated, is not free from difficulty. If it were necessary to express my view on this point. I should be inclined to hold that persons who had obtained orders for rateable distribution are persons affected by an application to set aside the sale, within the meaning of R. 92, and an order made behind their backs cannot bind them for the purposes of R. 93. But Mr. T. M. Krishnaswami Aiyar has, I think, rightly pointed out that in any case this is not a matter in which any question of jurisdiction arises so as to call for interference of this Court under S. 107, Government of India Act. The District Munsif was entitled, in deciding upon the rights of the parties, to deal with the question of law raised before him, and this is not a case in which it couid be said, even if he erred in his interpretation of Rr. 92 and 93, that he declined or failed to exercise a juris liction vested in him by the law. The petition is therefore dismissed with costs.

S.N./R.K. *Petition dismissed.*

A. I. R. 1919 Madras 870

AYLING AND SESHAGIRI AIYAR, JJ.

A. Cunniah Mudaly—Plaintiff—Appellant.

v.

A. Rangaswami Mudali and *others*—Defendants—Respondents.

Original Side Appeal No. 20 of 1916, Decided on 28th January 1918 from jndgment and revised decree of Bakewell, J., D/- 22nd December 1915.

Civil P. C. (1908), S. 97 — Preliminary decree revised or modified substantially in appeal—Final decree passed before result of appeal is inoperative.

If a preliminary decree passed under S. 97 is reversed or substantially modified in appeal the final decree passed on the footing of that preliminary decree before the decision in appeal ceases to be operative.

C. P. Ramaswami Aiyar and *A. Durai-sami Aiyar*—for Appellant.

C. Padmanabha Aiyangar—for Respondents.

Judgment.—This is a suit for partition. The plaintiff and defendant 1 are the sons of one Cunniah Mudali and defendants 2 and 3 are the sons of defendant 1. When the suit first came on for hearing, the learned Judge referred the question regarding the extent of the family property to a Commissioner. The Commissioner

sent in his report in April. Wallis, J., as he then was, differed from the Commissioner on one point, namely, that the Royapettah garden which was held to belong to the wife of defendant 1 by the Commissioner was family property. The learned Judge passed a preliminary decree to the effect that the Royapettah garden should go to the plaintiff on his paying Rs. 600 to defendants 1 to 3 and that items 1 to 3 should go to defendants, 1 to 3 who were ordered to pay to the plaintiff a sum of Rs. 3,800 odd within a month. There was a further direction, that if the said sum of Rs. 3,800 odd was not paid in a month, the plaintiff was to become absolute owner of items 3. There was an appeal against this preliminary decree, which was not decided until two years after. In the meantime a final decree in pursuance of the preliminary decree was passed. As the defendants 1 to 3 did not pay the money within the time stipulated, the plaintiff was put in possession of items Nos. 1 to 3 as absolute owner thereof.

The appeal against the preliminary decree was disposed of on 9th September 1912. The appellate decree varied the preliminary decree by declaring that the Royapettah garden was the property of defendant's 1 wife and that it was not part of the family property. As a result of this pronouncement, application was made by defendant 1 for restitution of the garden to the wife. Thereupon Bakewell, J., before whom the application was made came to the conclusion that the original final decree passed on the footing of the preliminary decree should be revised and that a fresh final decree should be passed. It is against this direction of the learned Judge that this appeal has been preferred. We think the course adopted by the learned Judge is right. S. 97, Civil P. C., makes it incumbent upon the parties to appeal against the preliminary decree. Under what circumstances such an appeal should be preferred has been pointed out by the Judicial Committee in *Ahmed Musaji Saleji* v. *Heshim Ebrahim Seleji* (1). In the present case, by the passing of the decree in appeal, the original partition has become infructuous. The equalisation as to value was dependent upon the view that the Royapettah garden belonged to the family. When that view was upset in appeal it became necessary that there should be a fresh partition. Consequently the final decree passed by Wallis J., can no longer remain in force. It was pointed out in *Lakshmi* v. *Marudevi* (2) and in *Ramien* v. *Veerappudian* (3) that if a preliminary decree is reversed on appeal, the final decree passed on the footing of that preliminary decree ceased to be operative. We think the same result would follow in cases of modifications of the preliminary decree which imperilled the original final decree. In our opinion, the result of the appeal was to imperil the final decree based on the preliminary decree. The principle of the decisions of Jenkins, C. J., and Mookerjee, J., in *Nistarinee Dabee* v. *Rai Mohun Biswas* (4) and *Abdul Jalil* v. *Amar Chand Paul* (5) and of the decision in *Wahidunnissa* v. *Dip Narain Pershad* (6) are applicable to the present case. We must therefore uphold the order of Bakewell, J., There has been great delay on the part of the respondents 1 to 3. We do not think they are entitled to their costs in this appeal. The other costs have been provided for by the learned Judge and we agree with his directions. We dismiss the appeal.

S.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1915 P. C. 116=42 Cal. 914=28 I. C. 710=42 I. A. 91 (P. C.).

(2) A. I. R. 1915 Mad. 197=12 I. C. 664=37 Mad. 29.

(3) A. I. R. 1914 Mad. 473=14 I. C. 394=37 Mad. 455.

(4) [1913] 20 I. C. 576.

(5) [1913] 21 I. C. 510.

(6) [1916] 35 I. C. 873.

A. I. R. 1919 Madras 871

WALLIS, C. J. AND SESHAGIRI AIYAR, J

Ganagdhara Ramarao and *another*—Plaintiffs—Appellants.

v.

Venkata Kumara Kumara Mahipati Surya Rao and *others* — Defendants—Respondents.

Civil Appeal No. 360 of 1917, Decided on 2nd October 1918, against order of Sub-Judge, Cocanada, in I. A. No. 474 of 1917.

(a) Civil P. C. (1908), S. 2 (2)—Order striking out defendant and dismissing suit as against him is "decree".

An order striking out a defendant from the record on the ground that there is no cause of action against him and dismissing the suit so far as he is concerned is a "decree" within the meaning of S. 2 (2), and is appelable. [P 872 C 1]

(b) Specific Relief Act (1877), S. 42—Suit for mere declaration for status as reversioner is not maintainable—Grant of relief is discretionary.

A suit for a mere declaration of plaintiff's status as a reversioner does not lie under S. 42. The grant of relief under that section is discretionary with the Court and there is a settled rule of practice against the grant of such relief when the only question for decision is which of two persons is entitled to the character of next reversioner at the date of the institution of the suit: *A. I. R.* 1919 *Mad.* 793 and *A. I. R.* 1915 *Mad.* 348, *Expl.* [P 872 C 2]

(c) Civil P. C. (1908), O. 1, R. 10, Cl. (2)—Rule relates to striking out of parties — Party's name struck out and substantial relief ordered to be deleted—Adjudication of rights is conclusive.

Per *Seshagiri Aiyar, J.*—Order 1, R. 10, Cl. 2, does not relate to the deletion of reliefs but only to the striking out of parties. Consequently where a substantial right has been adjudicated upon and where a party's name has been struck out on the ground that a suit against him would not lie and where a substantial relief claimed in the suit has been ordered to be deleted, the Court has conclusively adjudicated the rights of the parties with regard to the matter in controversy. [P 873 C 2]

C. P. Ramaswami Aiyar and *A. Suryanarainiah*—for Appellants.

S. Srinivasa Aiyangar, K. N. Aiyah and *P. Narayanamurthi* — for Respondents.

Wallis, C. J.—This is an appeal from an order striking out the name of defendant 1 on a petition under O. 1, R. 10, for the amendment of the plaint. No separate appeal is provided under the Code from orders passed under this rule, but in this case the Subordinate Judge decided to strike out defendant 1's name on the ground that the plaint disclosed no cause of action against him and ordered the suit to be dismissed as against him. In these circumstances I think the order comes within the definition of a decree and is appealable as such. The facts are these: Defendant 4 is the widow of a junior member of the Pittapur family, and the Rajah of Pittapur, defendant 1 has recently brought a suit as next reversioner of the propety in her enjoyment for a declaration that an adoption made by her is invalid. The widow, as one of her defences, contested the Rajah's claim to be the next reversioner and denied that he was related to her deceased husband. The present plaintiffs, who also deny the Rajah's relationship and claim to be themselves the next reversioners to the estate in the hands of the widow, sought unsuccessfully to be made parties to that suit for the purpose of establishing as against the Rajah that they are the next reversioners. Having failed in that attempt, they then instituted the present suit against the Rajah and the widow for a declaration that the Rajah, defendant 1, is not the nearest reversioner, or a reversioner at all, of the husband of defendant 4 and for a further declaration that the adoption of defendant 2 by defendant 4 was invalid. Defendants 2 and 4 in their written statements have not challenged the plaintiffs' claim to be the next reversioners, and indeed, it is their case in the suit brought against them by the Rajah that the plaintiffs and not the Rajah are entitled to that character. In these circumstances it is clear that the Rajah is not a necessary party to the suit as between the plaintiffs and the widow and the adopted boy, and that the suit against him cannot be supported unless it be held as argued, that the plaintiffs are entitled to maintain a separate suit against the Rajah for a declaration that the plaintiffs and not the Rajah are the next reversioners of the deceased and that the latter is not entitled to usurp the character of next reversioner.

Mr. C. P. Ramaswami Aiyar argued that the plaintiffs are persons entitled to the lawful character of next reversioners within the meaning of S. 42, Specific Relief Act, and that they are entitled under that section to bring a declaratory suit against defendant 1 who questions it. The granting of the relief under that section is discretionary with the Court, and it appears to me that there is a settled rule of practice against the grant of such relief when the only question for decision is which of two persons is entitled to the character of next reversioner at the date of the institution of the suit, a decision which may serve no useful purpose, as both the claimants may be dead and a different person entitled to succeed when the succession actually opens. In the most recent case in *Saudagar Singh* v. *Pardip Narayan Singh* (1) Lord Parker of Waddington, delivering the judgment of the Judicial Committee, stated that the point was simply whether under the practice prevalent in India, such a declaration, that is a declaration under S. 42, ought to have been made. In the present case, I think

(1) A. I. R. 1917 P. C. 196=45 Cal. 510=43 I. C. 484=45 I. A. 21 (P. C.).

the Subordinate Judge was right in holding that it ought not. Mr. Ramaswami Aiyar argued that the fact that the Rajah had brought a suit in the character of the next reversioner made a difference, but his client has refrained, no doubt advisedly from praying by way of consequential relief for an injunction restraining the Rajah from prosecuting the other suit. Whatever grounds the plaintiffs may have had for asking to be made parties defendant in the other suit, a matter not now before us they ought not, in my opinion, to be allowed either by reason of that failure or on any other ground, to maintain the present suit against the Rajah and the Subordinate Judge was right in dismissing it. The appeal fails and must be dismissed with costs.

Seshagiri Aiyar, J.—I am of the same opinion. This appeal raises some interesting questions. The plaintiffs, who are the appellants, sued for a declaration that defendant 1 is not the nearest reversioner to the estate of one Raja Venkata Rao and that he is not entitled to conduct any proceedings in respect of the said estate and for a further declaration that adoption of defendant 2 made by defendant 4 to her husband, the said Venkata Rao, is not valid. The late Raja of Pittapur had a brother named Raja Venkata Rao. The latter before his death, it is alleged gave his wife, defendant 4, authority to adopt a son. She adopted the brother of the plaintiffs. Defendant 1 is the present owner of the Pittapur Zamindari. On the death of the last zamindar his status as Aurasa son of the zamindar was challenged. The High Court and the Judicial Committee, without expressing any opinion on this question, held that under the will of the previons zamindar defendant 1 was entitled to the estate as persona designata. This was in 1912. In Original Suit No. 55 of 1915 the present defendant 1 brought a suit for a declaration that present defendant 4 was not entitled to adopt a boy to her husband. The present plaintiff intervened and they wanted to be made parties to that suit. Their application was dismissed. In revision the High Court refused to interfere. That suit is now being tried. In substance the present plaintiff's contention is that as defendant 1 is not the Aurasa son of the late zamindar he is not the nearest reversioner to the estate of Raja Venkata Rao and that consequently he has no right to bring a suit to declare that the adoption by Raja Venkata Rao's widow is invalid. The Subordinate Judge in a carefully written judgment came to the conclusion that defendant 1's name should be struck out and that the prayer against him should be deleted. Against that order this appeal has been preferred.

A preliminary objection was taken by the learned Advocate General against the maintainability of the appeal. His contention is that the order of the Subordinate Judge comes under O. 1, R. 10, Cl. 2, Civil P. C., and that no appeal is provided against it under O. 43. In a way the conclusion of the Subordinate Judge may be said to come within O. 1, R. 10. But what we have to see is the substance of the order and not the form of it. In his order the Subordinate Judge examined the right of the plaintiff to bring a suit like the present one and concluded, having regard to certain authorities which he has quoted, that such a suit would not lie. In my opinion this is an adjudication determining the rights of the plaintiffs to bring a suit of this nature; and his order is a "decree" as defined in S. 2, Cl. 2, Civil P. C. There is one other answer to this preliminary objection. I am disposed to agree with Mr. C. P. Ramaswami Aiyar, who appeared for the appellauts, that unless the removal of the plaintiff or defendant leaves the suit intact O. 1, R. 10, Cl. 2, cannot apply. In this clause the words are:

"The Court may order that the names of any party improperly joined whether as plaintiff or defendant be struck out."

That is to say, the impropriety is in introducing a party who has no connection with the reliefs claimed in the plaint. Moreover O. 1, R. 10, Cl. 2, does not relate to the deletion of reliefs, but only to the striking out of parties. Consequently where a substantial right has been adjudicated upon and where the party's name has been struck out on the ground that a suit against him would not lie and where a substantial relief claimed in the suit has been ordered to be deleted, I am of opinion that the Court has:

"conclusively adjudicated the rights of the parties with regard to a matter in controversy,"

and that therefore the order of the Subordinate Judge is a decree. The preliminary objection must therefore be overruled. On the merits very elaborate argu-

ments were addressed to us on both sides. It is now settled that a reversioner has no personal right of action. If he happens to be the next reversioner or if he is able to prove that the next reversioner has neglected his rights, he is given a right of action as representing the entire body of the reversioners. In other words, he has no individual rights or in the language of S. 42, Specific Relief Act, "is not entitled to any legal character in his own right." Therefore the first of the ingredients necessary to enable him to sue under S. 42, Specific Relief Act, is wanting.

Mr. Ramaswami Aiyar referred to some decisions of this Court as supporting his contention. In *Bobba Padmanabajudu* v. *Bobba Buchamma* (2) I pointed out that a suit by a reversioner for a declaration that his divided brother did not give authority to adopt as alleged by his widow is maintainable. My conclusion was in accordance with the judgment of the Judicial Committee which I quoted. I do not think that any observation of mine in that judgment lends support to the maintainability of the present suit. Reference was also made to *Gandla Pedda Nagana* v. *Siranappa* (3), wherein I traced the history of actions under S. 42. Mr. Ramaswami Aiyar referred to the head-note, (*of* 38 *Mad.* 1162) which makes it appear as if the suit was brought by a reversioner and contended that if a reversioner was allowed to sue for a declaration that a decree obtained by a third party against property in the hands of the widow is not binding on him, the present suit is equally maintainable. In my judgment I pointed out that the suit was not really one by a reversioner but by a person who had succeeded to the property on the death of the widow.

Even in my judgment the expression 'reversioner" appears in one or two places. But the expression has not been employed as referring to the rights of persons before succession opens to them, but only as describing what their status was before the widow died. The decision therefore does not help the appellants. On the other hand there is the decision of the Judicial Committee in *Janaki Ammal* v. *Narayanasami Aiyar* (4) which seems to be conclusive on the question now in dispute. In that case the suit was brought by a reversioner for a declaration that the widow was wrongfully wasting and alienating the property. In the first Court the allegations of waste and alienation were found against. But as there was an issue whether the plaintiff was a reversioner the first Court gave a decree embodying such a declaration. On appeal to the High Court this Court agreed with the lower Court that no acts of waste were proved and held that the declaration should remain. Before the Judicial Committee it was contended for the respondents that "as next reversioner he was the proper person to sue for the protection of the estate and therefore he had a "legal right as to property," within the meaning of S. 42, Specific Relief Act"

It is with reference to this contention that their Lordships say in p. 636 (of 39 *Mad*:

"And in their Lordships' opinion the case must accordingly be treated as if the suit had been directed simpliciter to a declaration of the plaintiff's individual right. In the view of the Board it is not legitimate to give a plaintiff, under cover of a request for "further relief" after all the substantial heads of a claim have failed, greater right to obtain a declaration than he would have had if such a declaration had been asked directly and unaccompanied by other and unfounded claims."

These observations are exactly in point. If the suit against defendant 1 is to be regarded simply as one for a declaration that the plaintiffs are the reversioners and not defendant 1, the observation of the Judicial Committee leaves no room for doubt that such a suit would not be maintainable. Mr. Ramaswami Aiyar sought to distinguish this case by arguing that this was not a case in which there were rival claimants to the nearest reversionership. I do not think that this matters. In *Janaki Ammal* v. *Narayanasami Aiyar* (4) there was an issue whether the plaintiff was the nearest reversioner. The fact that the nearest reversionership was denied by the widow and not by another reversioner is not a ground for distinction. I have already pointed out that each reversioner has an individual legal character. Mr. Ramaswami Aiyar referred to the decision in *Saudagar Singh* v. *Pardip Narayana Singh* (1), where declaration as to the status of the nearest reversioner was

(2) A.I.R. 1919 Mad. 793=47 I. C. 702.
(3) A.I.R. 1915 Mad. 348=26 I. C. 232.
(4) A.I.R. 1916 P. C. 117=39 Mad. 634=43 I. A. 207=37 I. C. 161 (P.C.).

embodied in the decree. Lord Parker distinguishes the case in *Janaki Ammal* v. *Narayanasami Aiyar* (4) on the ground that the declaration in the case before the Board was only incidental to the main relief given in the case. It is stated in the judgment:

"It is quite true that it involves a finding that the plaintiffs in this case are reversionary heirs, but that must always be the case where a declaration is made following the III. (c) of the section because it is only in virtue of the persons claiming the declaration being reversionary heir and therefore presumptively entitled that the declaration is made."

In that case the substantial declaration was as to the validity of the document and therefore the declaration as to reversionership was really a part of the main relief given in the case. I do not think this decision is any authority for the proposition that a bare declaration of the status as a reversioner lies under S. 42, Specific Relief Act. I do not think it necessary to examine the other cases quoted at the Bar. I think the decision of the Subordinate Judge is right and this appeal should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 875

SPENCER AND KRISHNAN, JJ.

Pallikandi Kathaparath Mammad and *another*—Plaintiffs—Appellants.

v.

Matancheri Mammad—Defendant—Respondent.

Second Appeal No. 347 of 1917, Decided on 20th August 1917, against decree of Sub-Judge, South Malabar, in Appeal Suit No. 59 of 1916.

(a) Deed—Burden of proof—Suit based on document—Onus lies on plaintiff to prove that it is genuine.

In a suit based on a document, the onus lies on the plaintiff to prove that it is genuine. The fact that it was found by the Registrar to be genuine in a registration inquiry does not affect the question of onus in a civil suit: 15 *Mad.* 138, *Expl.* [P 875 C 2]

(b) Mortgage—Suit on—Failure by usufructuary mortgagee to prove genuineness of mortgage — Mortgagee cannot on appeal claim subrogation.

A usufructuary mortgagee who fails to prove the genuineness of his mortgage-deed in a suit for possession cannot, in appeal, be allowed to claim a right of subrogation especially where the mortgagor is in possession as lessee of the prior mortgagee. [P 875 C 2]

K. R. Subramania Sastri and *K. P. Ramakrishna Iyer*—for Appellants.

C. Kunhiraman—for Respondent.

Judgment.—Plaintiff sued to recover the two items of property in suit on the strength of Ex. A, an usufructuary mortgage-deed alleged to have been executed by the defendant to him. That document has been found by the lower Court not to be proved to have been genuine. It is argued before us that the burden of proof has been wrongly placed by the Subordinate Judge on the plaintiff to prove that the document was genuine, because that document was found to be genuine by the District Registrar when he held an inquiry and ordered the compulsory registration of it, even though the defendant denied its genuineness before him. It is difficult to see how this can be allowed to affect the question, the burden of proof being in the first instance on the party setting up the document to prove its genuineness. It may be, as held in the Full Bench case of *Atchayya* v. *Gangayya* (1), that the Registrar was a Court under S. 195, Criminal P. C., when he held the enquiry, but that view cannot affect the question of proof which is the question here. We think that the Subordinate Judge was right in putting the burden of proof on the plaintiff to prove this document when he sued on it.

The next point taken is that, as plaintiff has paid off the previous usufructuary mortgage on the two items in favour of one Ali, plaintiff should have been given Ali's right under the doctrine of subrogation and this suit should have been decreed on that footing. Plaintiff's suit is for possession of the property. Assuming without deciding that plaintiff was entitled to be subrogated to the rights of Ali he cannot recover possession in this suit on that footing, as defendant was in possession of the properties as lessee of Ali even though the leases Exs. D and H have expired. The lease rights of defendant will have to be adjudicated upon before possession can be taken away from him. We canot well allow that to be done in this case, as plaintiff did not set up his right of subrogation in any of the lower Courts and to do so now will complicate the inquiry. Plaintiff can enforce his rights, if any, by way of subrogation in a fresh suit if so advised, when the question of the amount paid by plaintiff on defendant's behalf and the question, what the arrangement between

(1) [1892] 15 Mad. 138.

plaintiff and defendant was, whether to give a hypothecation or an usufructuary mortgage, may be considered. This suit for possession fails even if plaintiff has such a right. We think the decree of the Subordinate Judge is right and we dismiss this appeal with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 876

OLDFIELD AND SESHAGIRI AIYAR, JJ.

Angia Kuppier—Plaintiff—Appellant.

v.

Periakaruppa Karundan—Defendant—Respondent.

Second Appeal No. 1270 of 1918, Decided on 31st January 1919, against the decree of District Judge, Madura, in Appeal No. 226 of 1917.

Transfer of Property Act (1882), S. 68 (b) — Usufructuary mortgage — Attestation defective — Mortgagee dispossessed by third party—Suit by mortgagee for recovery of mortgage money held not to lie.

The failure to get back lost possession does not fall within S. 68 (b).

Defendant 1 executed a usufructuary mortgage-deed in favour of the plaintiff, which was not in proper form for want of attestation. The mortgagee, while in possession was dispossessed by a third party with whom the mortgagor did not act in collusion. The plaintiff thereupon sued defendant 1 for recovery of the mortgage money:

Held: that the suit did not lie, as (1) the mortgagor did not take active steps to deprive the mortgagee of his possession and (2) the mortgagor was not guilty of any default prior to deprivation as required by S. 68 (b): *A. I. R.* 1916 *P. C.* 119 and 7 *I. C.* 251, *Expl.* and *Dist.*

Held, also, that S. 68 (c) had no application as the mortgagor was not called upon to furnish other security before suit. [P 876 C 1, 2]

C. S. Venkatachariar—for Appellant.

Judgment.—The undisputed facts are that defendant 1 executed a deed of mortgage to the plaintiff, which was not in proper form owing to want of attestation. After the mortgage, the plaintiff was in possession for some time and then he was dispossessed by defendants 2 to 4 who claimed the property by title paramount. There is no allegation that defendant 1 aided or abetted these other defendants in depriving the plaintiff of his possession. Under these circumstances, plaintiff would not be entitled to sue for the mortgage money as such, even if the mortgage was in proper form. Reliance was placed upon *Ram Narayan Singh* v. *Adhindra Nath Mukherji* (1) for the proposition that even though plaintiff may not be able to assert his claim as mortgagee, he can claim the money advanced by him on the footing that the mortgagor should refund it. In the case before the Judicial Committee the mortgagor had taken active steps to deprive the mortgagee of his possession. To such a state of circumstances Cl. (b) of S. 68, T. P. Act, would in terms apply provided the mortgage was otherwise enforceable; but the Judicial Committee held that even though the mortgage qua mortgage was not valid, the mortgage money was recoverable. We are not prepared to extend the reasoning of that decision to a case where the mortgagor has done no act to deprive the mortgagee of possession. Then it was contended that the case fell under Cl. (c), S. 68, inasmuch as the mortgagee was deprived of his security by a stranger. If that is taken to be the finding, then before suing the mortgagor for the money, the mortgagee ought to have called upon the mortgagor to furnish some other security equivalent to the one which he was dispossessed of.

The last argument related to Cl. (b) and it was contended that as the mortgagor did not, when called upon, defend his title against defendants 2 to 4 he must be deemed to have been guilty of default which resulted in depriving the mortgagee of his possession. But the default referred to in Cl. (b) must be anterior to the deprivation. The failure to get back lost possession is not within the clause. In *Bhola Nath* v. *Hara Mohan* (2) the default was at the date of mortgage. We are not however to be understood as deciding that the failure to observe the conditions mentioned in S. 68 would amount to default on the part of the mortgagor. We therefore agree with the lower Court's conclusion, though not with the reason given by either of them. In the circumstances of the case, we permit the plaintiff to withdraw the suit with liberty to bring a fresh suit for the money, if he is otherwise entitled to it, on his paying all the costs of defendant 1 incurred up to date within two months from now.

S.N./R.K. *Order accordingly.*

(1) A. I. R. 1916 P. C. 119=44 Cal. 388=38 I. C. 932=44 I. A. 87 (P. C.).

(2) [1910] 7 I. C. 251.

A. I. R. 1919 Madras 877

SPENCER, J.

Mamidi Appayya and *others* — Petitioners.

v.

Yedan Venkataswami and *others*—Opposite Party.

Civil Revn. Petns. Nos. 1394 and 1393 of 1916, Decided on 18th February 1918, from order of Principal Dist. Munsif, Bezwada, in Civil Misc. Petn. No. 1918 of 1916, D/. 24th July 1916.

(a) Arbitration — Validity— Absence of some arbitrators at meetings— Award is invalid.

For a final award by arbitrators to be valid, it is essential that all the arbitrators should have been present at all the meetings including the last, that witnesses should have been examined in the presence of all and that all should have consulted together as to the form that their award should take. [P 877 C 1, 2]

(b) Civil P. C. (1908), Sch 2, Paras. 12 and 14 — Period of ten days' limitation for applying to set aside award is not applicable to proceedings under paras. 12 or 14— Lim. Act (1908), Art. 158.

The period of ten days' limitation for applying to set aside an award prescribed under Art. 158, Lim. Act, is not applicable to proceedings under para. 12, para. 14, and there is no limitation for making an application to remit an award for reconsideration of the arbitrators owing to some illegality being apparent on the face of it; 19 *I. C.* 496, *Foll.* [P 877 C 2]

(c) Arbitration—Validity— Award signed by some only of several arbitrators— Award is illegal — Civil P. C. (1908), Sch. 2, Para. 14.

The fact that when an award is presented, it bears the signature of some only of the arbitrators is an illegality on the face of the award which should lead the Court to remit it for reconsideration of the arbitrators. [P 877 C 2]

T. Ramachandra Row — for Petitioners.

V. Ramadoss—for Opposite Party.

Judgment.—These civil revision petitions arise out of a suit in which there was a reference made by consent of the parties to three arbitrators and a decree was passed by the Court on the award of two of them. The parties agreed to abide by the decision of the majority, but the petitioners seek to impugn the legality of the award which two out of the three arbitrators have signed because the arbitrators did not all meet together and deliberate upon the matter submitted to them, as appears from the third arbitrator's separate award or report and from defendant 2's affidavit. It is a well established principle in regard to arbitration that for the final award to be valid, it is essential that all the arbitrators should be present at all the meetings including the last, that witnesses should be examined in the presence of all, and that all should consult together as to the form that their award should take: vide *Nand Ram* v. *Fakir Chand* (1), *Thammiraju* v. *Bapiraju* (2) and *Abu Hamid Zahir Ala* v. *Golam Sarwar* (3). Also Banerji's Law of Arbitration in India, Edn. 2, p. 225].

After the District Munsif had passed a decree in the terms of the award of the majority of the arbitrators, defendants 2, 4 and 5 presented a review petition which was rejected without going into the question of the legality of the award, mainly for the reason that the review petition was put in nearly three months after the decree had been passed, while Art. 158, Lim. Act, allows only ten days' time to apply to set aside an award from the date of its submission to the Court. The respondents support the District Munsif's order declining to review his own judgment on the ground of limitation, and further raise the same objection against the High Court's entertaining the present petition and quote *Ghulam Khan* v. *Muhammad Hossain* (4) in support of their contention. It has however been held in this Court that the period of ten days' limitation for applying to set aside an award prescribed under Art. 158, Lim. Act, is not applicable to proceedings under S. 12 or S. 14, Sch. 2 of the present Civil P. C., and that there is no limitation of time for making applications to remit an award for re-consideration of the arbitrators owing to some objection to the legality of the award being apparent on the face of it: see *Hyder Sahib* v. *Giria Chetttr* (5).

I think that the fact that the award, when presented, bore the signatures of only two out of the three arbitrators was an illegality on the face of the award: see *Ramesh Chandra Dhur* v. *Karunamoyi Dutt* (6) and that this omission should have attracted the attention of the Court and should have led to consideration whether the award should not be remitted under S. 14, Cl. (c), Sch. 2, Civil P. C., for reconsideration by the arbitrators.

(1) [1885] 7 All. 523.
(2) [1889] 12 Mad. 113.
(3) [1917] 40 I. C. 422.
(4) [1902] 29 Cal. 167=29 I. A. 51=8 Sar. 154 (P.C.).
(5) [1913] 19 I. C. 496.
(6) [1906] 33 Cal. 498.

The pleader for defendants 2, 4 and 5 filed an affidavit in which he explained that he did not file objections to the award of the two arbitrators, as he thought that the award of the third arbitrator, which was favourable to his clients, was the only award on the record. The District Munsif observes that the latter cannot strictly be termed an award and that the pleader had no good reason for being misled and was negligent. He should have lost no time in filing objections and he should have been present at the hearing on 3rd February 1916, when he would have known about the award of the two arbitrators dated 9th January and filed on 12th January. He has not scrupled to suggest that this award was subsequently written and ante-dated, although the Court stamp shows it to have been filed in Court on the 12th. But the mention in the Court's B diary of the receipt of only one award without an entry being made when the third arbitrator's report was received on the 17th has given occasion for the pleader to say that he only knew of one award and he has thus taken advantage of the Court's omission to mention both awards. It would, in my opinion, have been unfair to the defendants to put them on terms owing to their pleader's neglect to look into the award and to give them another chance of objecting to the award which was unfavourable to them, on condition of their paying the plaintiff's costs for the hearing on 3rd and 4th February.

Accordingly I set aside the order and decree of the lower Court and direct that, the petitioners pay into Court such costs as the District Munsif may allow to the plaintiff for the hearings of 3rd and 4th February and if within ten days of the receipt of this order in that Court the defendants file objections to the award filed on 12th January, the District Munsif will consider those objections and if he finds them to be true and substantial objections to the legality of the award, will remit the award for reconsideration of the same three arbitrators. In case the arbitrators refuse to consider it, it will then be time for the lower Court to determine whether it will set aside the award under S. 15, Sch. 2, Civil P. C., and decide the case itself. Costs of Civil Revision Petition No. 1394 of 1916 will be costs in the cause and will abide and follow the result.

These civil revision petitions having been posted to be spoken to this day, the Court delivered the following further.

Judgment.—In the event of the petitioners failing to file objections and to deposit the plaintiff's costs, as above mentioned, within the time allowed, these petitions will stand dismissed with costs of Civil Revision Petition No. 1394 of 1916 as from that date.

S.N./R.K. *Case remanded.*

A. I. R. 1919 Madras 878

COUTTS-TROTTER AND KUMARASWAMI SASTRI, JJ.

Uppara Chinngappa—Appellant.

v.

Gaddam Chinna Hanumanna—Plaintiff—Respondent.

Second Appeal No. 2051 of 1917. Decided on 23rd October 1918, against decree of Sub-Judge, Cuddapah in Appeal Suit 308 of 1916.

Hindu Law—Joint family—Refrencee to arbitration by manager in good faith is binding on other co-parceners.

Where the manager of a Hindu family refers a dispute to arbitration in good faith and the circumstances are such that there is no collusion, the result of the submission will be binding on the other members of the family.

[P 879 C 1]

K. Kamanna for *B. Somayya*—for Appellants.

V. S. Narsimhachar—for Respondent.

Judgment.—This is a suit to enforce the award of an arbitrator. What happened was that there was a dispute which ended in a criminal case, the dispute being about the dams alleged to have been put up on the defendants' land which caused the flooding of the plaintiff's land. The father and sons were parties to the agreement, but the reference to the arbitrator was made by the father alone. The question is, whether this is binding on the sons or whether, as they now wish, they should be allowed to re-open this probably trivial dispute.

There is no direct authority on the point. The cases relied on by the learned Subordinate Judge, viz., *Jagan Nath* v. *Mannu Lal* (1) and we may add another case *Pitam Singh* v. *Ujagar Singh* (2) and *Chinna Poochiammal* v. *Ganga Naicker* (3) and *Balaji* v. *Nana* (4)

(1) [1894] 16 All 231.
(2) [1875-78] 1 All. 651.
(3) [1899] 9 M. L. J. 34.
(4) [1903] 27 Bom. 287.

sometimes speak of the authority of the manager and sometimes of the authority of the father to bind the other members of the family by an act, such as submission to arbitration. They do not show whether the principle is to be applied to members of the family other than minors, and we think it looks in some of the cases as if the members who were held to be bound were in fact minors. But the language used is perfectly general and the proposition in its widest sense is accepted in the text books of the authority such as Mayne, and Banerji on the Law of Arbitration in India. We therefore come to the conclusion that it must be regarded on the authority of these cases as a principle that where the manager of a family refers a dispute to arbitration in good faith and the circumstances are such that there is no collusion, the result of the submission will be binding on the other members of the family. The appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 879 (1)

PHILLIPS AND KUMARASWAMI SASTRI, JJ.

Arunachala Chettiar—Defendant—Appellant.

v.

Muthu and *others*—Petitioners — Respondent.

Second Appeal No. 1413 of 1917, Decided on 12th September 1918, against decree of Dist. Judge, Tanjore, in Appeal Suit No. 360 of 1915.

Succession Certificate Act (1889), Ss. 4 (1), 16 and 18 — Suit by assignee of certificate holder is maintainable.

An assignee of a person to whom a succession certificate has been granted is entitled to sue for a debt due to the assignor and to obtain a decree thereon without obtaining a certificate in his own name : 34 *I. C.* 364, *Appr.* ; 17 *I. C.* 486, *Diss .from*

The certificate, until revoked, affords protection to the assignee, though it was obtained by the assignor after the assignment. [P 879 C 2]

T. V. Muthukrishna Aiyar and *N. Muthuswami Aiyar*—for Appellant.

S. Muthia Mudaliar — for Respondents.

Judgment.—Appellant's first contention is that plaintiff, being only the assignee of the person to whom succession certificate had been granted, is not entitled to a decree without obtaining a succession certificate in his own name. This contention is supported by the ruling in *Allahdad Khan* v. *Sant Ram* (1), but that decision has been doubted in *Rang Lal* v. *Anna Lal* (3) and has been dissented from by both the Judges in *Raman Lalji Maharaj* v. *Hari Das* (2). One of the main grounds for the decision in *Allahdad Khan* v. *Sant Ram* (1) is that S. 16, Succession Certificate Act, affords protection only when payment is made to the certificate holder, and not to his assignee. We respectfully regret that we are unable to accept this argument, for payment to the assignee is as valid as payment to the assignor in the absence of any restriction imposed by law. Further, S. 4 (1) of the Act only requires the production of a certificate and not a certificate in the name of the person suing. Agreeing with *Raman Lalji Maharaj* v. *Hari Das* (2) we overrule this contention.

The next contention is that plaintiff's assignor obtained the succession certificate after she had effected the transfer to plaintiff. This may or may not form a ground for revoking the certificate under S. 18, but until revoked, the certificate is valid and affords protection and this objection must also fail. The second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1913] 35 All. 74=17 I. C. 486.
(2) [1916] 34 I. C. 364.
(3) A.I.R. 1914 All. 129=22 I. C. 349=36 All. 21.

A. I. R. 1919 Madras 879 (2)

ABDUR RAHIM AND NAPIER, JJ.

Kumarasami Chetty— Complainant—Petitioner.

v.

Kuppusami Chetty and *others*—Accused —Opposite Parties.

Criminal Revn. No. 613 of 1917, and Criminal Revn. Petn. No. 482 of 1917, Decided on 22nd January 1918, against the order of Sub-Divisional, Magistrate Usilampatti, in Criminal Appeal No. 66 of 1917.

(a) Criminal P. C. (1898), S. 345—S. 345 deals only with lawful compounding of offences— Composition of offence— Complainant cannot retract.

Section 345 deals only with the lawful compounding of offences. The principles which apply to the offence also apply to the exception. The section is not limited to acts done in Court or to cases in which the parties continue to be of the same mind until the case comes on for further hearing before the Court. Once a composition has been effected, the matter is at an end and

the person injured cannot effectively resile from the agreement. If he chooses to do so, it is for the Court to enquire into the accused's allegation that the offence was compounded out of Court and to direct on acquittal under the section if it so finds: 31 *I. C.* 819; 21 *Cal.* 103; and 3 *C. W. N.* 322, *Foll.* [P 881 C 1]

(b) Criminal P. C. (1898) S. 345—Composition before filing of complaint is covered by S. 345.

A composition made before the filing of a complaint in Court is covered by the provisions of S. 345, the offence being complete when the acts constituting it have been committed apart from whether any complaint or charge has been laid before the court or not. [P 881 C 1]

(c) Criminal P. C. (1898), S. 345, para. 6—"Accused" only describes character of accused at time of trial.

The word 'accused' in para. 6 of the section only describes the character of the person accused of the offence at the time of the trial when the question of the effect of the composition is under consideration. [P 881 C 1]

(d) Criminal P. C (1898), S. 345—Compounding must be complete.

To operate as an acquittal, the compounding must have been completed and any complete agreement would not amount to an acquittal within the meaning of the law. [P 881 C 2]

R. L. Thornton—for Petitioner.

K. N. Aiya, *K Sankara Subba Aiyar* and *A. Narayanasami Aiyar*—for Respondents.

Public Prosecutor—for the Crown.

Abdur Rahim, J.—This is an application to revise an order of acquittal passed by the Sub-Divisional Magistrate in appeal in a case in which the accused were convicted by a 2nd Class Magistrate of offences under Ss. 147, 355 and 323, I. P. C. The appellate Magistrate found that the charge of rioting could not be sustained upon the evidence and thereupon acquitted the accused of that offence. That acquittal must, in my opinion stand as no sufficient reason has been made out for interference with that part of the order of the appellate Magistrate. He has acquitted the accused of charges under Ss. 323 and 355, on the ground that there had been a valid composition of those offences within the meaning of S. 345 Criminal P. C., before the complainant laid the charge in Court. There are two questions of law which arise in connexion with this matter. First of all a doubt has been expressed bp Oldfield, J,. who admitted this application, with regard to a decision of mine in *Mahomed Kanni* v. *Pattani Inayathulla Sahib* (1), in which it was laid down that it was not necessary for S. 345, Criminal P. C, to operate that the complainant, after the composition has been arrived at, should still be of the same mind and join the accused in asking the Court that the case should be dismissed as there has been a valid composition. Once there has been a composition of an offence compoundable under the Criminal P. C. the matter is at an end and the person injured cannot afterwards effectively resile from the agreement. If he chooses to do so, it is for the Court to enquire into the allegation of the accused that the offence was compounded out of Court and if it finds that it was so compounded, to acquit the accused under the provisions of S. 345. In holding this view I followed a ruling of the Calcutta High Court in *Murray* v. *Queen-Empress* (2). There is also another ruling of the same Court, *Kusum Bewa* v. *Bechu Bewa* (3), which proceeds upon the same principle. Both the learned Public Prosecutor and the learned counsel who appeared for the petitioner urged no arguments against the decision in *Mahomed Kanni* v. *Pattani Inaythulla Sahib* (1), and on giving the question my best consideration again, I do not find any sufficient reasons for taking a different view.

The next point of law that has been discussed relates to the question whether a composition, which takes place before any complaint has been laid in Court by the person injured, is covered by the provisions of S. 345. In its first part, the section says that the offences described in the table attached, may be compounded by the persons mentioned in Col. 3 of the table. Looking at Col. 3, we find that the persons who can compound these offences are, generally speaking, the persons injured and not a person who has already laid a charge in Court. When the person injured has entered into a composition, that composition is complete and para. 6 of the section lays down what the effect of such a composition is. It says that;

"The composition of these offences under this section shall have the effect of an acquitta of the accused."

It is argued that the use of the words 'offence' and 'accused' shows that the composition which is contemplated is one arrived at after a complaint has been laid and there is an accused person before the Court. I cannot accept this argument as at all

(1) [1915] 39 Mad. 946=31 I. C. 819.

(2) [1894] 21 Cal. 103.

(3) [1899] 3 C. W. N. 322.

sound. An offence is complete when the acts constituting it have been committed, apart from whether any complaint or charge has been laid before the Court or not. The allusion to "the accused" in para. 6, S. 345, only describes his character at the time of the trial when the question of the effect of the composition is under consideration. As regards certain classes of offences which may be compounded, the legislature provides that they may be compounded only with the permission of the Court. In those cases, the operation of the composition is necessarily suspended until the Court sanctions it. But in the other cases, no such permission is needed and no reason is apparent to me or has been suggested why the legislature, having permitted certain classes of offences to be compounded by the parties themselves without any reference to Court, should insist that that composition should be arrived at after the person alleged to have committed the offence has been brought before the Court. In the absence of clear language showing that that was the intention of the legislature, I should not be prepared to impute to it any such intention. I think it is quite clear upon the interpretation of S. 345 that the contention on behalf of the complainant on this point cannot be sustained. It is unnecessary therefore to discuss the English law on the subject to which some reference has been made at the Bar. But I may point out that so far as I have been able to go into the matter, the case of *Keir* v. *Leeman* (4) supports the view which I have indicated as the one adopted in the Criminal Procedure Code rather than otherwise. This was a judgment of Lord Denman, C. J., and he after reviewing the cases at some length laid down the following proposition on the subject of compromise of offences :

"We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But, if the offence is of a public nature no agreement can be valid that is founded on the consideration of stifling a prosecution for it."

The exact point we have to consider here was not before the learned Judges in that case, but the proposition seems to imply that a composition of an offence of a particular description would not be the less valid because it took place before any complaint was laid in Court. Then the exception to S. 214, Penal Code, exempts from the provisions of Ss. 213 and 214 cases of compounding offences which may be lawfully compounded. If the contention submitted on behalf of the prosecution in this case were sound, the compounding of particular offences dealt with under Ss. 213 and 214, Penal Code, would be no offence if the compounding took place before the charge was laid. It seems to me that this would be an untenable proposition. On the facts, however, of this case, I am not satisfied that the Subdivisional Magistrate "quite clearly realized whether there was a completed agreement or composition" within the meaning of S. 345, Criminal P. C. It appears that there was an arbitration and the arbitrator decided after some parley that accused 1, was to pay to the complainant Rs. 300. It is argued on behalf of the complainant that he did not accept this composition and had not even agreed to the arbitration. The Subdivisional Magistrate does not seem to have arrived at a clear conclusion on these points. A further question arises as to whether Rs. 300 was to be actually paid before there was any completed composition within the meaning of S. 345; or whether the complainant was satisfied with the promise of the accused to pay that amount.

The amount was not actually paid before the complaint was lodged in Court. Unless it is found that the compounding was completed before the complaint was made, any incomplete agreement would not amount to an actual acquittal within the meaning of the law. I may say, speaking for myself, that I should ordinarily be very reluctant to interfere in a case of this nature. But there is no finding of the appellate Magistrate on the subject of the charges under Ss. 323 and 355, Penal Code, the acquittal of the accused of these charges being based merely on an alleged composition. The facts found are not enough to show that the Subdivisional Magistrate had in this connexion quite clear before his mind's eye the elements which would be necessary for a complete and valid composition. I would therefore set aside the order acquitting the accused of the charges under S. 323 and 355, I. P. C., and remit the appeal to his

(4) [1844] 6 Q. B. 308=13 L. J. Q. B. 359.

re-heard and disposed of by the appellate Magistrate on these charges in the light of the above observations.

Napier, J.—I agree and wish to add only a few words. With regard to the decision reported as *Mahomed Kanni* v. *Pattani Inayathulla Sahib* (1) which has been referred to in the admission order, I desire to say that I am in entire accord with it. It lays down that the composition referred to in S. 345, Criminal P, C., is not limited to acts done in the Court to cases in which the parties continue to be of the same mind until the case comes on for further hearing before the Court: that view seems to me to be entirely warranted by the language of the section. The sole question to be ascertained is whether there was a contract and once that has been ascertained, there is nothing on principle which allows a party to resile from his contract and lay a charge which he had agreed for consideration not to lay. A further question has been argued whether such a composition can be made before any complaint has been made to a Magistrate or any proceeding taken in Court. Considerable stress has been laid on the words "offence" and "accused" in the section; and the learned Public Prosecutor has pointed out that it must be difficult to say whether a composition was lawful or unlawful unless the facts had been considered by the Court; the difficulty will arise however in the actual offence compounded. It is clear from the very earliest authorities that the offence of compounding a felony could be committed before any charge had been laid. With reference to compounding theft, the language of Lord Coke is quoted in *Reg* v. *Burgess* (5), which language is reproduced in Archibold's 'Pleading and Evidence in Criminal Cases' in the section dealing with compounding offences. The offence known as *theft bote* is committed

"where the owner not only knows of the felony but taketh of the thief his goods again or amends for the same to favour or maintain him, that is not to prosecute him to the intent that he may escape."

It is reproduced by Blackstone in his Commentaries as follows:

"the offence of theft bote which is where the party robbed not only knows the felon but also takes his goods again or other amends upon agreement not to prosecute."

This is the language of the earliest authorities and there cannot be the slightest doubt that the offence of illegal compounding is one that can be committed in relation to a matter which has not been brought before the Court. Now the connexion between illegal compounding and legal compounding is very close, because in the Penal Code the exception to S. 214, says that

"the provisions of Ss. 213 and 214 do not extend to any case in which the offence may lawfully be compounded."

Of course lawful compounding is that which is dealt with under S. 345, Criminal P. C. So the principles which apply to the offence must necessarily apply to the exception. I am therefore satisfied that a composition made to prevent a case going into a Court is just as much a composition under S. 345, as one made after the case has come into Court. As my learned brother has pointed out, it will have no effect as a plea in bar of conviction in cases covered by Cl. (2) unless the Court has given its sanction. But where a composition has been made out of Court and at a certain stage in the proceedings the Court gives the sanction required by Cl. (2), then it is a good composition. On the facts of this case, it seems to me that the Subdivisional Magistrate has entirely misunderstood the alleged position. He seems to have thought that because P. W. 2 representing P. W. 1 agreed to abide by the decision of the arbitrators and there was a decision of a certain sort, that amounted necessarily to a contract not to prosecute. Speaking for myself, I think that the evidence is perfectly clear on that point: but I do not wish to decide this case on a question of evidence, because we are sitting in revision of an order of acquittal. What the Subdivisional Magistrate should have done was to examine the evidence and see whether the panchayatdars decided that the complainant was to accept the promise of the accused to pay or whether the decision of the punchayatdars was that if the accused did pay, no complaint should be laid. I agree with my learned brother that this is a matter to which the Subdivisional Magistrate must direct his attention. I agree with the order proposed.

S.N./R.K. *Order set aside.*

(5) [1886] 16 Q. B. D. 141=55 L. J. M. C. 97.

A. I. R. 1919 Madras 883

PHILLIPS AND KRISHNAN, JJ.

Rajabhai Narain — Defendant — Appellant.

v.

Karim Mahomed—Plaintiff—Respondent.

Second Appeal No. 92 of 1917, Decided on 26th February 1918, against decree of Dist. Judge, South Malabar, in Appeal Suit No. 274 of 1916.

(a) Civil P. C. (1908), S. 20—"Cause of action" means whole bundle of material facts necessary for plaintiff to allege and prove.

The term "cause of action" as used in S. 20, Civil P. C., means the whole bundle of material facts which it is necessary for a plaintiff to allege and prove in order to entitle him to succeed. [P 884 C 1]

(b) Civil P. C. (1908), S. 20—Carriage by sea—Short delivery—Excess freight illegally collected—Suit for return—Claim for general average contribution — Suit brought in Court where excess freight was collected—That Court held to have jurisdiction.

A claim for general average contribution can be sustained only when the voyage has been completed and the vessel has reached its place of destination or some other port safely. If there are several general average acts during the same voyage the principle is to make each owner of a sacrificed interest contribute to all the sacrifices in whatever order of time they may have occurred. The time of jettisoning cannot be taken as the time when the value of the goods is to be ascertained because the whole adventure may afterwards be brought to an end by the total loss of ship and cargo when there can be no contribution at at all.

A claim for general average may be laid at the place where the voyage has safely ended. [P 884 C 1, 2]

Plaintiff chartered defendant 1's vessel to sail from Cutch to Basra: where it was to take 700 bundles of dates and discharge them at Calicut. Defendant 1 was a resident of Cutch where the charter party was entered into. The ship experienced rough weather on her way from Basra to Calicut, in consequence whereof the master (defendant 2) had to jettison 165 bundles. The ship however reached Calicut in safety. The master refused to deliver to plaintiff any of the goods till the whole frieght was paid. Plaintiff paid the freight under protest and sued the owner of the ship and the master in the Calicut Munsif's Court for (1) the return of the excess freight collected, and (2) the price of the bundles short-delivered, or (3) the amount due on a general average contribution. The defendants objected to the jurisdiction of the Court:

Held (1) that the claim for return of frieght was properly laid in the Calicut Court as the frieght was collected at Calicut; (2) that, as Calicut was the place of performance of the contract, the Calicut Court had jurisdiction te entertain the claim for the price of the short-delivered goods; (3) that as the voyage safely came to an end at Calicut, plaintiff's cause of action for general average arose in Calicut. [P 884 C 2]

(c) Jurisdiction — Foreigner — Municipal Court has jurisdiction over non-resident foreigner if cause of action arises within its jurisdiction — Whether decree against him can be enforced in foreign State is to be disposed of by Court of that State.

A Municipal Court is entitled to exercise jurisdiction over a non-resident foreigner where the cause of action arises within its jurisdiction. The question whether its decree can be enforced against him in the foreign state is a question for dispesal for the Courts of that state. [P 884 C 2]

T. R. Ramachandra Ayyar, A. Sundaram, T. R. Krishnaswamy Ayyar and *R. V. A. Krishna Ayyar*—for Appellant.

T. Richmond—for Respondent.

Krishnan, J.—The question raised before us in second appeal is one of jurisdiction. The facts necessary to be stated for the decision are these: The plaintiff chartered a vessel named "Ganga Patharath" belonging to defendant 1 to sail from Cutch to Basra and there to take on board 700 bundles of dates and to discharge the same at Calicut. The charter-party was entered into at Cutch, defendant 1 being a resident of that place and a subject of the State of Cutch. Defendant 2 is the tindal or the master of the ship. The ship sailed to Basra and took on board 651 bundles of date, but on her voyage to Calicut she met with rough weather in the Arabian Sea and to save her and the cargo the master had to jettison 165 bundles of dates. On her subsequent arrival in Calicut the master refused delivery of any of the plaintiff's goods till the freight for the whole consignment was paid and the plaintiff thereupon paid it under protest and took delivery of the remaining bundles. He has now sued in the Calicut Court for the return of the excess freight collected and for the price of the bundles short-delivered or in the alternative, for what is due to him on a "general average" account.

The objection as to jurisdiction was taken in the first Court but it was overruled and a decree was passed against defendant 1 for the refund of the excess freight and for money due as "general average contribution." Defendant 1 has appealed to us and has again raised before us this question of jurisdiction. The plaint, as I read it, combines 3 claims based on three different causes of action; the first, for the refund of freight, based on the fact that it was illegally collected from the plaintiff and this took place in Calicut; the second for the price of goods

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short delivered which, according to the contract in the charter-party, were to be delivered in Calicut and the third, in the alternative, a claim for "general average" if the Court found that the goods were properly jettisoned. The cause of action for the first arose wholly in Calicut and for the second, in part in Calicut, as that was the place of performance. It is clear that as regards these two causes of action the Calicut Court had jurisdiction but as to the cause of action for the 3rd claim, the learned pleader for the appellant had argued that no part of it arose in Calicut. It is therefore necessary to see what exactly is the plaintiff's cause of action for his claim for general average. It is now settled that the term "cause of action" as used in S. 20, Civil P. C., means the whole bundle of material facts which it is necessary for a plaintiff to allege and prove to entitle him to succeed. To sustain the plaintiff's claim in the present case, it was necessary to establish that his goods were properly on board ship, that they were properly jettisoned to avert a danger which threatened the whole adventure and that, as a result, the ship and cargo against which contribution is claimed, were saved from damage or destruction. As laid down by Bovil, C. J.:

"The whole law on the subject is founded on the principle that the loss to the individual whose goods are sacrificed for the benefit of the rest, is to be compensated according to the loss sustained on the one hand and the benefit derived on the other"; see *Fletcer* v. *Alexander* (1).

To decide the extent of such sacrifice and the amount of contribution properly claimable, the voyage must have been completed or must have been definitely brought to an end at another port. See Carver on Carriage by Sea, S. 416. Before the claim for contribution can arise, the ship and cargo must have been brought to a safety in port for as observed by Bovil, C. J., in the case above cited, p. 383 of (1868) 3 *C. P.*, the time of jettisoning cannot be taken as the time when the value of the goods is to be ascertained because the whole adventure may afterwards be brought to an end by the total loss of the ship and cargo when there can be no contribution at all. To complete therefore the cause of action for "general average" it is necessary to allege that the voyage has ended and the ship or the goods against which it is claimed, had been brought to safety in part. In fact it was held in *Whitecross Wire Co.* v. *Savill* (2) that a maritime adventure is not at an end till all the goods are delivered. At any rate it is clear that it cannot be ended till the ship reaches its destination or if the voyage be abandoned, some other place of safety. Appellant's vakil relied on the observations of the Privy Council in *Strang Steel & Co.* v. *A. Scott & Co.* (3), viz.:

"In jettison the rights of those entitled to contribution, and the corresponding obligations of the contributors, have their origin in the fact of a common danger which threatens to destroy the property of them all; and these rights and obligations are mutually perfected whenever the goods of some of the shippers have been advisedly sacrificed and the property of the others has been thereby preserved,"

and argued that as soon as the particular peril which necessitated the sacrifice passed away, the cause of action for contribution was complete. But it seems to me that it cannot be predicated that the property of the others has been preserved till the maritime adventure has come to an end. Their Lordships' observations are therefore not against the view I am taking. If there are several general average acts during the same voyage, the principle is to make each owner of a sacrificed interest contribute to all the sacrifices in whatever order of time they may have occurred. See Carver, S. 417. This can hardly be correct if the right to contribution regarding any one sacrifice is to be taken to be complete as soon as the particular peril is past. I am therefore of opinion that the fact that the voyage safely came to an end, is a part of plaintiff's cause of action for general average and as that took place in Calicut the Calicut Court had jurisdiction under S. 20, Civil P. C., to try the suit so far as it referred to general average as well.

The learned vakil for the appellant raised a further objection to jurisdiction on the ground that his client was a foreign subject, residing in Cutch and not in British India and that the vessel itself against which the claim was made, was a foreign ship. This objection is not valid, as a Municipal Court is entitled to exercise jurisdiction over a non-resident foreigner where the cause of action arises within its jurisdiction. The question

(1) [1868] 3 C. P. 375=37 L. J. C. P. 193.

(2) [1884] 8 Q B D. 653=51 L. J. Q. 426.

(3) [1890] 17 Cal. 362=16 I. A. 240 (P. C.)

whether its decree could be enforced against him in the foreign State, is a question for disposal for the Courtsof that State. If defendant did not wish to be bound by the decree, he should not have appeared and pleaded to the cause and appealed and filed a second appeal as he has done; he has clearly submitted to the jurisdiction of the British Court. This objection must also be overruled. It may be mentioned that the respondent urged that, under S. 21, Civil P. C. the objection as to jurisdiction could not be urged before us without showing that there was a failure of justice. In the view I am taking it is not necessary to discuss the scope of this section. No objection has been urged on the merits. The second appeal therefore fails and is dismissed with costs.

Phillips, J.—I agree. Plaintiff's cause of action against the ship owner with whom he contracted, is primarily the non-delivery of the goods contracted to be delivered, and it is only in order to meet the defence of "jettison' set up that he has to rely on the doctrine of "general average" according to which the shipowner is still liable to contribute to the loss sustained although to a limited extent. In this view at least a part of plaintiff's cause of action arose at Calicut and the suit was rightly filed in the Court there.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 885

KUMARASWAMI SASTRI, J.

Penumetsa Thirumalraju and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 270 and 216 of 1917, Decided on 15th November 1917, from the judgment of Sessions-Judge, Kistna in Criminal Appeal No. 57 of 1916.

(a) Penal Code (1860), Ss. 96 and 97—Failure to inform police does not take away right of private defence.

The right of private defence against an act of trespass on one's property is not lost by reason of the omission to send word to a police station which is at some distance from the place of occurrence. [P 885 C 2]

(b) Penal Code (1860), Ss. 96, 97 and 141—Persons exceeding right of private defence in repelling attacks on their property do not constitute unlawful assembly.

Persons who exercise their right of resisting an unlawful trespass on their property do not become members of an unlawful assembly by repelling attacks made on them or by exceeding their right of private defence. [P 885 C 2]

(c) Criminal Trial—Judgment—Joint trial—Evidence against each accused must be separately discussed.

Where several persons are charged with an offence the judgment of the Court should contain a discussion of the evidence as against each accused. [P 886 C 1]

G. Venkataramiah—for Petitioners.

C. Narasimhachariar for *Public Prosecutor*—for the Crown.

Order.—The evidence shows that the bodi was irrigating the lands of accused 1 and that at least from 1901 the lands of the opposite party were not irrigated by it. The Sessions Judge finds that the spout was only capable of irrigating two acres, which is the extent of field No. 418 belonging to accused 1.

The Deputy Magistrate in the counter-case finds that the Kapus went to the field of the accused in the present case with a spear and sticks to enforce their right and repair the bodi and ready to repel by force any obstruction to their interfering with the bodi. I have little doubt that the accused had the right to prevent the Kapus from entering upon their fields and interfering with the bodi on it. It is difficult to see how they lost the right of private defence because they did not send word to the police station six miles off. By the time a person could have gone there and returned with police help, the Kapus would have trespassed on the land of accused 1 and gained all they would. Accused 1 and those on the land were justified in getting help and resisting the trespass attempted by the Kapus.

The only question is whether the accused or any of them exceeded their right of private defence. In this connexion I may point out that persons exercising their right are not members of an unlawful assembly by repelling attacks made on them or by exceeding the right of private defence: see *Kunja Bhuniya* v. *Emperor* (1). If any person exceeds his right of private defence he will be individually liable for any injury caused. So far as the accused 1 to 3 aor concerned, the Deputy Magistrate finds that they did not cause hurt to anybody and the Sessions Judge did not differ from him. They were clearly within their right in resisting the attempt of the Kapus to trespass on their land and as they have

(1) [1912] 39 Cal. 896=15 I. C. 481.

not exceeded their right of private defence, it is difficult to see how they can be convicted of any offence. The learned Public Prosecutor is unable to support the conviction so far as they are concerned. As regards the other accused there is the finding that they exceeded the right of private defence. It would have been more satisfactory if the Sessions Judge had discussed the evidence as against each accused, as he was bound to do: *In re, Ramasawmy Naidu* (2). But I think no useful purpose will be served by sending the case back. I set aside the conviction and sentence against accused 1 to 3 and confirm the conviction as against the other accused. The security bond executed by accused 1 to 3 will be cancelled.

S.N./R.K. *Conviction against accused Nos.* 1 to 3 *set aside.*

(2) [1915] 31 I. C. 825

A. I. R. 1919 Madras 886

WALLIS, C. J., AND SESHAGIRI AIYAR, J.

C. Venkatachariar—Plaintiff—Appellant.

v.

Narasimha Ayyangar and *others*—Defendants—Respondents.

Appeal Suit No. 92 of 1917, Decided on 23rd August 1918, against decree of Tempy. Sub-Judge, Salem, in Original Suit No. 13 of 1915.

(a) Landlord and Tenant—Permanent tenancy — Expressions "Kayam," and "Saswatham" import ordinarily permanent tenancy.

The expressions "kayam" and "saswatham" occurring in lease deeds ordinarily import a permanent tenancy. Even if literal effect is not given to these words so as to involve as a necessary inference a permanent tenancy, the surrounding circumstances may be looked at and a permanent tenancy may be inferred from the use of these words. [P 886 C 2]

Where a deed of lease is a renewal of prior documents in respect of which a permanent tenancy was judicially upheld, the presumption may be made that a permanent tenure was intended to be conferred by the later document. [P 886 C 2]

(b) Transfer of Property Act (1882), S. 111 (g)—Denial of landlord's title to lands not comprised in ejectment suit does not entail forfeiture.

The denial of the landlord's title in respect of lands not comprised in an ejectment suit will not entail forfeiture of the tenancy in respect of the suit lands under S. 111: *Doe d. Devis* v. *Evans*, (1841) 9 *M. & W.* 48; *Doe d. Calvert* v. *Frowd*, (1828) 4 *Bing.* 557; *Doe d. Phillips* v. *Rollings*, (1847) 4 *C. B.* 188, *Dist.* [P 887 C 1]

A. Krishnaswami Aiyar—for Appellant.

K. Srinivasa Aiyangar—for Respondents.

Judgment.—This is an appeal from the judgment of the Subordinate Judge of Salem in a suit brought by a mittadar to eject the defendants, who claim to hold under a permanent lease. Two questions have been argued before us: (1) whether the defendants hold on a permanent tenure; and (2) whether, if they did so hold, they have forfeited their tenure by renouncing their character as lessees by setting up a title in a third person, within the meaning of S. 111 (g), T. P. Act. As regards the first point we have been referred to the cases reported as *Rajaram* v. *Narasinga* (1), *Foulkes* v. *Muthusami Goundan* (2), *Venkataramanna* v. *Venkatapathi Nayani Varu* (3) and *Rama Iyengar* v. *Anga Guruswami Chetti* (4), in which the meaning of the words "saswatham" and "kayam" occurring in leases have been construed. We do not think it necessary again to discuss the meaning of these terms or the correctness of the decision in *Rajaram* v. *Narasinga* (1), because it has been abundantly established in later cases that, even if literal effect is not to be given to these words so as to involve as a necessary inference a permanent tenancy, yet the surrounding circumstances may be looked at and a permanent tenancy may be inferred from the use of these words. In the present case, we find that the lease in the suit was a renewal of previous documents, and that previously to the execution of this instrument the lessees had been held to hold on a permanent tenure in the suit of 1819. That consideration, in our opinion, is sufficient to show that it was intended to confer a permanent tenure in favour of the lessees by virtue of Ex. J in this case. Therefore, on that ground, we agree with the learned Subordinate Judge.

The next question is a somewhat interesting one which has been very ably argued by Mr. A. Krishnaswami Aiyar for the appellant, namely, whether the denial by the present defendants of the title under which the mittadar claims the whole mitta in a previous suit,

(1) [1892] 15 Mad. 199.
(2) [1898] 21 Mad. 503.
(3) [1915] 29 I. C. 188.
(4) [1918] 46 I. C. 62.

brought by the mittadar not in respect of the suit land, but to recover jodi in respect of certain inam lands in the mitta which were also held by the defendants, is a sufficient setting up by the lessees of a title in a third person to the suit lands. Mr. Krishnaswami Aiyar has argued that directly and by necessary implication, the written statement in that suit Ex. G should be held to contain a setting up of the title in a third person to the suit lands. We asked him to cite the strongest cases which he could in support of that proposition and he referred us to *Doe d. Devies* v. *Evans* (5), *Doe d. Calvert* v. *Frowd* (6); *Doe d. Phillips* v. *Rollings* (7).

In every one of these cases, the denial of title, whether it was direct or whether it was inferential, was in respect of leasehold premises and there is no case in which a denial of the landlord's title to some other lands has been held to operate as a forfeiture of his title to the suit lands, merely because one thing would logically follow from the other. Mr. K. Srinivasa Aiyangar for the respondents has contended that the denial by the defendants of the mittadar's right in the suit for the jodi of the inam lands is consistent with the plaintiff's having the rights of a lessor in respect of the suit lands which he might have acquired in other ways than by transfer of the mittadar's title from the plaintiff's predecessor to the plaintiff. The doctrine of forfeiture, which is embodied in S. 111, T. P. Act, is not one to be extended, and we think we should be extending it if we were to treat the denial in the written statement Ex. G in this case as a setting up of a title of a third person to the lands in this suit. Mr. Srinivasa Aiyangar for the respondents desired to take other objections, but we do not think it necessary to hear them, because on the ground which we have stated, we think that the appeal fails and must be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(5) [1841] 9 M. & W. 48=11 L. J. Ex. 9.
(6) [1828] 4 Bing. 557=1 Moo. & P. 480.
(7) [1847] 4 C. B. 188=17 L. J. C. P. 268.

A. I. R. 1919 Madras 887

SESHAGIRI AIYAR AND PHILLIPS, JJ.

Sarvothama Row—Defendant—Appellant.

v.

Chinnasami Pillai and *others*—Plaintiffs—Respondents.

Second Appeal No. 80 of 1918, Decided on 9th December 1918, against decree of Sub-Judge, Tanjore, in Appeal Suit No. 25 of 1917.

Limitation Act (9 of 1908), Art. 115—Purchaser from member of joint Hindu family obstructed possession by prior purchaser from Manager—Suit by former for possession dismissed by High Court—Subsequent suit for sale price and litigation expenses is maintainable—Limitation starts from date of decision by High Court.

Plaintiff purchased certain properties from a junior member of a joint Hindu family on 12th January 1909. When he attempted to take possession he was obstructed by a prior purchaser of the properties from the manager of the joint family. Plaintiff then brought a suit for possession of the properties. He succeeded in the first Court, but his suit was dismissed on appeal, and the High Court confirmed the lower appellate Court's decree in second appeal on 18th February 1915. An application for review of the judgment of the High Court was also unsuccessful. Within three years of the High Court's decision plaintiff brought the present suit for return of the sale price and fori litigation expenses incurred by him:

Held: (1) that the consideration for the plaintiff's purchase should be deemed to have failed only on the date of the High Court's decision, and that the suit was therefore in time: 19 *Cal.* 123 (*P. C.*), *Expl.* and *Dist.*

(2) that the plaintiff was entitled to his litigation expenses, except the costs of his review petition to the High Court. [P 883 C 1, 2]

P. S. Vaidyanatha Aiyar—for Appellant.

K. Rojah Aiyar—for Respondents.

Judgment.—The managing member of a joint Hindu family, consisting of himself and his brother, sold the suit properties to a stranger on 22nd December 1908. The younger brother sold his share alone to the plaintiff on 12th January 1909. There was also a mortgage outstanding on the property. When the plaintiff attempted to take possession he was resisted by the purchaser from the manager. Thereupon he sued for possession of the half share sold to him. He succeeded in the first Court. The lower appellate Court held that the sale by the manager was binding on the plaintiff's vendor and dismissed the suit. In second appeal, this decree was confirmed; an application to review the judgment also failed. The decision of

the High Court in the second appeal was given on 18th February 1915. This suit for refund of the sale price and for the expenses of the costs incurred in the unsuccessful litigation was instituted within three years of the judgment of the High Court. The Courts below have held that the suit was not barred by limitation.

Before us the learned Vakil for the appellant relied on *Hanuman Kamat* v. *Hanuman Mandur* (1) for the proposition that the cause of action for the refund of the money arose when the plaintiff was refused possession. In the case before the Privy Council, the managing member of a Mithila family, who was only entitled to dispose of the shares of his brothers with their consent and not, as under the Mitakshara Law, to alienate family property for justifiable proposes, alienated the family property. When the vendee sought to take possession the other brothers resisted. The Judicial Committee pointed out that, as the alienation depended on consent and as that consent was certainly refused when the brother refused to give possession, the cause of action arose on that date. In the present case, the plaintiff's vendor was competent to dispose of his share and the manager had a right prima facie without consulting his brother to deal with the property for family purposes. It was only when it was finally determined that the sale by the plaintiff's vendor could not take effect against the sale by the manager that the former sale became infructuous: consequently, it was only then that the consideration failed. This case is practically the second of the class of cases referred to in *Subbaraya Reddiar* v. *Rajagopala Reddiar* (2). The decision in *Parvataneni Venkaramayya* v. *Lanka Rambrahman* (3) also supports this view. We think the suit is not barred by limitation.

It was next contended that the costs of the litigation should not be given to the plaintiff. He was bound to have sought the aid of the Court to vindicate the title of his vendor and the litigation expenses must be regarded as having been legitimately incurred. These damages are not too remote as laid down in *Krishnan Nambiar* v. *Kannan* (4) and in *Digamber Das* v. *Nishibala Debi* (5).

We are however of opinion that the plaintiff is not entitled to recover the costs of his unsuccessful attempt to have the decision of this Court reviewed. It is a luxury he indulged in for which the defendant should not be held liable. The sum of Rs. 55-9-9 allowed under this head should be deducted from the decree. In other respects, we confirm the decree of the lower appellate Court. Parties will pay and receive proportionate costs throughout.

S.N./R.K. *Decree slightly varied.*

(1) [1892] 19 Cal. 123=18 I. A. 158 (P. C.).
(2) A. I. R. 1915 Mad. 708=38 Mad. 887=23 I. C. 570.
(3) A. I. R. 1919 Mad. 849=47 I. C. 924.
(4) [1898] 21 Mad. 8.
(5) [1910] 8 I. C. 91.

A. I. R. 1919 Madras 888

OLDFIELD AND BAKEWELL, JJ.

Mallidi Dorayya—Defendant and Petitioner—Appellant.

v.

Sutti Veerayya—Plaintiff and Counter-Petitioner—Respondent.

Appeal No. 127 of 1916, Decided on 8th October 1917, against the appellate order of Temporary Sub-Judge, Cocanada, in Appeal Suit No. 47 of 1916.

Civil P. C. (5 of 1908), O. 21, Rr. 43, 54 and 55—Order against judgment-debtor on hearing all objections to attachment is conclusive.

Where an order for attachment of the judgment-debtor's property is passed after hearing his objections, the order is conclusive and debars the judgment-debtor from raising other objections in the same proceedings: 8 *Cal.* 51 (*P. C.*) *Foll.* [P 888 C 2]

G. Venkatramiah—for Appellant.

P. Narayanmoorthy—for Respondent.

Judgment.—We can dispose of this appeal on only one of the grounds in the appeal memo., the fifth, and we therefore express no opinion on the others. The order under appeal is one refusing to raise the attachment of the property of the defendant-appellant in execution of respondent's decree. The appeal has been resisted on the ground that appellant had notice to appear on 14th August 1915 and show cause against the attachment and that he appeared accordingly, but, that the Court after considering his contention, that the decree was satisfied, made an order for attachment which, it is contended, debars him from subsequent objection on any ground. There is no doubt regarding the facts: and following *Mungul Pershad Dichit* v. *Grija Kant*

Lahiri (1), we must hold that the order was conclusive. Argument to the contrary has been based on the fact that the order was passed without reference to the plea of limitation now relied on and in fact without its being submitted to the Court. We do not think it necessary to go through the authorities cited to show that, in such circumstances, the propriety of the order can be questioned by a subsequent petition, because they all relate to attempts to question it in subsequent distinct proceedings, suits or execution petitions, not as here in the same proceeding at a later date. To allow appellant's contention would deprive the decision reached at any particular stage in an execution proceeding of finality and enable the judgment-debtor to protract that proceeding indefinitely. Law and convenience being against him, the appeal must fail. The respondent, however has succeeded on a point not taken in the lower Courts. We therefore dismiss the appeal but in the circumstances without costs.

S.N./R.K. *Appeal dismissed.*

(1) [1882] 8 Cal. 51=11 C. L. R. 113=8 I. A. 123 (P. C.)

A. I. R. 1919 Madras 889

AYLING AND PHILLIPS, JJ.

Appaji Iyer and *others* — Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 558 of 1917 and Criminal Revn. Petn. No. 436 of 1917, Decided on 8th January 1918, from judgment of Sub-divisional Magistrate, Gopichettipalayam in Appeal No. 26 of 1917.

(a) Madras Towns Nuisance Act (3 of 1889), S. 3—Money to be seized as used for gaming must have been actually displayed as stakes.

Money or coins can be said to be used for the purpose of gaming under S. 3 only if they are actually staked. To justify their confiscation the money or coins should have been actually used or displayed in the act of gambling. [P 890 C 1]

(b) Criminal P. C. (1898), S. 517—Property that has been actually used for commission of offence only can be confiscated—Property produced but in respect of which no offence is committed is not in absolute disposition of Court.

Section 517, Cl. 1, authorizes the confiscation only of property which has been used for the commission of an offence.

The words "may make such order as it thinks fit" in the section do not confer on a Court absolute power of disposition over property which is produced before it but regarding which no offence has been committed and which has not been used for the commission of an offence: 1 *I. C.* 79, *not Appr.* [P 890 C 1]

(c) Madras Towns Nuisance Act (3 of 1889), S. 3—Sovereigns found tied up in waist cloth and in another accused's mouth seized—Those in mouth could be said to be used in gaming but not those in waist cloth—Confiscation is illegal.

Where some sovereigns were found tied up in the waist cloth of one accused and some others concealed in the mouth of another accused who were convicted under the Madras Towns Nuisance Act and the Magistrate ordered confiscation of the sovereigns:

Held: that the order so far as it related to the sovereigns found in the mouth of one of the accused was legal, as it could be reasonably inferred that they were intentionally secreted to avoid exposure but that the confiscation of the coins tied in the waist cloth was illegal. [P 890 C 2]

(d) Criminal P. C. (1898), S. 517—Scope—Discretion must be judicially used—High Court not to interefere where discretion is used.

Per *Phillips, J.*—The powers under S. 517, Criminal P. C., are very large and the Magistrate's discretion under it is wide, but such discretion must be exercised judicially and, if so exercised, the High Court should not interfere with it in revision. [P 891 C 1]

(e) Criminal P. C. (1898), S. 517—Money shown to be probably used in gaming—Its forfeitures can be ordered—No inquiry is necessary.

If there are circumstances from which an inference can be drawn that money has been used for gaming, a Magistrate can order its forfeiture and it is not necessary that he should hold an inquiry for that purpose. [P 891 C 2]

J. C. Adam—for Petitioners.

C. Narasimha Chariar for *Public Prosecutor*—for the Crown.

Ayling, J.—I can see no reason for interfering with the conviction in this case or with the order directing the destruction of the cards. The real difficulty is in determining whether the Magistrate had jurisdiction to pass the order confiscating the money (12 sovereigns) found on the person of accused 2 and 3. The order admittedly cannot be brought under the last paragraph of S. 3, Act 3 of 1889, inasmuch as the conviction was not under Cl. 10 of the same section: and it can only be upheld if it is covered by S. 517, Criminal P. C., Cl. 1 of which runs as follows:

"When an inquiry or a trial in any criminal Court is concluded, the Court may make such order as it thinks fit for the disposal of the property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence."

Mr. C. Narasimha Chariar who appeared for the Public Prosecutor has endeavoured to support it on two grounds:

(1) That the money was property "which has been used for the commission of an offence," i.e., gaming in a common gaming house S. 7 (Act 3 of 1889) and (2) that, even if it were not, the Court had jurisdiction to dispose of it by confiscation under the earlier part of the clause as property produced before it.

I have no doubt that the section authorizes the confiscation of property "which has been used for the commission of an offence" [vide *Ramasami Aiyar* v. *Venkateswara Aiyar* (1),] but are the sovereigns such property? The Sub-Magistrate who passed the order merely speaks of them as property "concerned in the case." The Subdivisional Magistrate in upholding it calls them "sovereigns used for gaming;" but he does not refer to, much less discuss, the evidence to show that they were used for gaming, or consider the difference between the sovereigns found in accused 3's mouth and the sovereigns found in accused 3's pocket. I take it the coins can only be said to have been used for gaming if they had been actually staked. Now, as regards the eight sovereigns found in accused 2's mouth I think this can be legitimately inferred from the evidence. The place of concealment tends to indicate a guilty knowledge and P. W. 1 deposes that, when the police party entered seven or eight sovereigns were lying on the mat with the cards. This disappeared somehow and it may be fairly inferred that accused 3 who was one of the gamblers, snatched them up and put them in his mouth. I think the order of confiscation of the eight sovereigns found in accused 3's mouth can be upheld on this ground.

The other four were found, three tied in accused 3's waist cloth and one in accused 2's pocket. There is nothing to indicate that these coins had been staked; and it cannot be inferred from the fact they were found in the pocket or cloth of a person engaged in gambling. *Emperor* v. *Walli Mussaji* (2) and *Emperor* v. *Tota* (3) are cases in which orders for confiscation of money in similar circumstances were set aside, because they were not covered by the terms of the Gambling Acts in force; there was apparently no suggestion in either case that any portion of S. 517, Criminal P. C., could be invoked in aid of the order.

Mr. Narasimha Chariar however seeks to fall back on the first portion of the section and argues that the coins were produced before the Court, and that the Court is authorized to dispose of them "as it thinks fit," which words would, he says, include even confiscation. The section was altered in 1898 and its present wording is, no doubt, startlingly wide; but I cannot believe that it was intended thereby to confer on a Court the absolute power of disposition of proparty regarding which no offence has been committed and which has not been used for the commission of an offence. A reference to the draft bill which ended in the Code of 1898 shows that the original intention was to empower a Court to pass such order as it thought fit for the disposal of any property produced before it "the title to which is doubtful or in dispute," which seems to indicate a provisional disposal of that property, leaving any party claiming an interest therein to seek his remedy through the usual channels against the holder.

In the Select Committee the words "the title to which is doubtful or in dispute" disappeared, an omission which is not explained in the Committee's report. If the intention had been to confer such wide punitive powers as are now claimed (for confiscation implies nothing less), it is difficult to believe that no explanation would have been offered. We have not been referred to any case in which the section has been construed in such a wide sense. The judgment in *Russel Bibee* v. *Ahmad Moosajee* (4) implies no more than the limited and provisional power above indicated. The two cases already quoted, *Emperor* v. *Willi Mussjai* (2) and *Emperor* v. *Tota* (3), are both indirectly against such a view; for in each case the order set aside could apparently have been supported in view of the law contended for on behalf of the Court. With these may be read the order in *Ponnusawmy Pillay, In re* (5), which is indeed an authority to the contrary though no doubt of an obiter nature and unsupported by reasons. I may also refer to the view taken by the learned Judges in *Abi-*

(1) [1913] 18 I. C. 171.
(2) [1902] 26 Bom. 641.
(3) [1904] 26 All. 270.
(4) [1907] 34 Cal. 347.
(5) [1909] 1 I. C. 79.

nash Chandra Battacharjee v. *Emperor* (6) regarding the proper interpretation of the earlier portion of the section, although I am unable to follow them as regards the limitation of forfeiture of property connected with an offence. I would set aside the order of confiscation of these four sovereigns as not warranted by S. 517, Criminal P.C., and direct their return to the persons from whom they were seized.

Phillips, J.—The first point taken is that the finding that the house is a gaming house is based on the uncorroborated testimony of an accomplice. In the first place P. W. 2 is hardly an accomplice in the offence charged, although he may have frequented the house for gambling on previous occasions and secondly the evidence of P. W. No. 1 is corroborative in that it shows that some nine persons of different castes were gambling together. Our interference in the concurrent finding of the two Courts is not called for on this ground. The second point is that the order to confiscate the cards and sovereigns is not legal. The Sub-Magistrate does not state under what provision of law he passed the order, but inasmuch as the convictions were under Ss. 6 and 7 of Act 3 of 1889 the order cannot have been passed 'under S. 3 of that Act and the presumption being that the Sub-Magistrate acted according to law, the order must have been passed under S. 517, Criminal P. C., the section relied on by the Subdivisional Magistrate. The question then is whether the order is a legal order; and the cases quoted for petitioners, i. e., *Emperor* v. *Walli Mussaji* (2) and *Emperor* v. *Tota* (3), are not very much to the point as they relate to the provisions of special Acts, and not to S. 517, Criminal P. C. The powers under the section are very large and the Magistrate's discretion under it is wide, for he can make 'such order as he thinks fit" for the disposal of any property produced before him: vide *Russel Bibee* v. *Ahmad Moosajee* (4). Such discretion must, I take it, be exercised judicially and if it has been so exercised. I do not think that we should interfere in revision, especially when the order has been confirmed by an appellate Court. In the present case, P. W. 1 says that he saw sovereigns being used for gambling, and when accused 1 to 3 were arrested 8 sovereigns were found in accused 3's mouth, three in a towel or handkerchif tucked into his waist and one in accused 2's pocket.

Under S. 3 of Act 3 of 1889 money employed or displayed for the purpose of gaming is liable to forfeiture, and consequently an order under S. 517, Criminal P. C. for the confiscation of money employed or displayed for the purpose of gaming would be a legal order, for it would be an order passed on the lines of a statutory provision for similar cases, and could not be deemed to be an arbitrary exercise of discretion. In this case however there is no definite proof that these particular sovereigns were employed or displayed for the purpose of gaming, but in view of the fact that sovereigns had been used for gaming and had been seen on the mat used by the gamblers, it is not an unreasonable presumption that the sovereigns found on accused 2 and 3 were some of those sovereigns. The 8 sovereigns in accused 3's mouth can hardly be said to have been carried by him in this way in the ordinary course of business; and a very natural inference would be that he had snatched up the coins from the mat and concealed them in his mouth and the inference is all the stronger from this that he had three other sovereigns tied up in a cloth at his waist. The inference as to this latter and the one sovereign found with accused 2 that they were being employed for gaming is much weaker, but there is the circumstance that accused 2 and 3 have not explained their possession on any other hypothesis. The evidence of D. W. 1 is incredible and if believed, would merely show that accused 1 was going to give him the 12 sovereigns the following day to convert into jewelry. In a case under the Madras City Police Act 3 of 1888, *Queen-Empress* v. *Bashyam Chetti* (7), it was held that the Magistrate was not required to hold an inquiry as to whether the money ordered to be forfeited had been used for gaming, that it was sufficient that the money etc., had been seized by the Commissioner of Police under circumstances of reasonable suspicion entertained by him. If money were found in a gambler's purse and there were no circumstances to suggest that it had been employed for gaming, it would certainly be unreasonable to order its confiscation, but in this

(6) [1907] 34 Cal. 986.

(7) [1896] 19 Mad. 209.

case there are circumstances from which the inference can be drawn that the sovereigns had been employed for gaming. As regards eight of them the inference is very strong: but the inference as regards the other four is much weaker, and while I am doubtful whether it can be said that the Magistrates have exercised their discretion in an arbitrary manner as regards these four sovereigns and that, I take, would be the only ground for interference by this Court in a case of revision, I am not prepared to differ from my learned brother's opinion and agree in the order proposed.

S.N./R.K. *Order partly set aside.*

A. I. R. 1919 Madras 892

ABDUR RAHIM AND OLDFIELD, JJ.

Public Prosecutor—Appellant.

v.

Maddila Mutayalu and *another*—Accused.

Criminal Appeal No. 706 of 1917, Decided on 24th April 1918, against acquittal by Sess. Judge, Ganjam, in Criminal Appeals Nos. 25 and 26 of 1917.

Penal Code (1860), Ss. 372 and 373—Making over of minor girl, by hire or sale, is essential—Performance of "Kanyarikam" ceremony and having sexual intercourse for three days successively, does not bring case within these sections, if girl is still in possession of parents.

Under Ss. 372 and 373, there must be making over of possession of the minor girl either by sale or by hire or by some similar arrangement in order that a case may come within the mischief of the law: 1 *Mad.* 164; 5 *M. H. C. R.* 415; 18 *I. C.* 257; 15 *Mad.* 323 and 12 *I. C.* 654, *Dist.*

Where the only evidence against the accused was that he performed the kanyarikam ceremony, i. e., the nuptials of a minor girl and had sexual intercourse with her for three days successively, but the girl continued to live with her parents who never parted with possession of her to the accused:

Held: that these facts were not sufficient to support the conviction of the accused under S. 373 and the conviction of the girl's parents under S. 372. [P 892 C 2]

T. Prakasam—for Accused.

F. R. Osborne—for the Crown.

Judgment.—This is an appeal against the acquittal of two persons, the first of whom was charged with an offence under S. 372, I. P. C., and the other under S. 373, I. P. C. The first accused is the mother of a Hindu girl under 16 years of age and the 2nd accused is a Komattee. The latter kept the elder sister of the girl until she died and on her death, the evidence is that a ceremony called Kanyarikam was performed between the 2nd accused and the girl with the help of the 1st accused. The Kanyarikam ceremony, according to the witnesses, has the effect of an arrangement by which a person has intercourse with a girl who has just attained puberty for three days. P. W. 1 says:

"The 2nd accused Krishnamurthy performed the Kanyarikam ceremony which means her nuptials."

The man that performed the ceremony enjoys the girl's bed for three days successively. They may afterwards continue their friendship or may separate. The evidence however shows that the minor girl continued to live with her parents, that is, the 1st accused and her father in the same house as before. The house had been rented by the 2nd accused and he paid the rent while his former mistress, who was the sister of the girl concerned in this case, was living. The same arrangement was continued. There is evidence to show that the parents of the girl in no way parted with the possession of her to the 2nd accused. There is no suggestion, except that the ceremony of Kanyarikam was performed, that she was let to hire for any term. The question is, whether the performance of this ceremony and the above mentioned facts bring the case within S. 372, I. P. C., so far as the mother of the girl is concerned, and within S. 373, I. P. C., so far as the 2nd accused is concerned. We may take it that the 2nd accused did have intercourse with this girl D. W. 9. The main question in the case is whether what has taken place amounts to letting to hire or otherwise disposing of the minor within the meaning of S. 372, I. P. C., or hiring or otherwise obtaining possession within the meaning of S. 373, I. P. C. The first section is aimed at the person who disposes of the person of a minor for immoral purposes, and the other section is directed against the man who obtains possession of a minor girl for such purposes. We think that the language of the two sections is sufficiently clear to show that there must be making over of possession of the minor girl either by sale or by heir or by some similar arrangement in order that the case may come within the mischief of the law. This seems to us to be also the effect of the rulings. One of the earliest cases in this Court is that reported as *Queen*

v. *Shaik Ali* (1). That is a decision of three Judges. It is pointed out by Scotland, C. J., in his judgment in that case that to bring a case within S. 373, I. P. C., there must be evidence to show that complete possession and control of the minor's person was obtained by buying, hiring or otherwise with the intent or knowledge specified in the section. It is further pointed out that

"the provision seems to exclude the supposition that an obtaining of possession in the sense in which that expression is, no doubt, 'sometimes used, of merely having sexual connexion with a woman, could have been in the contemplation of the framers of the section."

Innes, J., says :

I am of opinion that 'possession' in the section under which he is indicted means possession with a power of disposal, and in this sense there is no evidence that the prisoner had possession of the girl."

The same view of the law was taken in *Queen-Empress* v. *Sukee Raur* (2). That was a case under S. 373 and Pigot, J., held that S. 372, I. P. C., contemplates a case of letting or hiring or other similar transaction by which the possession of a girl is obtained with the intention of employing her habitually for the purpose of indiscriminate sexual intercourse. Mr. Mayne in his commentary on this section at p. 589, fourth edition, states the law to be that

"the words refer to a making over of a minor either in perpetuity or for a term, and not merely for the commission of isolated acts of sexual intercourse."

We have on the other hand been referred to a number of decisions with respect to the dedication of a minor girl to a temple or a god as a Dasi. We do not think that those cases have a very close bearing on the present question. Those are the class of cases reported as *Reg.* v. *Arunachellam* (3), *Padmavati, Ex parte* (4), *Public Prosecutor* v. *Kannammal* (5), *Srinivasa* v. *Annasami* (6) and *Public Prosecutor* v. *Rajammal* (7). We hold that the facts proved in the case are not sufficient to support convictions under Ss. 372 and 373. The order of acquittal will therefore stand.

S.N./R.K. *Appeal dismissed.*

(1) [1869] 5 M. H. C. R. 473.
(2) [1894] 21 Cal. 97.
(3) [1876] 1 Mad. 164.
(4) [1869] 5 M. H. C. R. 415.
(5) [1914] 18 I. C. 257.
(6) [1892] 15 Mad. 323.
(7) [1911] 12 I. C. 654.

A. I. R. 1919 Madras 893

AYLING AND SESHAGIRI AIYAR, JJ.

(*Vaddiparthi*) *Mangayya* and *another* —Petitioners.

v.

(*Vaddiparthi*) *Venkataramanamurthi* and *others*—Opposite Parties.

Civil Misc. Petn. No 1142 of 1918, Decided on 15th August 1918

(a) Civil P. C. (1908), S. 109—Remand for retrial on merits—There is no final judgment.

Where a High Court, on appeal, remands a case for retrial by the lower Court, there is no final judgment against which the High Court can grant a certificate to appeal to the Privy Council under S. 109, Civil P. C. [P 894 C 1]

(b) Civil P. C (1908), S. 109—Every issue found by appellate Court—Remand to give consequential relief—Judgment is final.

Where every issue of a fact has been found by the appellate Court and the remand is directed solely with a view to give the consequent reliefs dependent on the conclusions of the appellate Court, the judgment must be regarded as final within the meaning of that expression in S. 109 (a), Civil P. C. [P 894 C 1]

The mere fact that a judgment has not been given on a preliminary point will not render it necessarily a final adjudication. The question in each case will be whether the pronouncement by the appellate Court has given a final decision upon all the rights litigated. 17 *All.* 112 (*P. C.*), *Expl.* 13 *Mad.* 249: *A. I. R.* 1915 *Mad.* 423 and 32 *I. C.* 360 (*F.B.*), *Foll.* [P 894 C 2]

(c) Civil P. C. (1908), S. 109—Judgment on merit on one issue and remand on other issues—Judgment is not final.

Where a final decision is given on one of the issues on the merits and a retrial is ordered in respect of the other points or issues, the judgment is not final under S. 109 (a), and leave cannot be granted to appeal to the Privy Council in respect only of the adjudication on the merits. [P 894 C 2]

P. Narayanamurthi—for Petitioners.

P. Somasundaram—Opposite Parties.

Order.—We uphold the preliminary objection that leave should not be granted in this case. The suit was for partition. There are two sets of properties. As regards the first of them, the defence was that the defendants were the holders of the service in respect of which the inam was granted, that they were enjoying the property by doing the service, and that consequently plaintiff was not entitled to claim his share in it. As regards the second set of properties, it was contended that the parties had become divided in respect of it long ago and that it was not open to the plaintiff to claim a repartition. Issues 1 and 2 relate respectively to the two sets of properties. The other issues were general in their nature, and raise questions of

limitation and res judicata. The Subordinate Judge held that the first set of properties was not divisible, that the claim of the plaintiff was barred by limitation and res judicata and dismissed the suit. He gave no specific finding on the second issue. On appeal we differed from the Subordinate Judge on the question of the divisibility of the inam lands and overruled him on the questions of limitation and res judicata. In this view we remanded the suit for disposal on the merits. The two outstanding questions on which findings of fact had to be arrived at by the Subordinate Judge related to the re-partition of the second set of properties and to the accountability of the defendants for the income of the first set of properties.

This application has been made for leave to appeal against our judgment. It was opposed on the ground, among others, that as we directed a retrial on remand, there is no final judgment against which an appeal can be preferred to the Privy Council. We think this contention is right Mr. Narayanamurthi places strong reliance on the observations of the Judicial Committee in *Saiyid Muzhar Hossein* v. *Mt. Bodha Bibi* (1). It is true that, where every issue of fact has been found by the appellate Court and the remand is directed solely with a view to give the consequential reliefs dependent upon the conclusions of the appellate Court, the judgment must be regarded as final within the meaning of that expression in S. 109, Cl. (a), Civil P. C. At the same time we are unable to agree with the learned vakil that, unless the judgment of the appellate Court proceeds upon a preliminary point, it should be regarded as a final adjudication. For example, there may be reversal upon a question of adoption decided by the first Court and a consequent remand for the purpose of ascertaining the extent and nature of the properties to be decreed in favour of the plaintiff. It may be that, on remand notwithstanding the finding in favour of the plaintiff on the question of adoption, he may fail to obtain any relief whatsoever in the suit. Under such circumstances it would be futile to grant leave to appeal to the Privy Council. The decision of this Court in *Tirunarayana* v. *Gopalasami* (2) supports the view we have taken. The question in each case will be whether the pronouncement by the appellate Court has given a final decision upon all the rights litigated. *Nayari Venkataranga* v. *Venkatarama Narasimha* (3) quotes with approval the earlier Madras case and we see no reason to differ from these two decisions. The Allahabad High Court considered the matter very fully in a recent Full Bench decision in *Nuri Mian* v. *Ganges Sugar Works, Ltd.* (4) and our conclusions are in accordance with that decision.

Mr. Narayanamurthi argued that as the judgment is final within the meaning of the Judicial Committee in *Saiyid Muzhar Hussein* v. *Mt. Bodha Bibi* (1) in respect of the first set of properties, he is entitled to prefer an appeal in regard to it. The result of upholding this contention would be to split up a suit into a number of claims and to give the party against whom a judgment has been given upon one of them a right of appeal to the Judicial Committee. Such a course would be obviously wrong. We have therefore come to the conclusion that the judgment appealed against, notwithstanding that it gave a decision on the merits in respect of one set of properties, is not a final judgment contemplated by S. 109 (a), Civil P. C., and that the leave asked for should be refused. No costs.

S.N./R.K. *Leave refused.*

(1) [1895] 17 All. 112=22 I. A. 1 (P. C.).
(2) [1890] 13 Mad. 349 (F. B.).
(3) A. I. R. 1915 Mad. 423=38 Mad. 509=21 I. C. 842.
(4) [1916] 38 All. 150=32 I. C. 360 (F. B.).

A. I. R. 1919 Madras 894

SPENCER AND BAKEWELL, JJ.

Kuttiventi Venkataramanamurthi—Defendant—Appellant.

v.

Macherla Sundara Ramiah and *others*—Plaintiffs—Respondents.

Second Appeal No. 1114 of 1916, Decided on 22nd January 1918, from decree of Dist. Judge, Godaveri, in Appeal Suit No. 54 of 1915.

Civil P. C. (1908), Ss. 36 and O. 21, Rr. 53 (3) and 93—Decree for maintenance charged on immovable property—Sale of property charged in execution—Sale set aside—Order in favour of purchaser for repayment of purchase money can be enforced by attaching maintenance decree and executing it under O. 21, R. 53 (3).

There is nothing in O. 34, R. 14 to prevent a maintenance decree-holder from proceeding in execution against the properties charged under the maintenance decree: 42 *I. C.* 975, *Foll.*; 17 *M.L.J.* 217, *not Foll.* [P 896 C 1]

Where a property charged with maintenance is brought to sale, but the sale is subsequently set aside, the purchaser is entitled under O. 21, R. 93, to an order for refund of the purchase-money with or without interest in the Court's discretion and to execute the order under S. 36 as if it were a decree. [P 895 C 2]

In such a case the purchaser can enforce payment of the amount ordered to be refunded to him by attaching the maintenance decree and executing it under O. 21, R 53 (3). [P 896 C 1]

B. Appa Rao—for Appellant.

P. Somasundaram for *P. Narayanamurthi*—for Respondents.

Judgment.—Defendant 1 obtained a decree for maintenance against defendants 2 to 5. By the decree a charge was created over certain immovable property concerned in the present suit. In executing the decree the property which was subject to the charge was attached and sold for Rs. 900. The plaintiff was the purchaser. He paid the purchase money into Court, and defendant 1 drew out Rs. 365-7-0 of it. On defendant 3's petition the sale was subsequently set aside on 14th September 1908. The plaintiff applied for a refund of his purchase-money and obtained an order on 1st December 1908 that defendant 1 should within one month deposit in Court the money drawn out by her with interest at 6 per cent. Subsequently in execution of that order he attached on 15th December 1908 defendant 1's maintenance decree. He applied to sell the property charged under the maintenance decree but his application was dismissed on 22nd April 1910, for what reason it is not clear, from the records before us. Finally he brought this suit in 1911 against defendants 1 to 5 to recover the purchase-money. In the plaint there is a prayer for sale of the debt of Rs. 607 due to defendant 1 from defendants 2 to 5. But the Courts below have treated this as a suit by the holder of a decree to enforce a charge and have passed decrees in the form prescribed by O. 34, R. 4 (1), Civil P. C.

The points argued in second appeal are: (1) whether the plaintiff's suit is maintainable in its present form; (2) whether the plaintiff is entitled to recover from defendants 2 to 5 the amount due to defendant 1 up to the date of his attachment of the maintenance decree or the amount due to her on the date when this suit was instituted. In considering the maintainability of the present suit it is necessary to keep distinct the plaintiff's cause of action to recover from defendant 1 the amount of purchase-money taken out of Court to which he alone became entitled upon the sale being set aside, and his cause of action as against defendants 2 to 5, who are the judgment-debtors in the maintenance suit, to execute the decree attached by him as if he were the original decree-holder. As against defendant 1 the plaintiff as purchaser was entitled by O. 21, R. 93, to an order for repayment of his purchase-money with or without interest and to execute the order under S. 36, Civil P.C., as if it was a decree. He appears to have followed this procedure when he obtained the order of 1st December 1908 and to have executed the order when he attached the maintenance decree. The interest the plaintiff is entitled to against defendant 1 is interest up to the date of repayment of the purchase-money taken by her. Under O. 21, R. 93 it was discretionary with the Court to direct the payment of interest and the Court in its order of 1st December in fact fixed the interest at 6 per cent up to the date of payment. Having got this order it was unnecessary for the plaintiff to get a personal decree against this defendant; but in order that she might be bound by the order or decree to be obtained against defendants 2 to 5, it might have been advisable to make her a party to any proceedings against the family property of defendants 2 to 5. As between defendants 2 to 5 and the plaintiff there is no privity of contract for the return of his purchrse-money. He can only recover it by virtue of his right to step into the shoes of the maintenance decree-holder and to execute her decree in any manner lawful to her [O. 21, R. 53 (3)].

It was held in *Venkatasubhamma* v. *Venkanna* (1) that the maintenance decree-holder must institute a fresh suit and could not, in execution of his or her maintenance decree, bring to sale the properties made subject by that decree to a charge for maintenance. S. 99, T. P. Act, which was held to preclude the decree-holder from proceeding in execution, has since been repealed, and it has recently been decided by this Court in *Sowbagia Ammal* v. *Manika Mdali* (2) that there is nothing in O. 34, R. 14 which has taken the place of S. 99, T. P.

(1) [1907] 17 M. L. J. 217.
(2) [1917] 42 I. C. 975.

Act, to prevent a maintenance decree-holder from proceeding in execution against the properties charged under the maintenance decree. The learned Judges who decided that case remarked that the position of a widow who, by virtue of her maintenance decree, for the first time acquires a charge on specified immovable properties, is different from that of a holder of a charge under S. 100, T. P. Act (although S. 100 speaks of charges arising by operation of law as well as those created by act of parties), and that it does not fall within the scope of O. 34, R. 14. We are not prepared to dissent from their opinion. Accordingly it was open to the plaintiff as representative of the maintenance decree-holder under O 21, R. 53 to proceed to attach and bring to sale the defendants' immovable property. Instead of doing so he has launched this suit, alleging in his plaint that all the parties agreed that that was his only remedy. The question of estoppel has been argued before us but it is unnecessary to go into it, as there was no issue raised on the point at the trial and as the plaintiff's suit need not be dismissed simply on the ground that his proper remedy lay in execution, seeing that under S. 47, Civil P. C., it was always open to the Court in which the suit was instituted to treat the suit as a proceeding and deal with it accordingly.

The objection to the suit is a good objection. The plaintiff is not the holder of the charge nor the transferee of the maintenance decree-holder's interest. He has not as yet brought the maintenance decree to sale and purchased it himself. He has not done more than attach the decree, an act which gives him a right to execute the decree by virtue of O. 21, R. 53 (3), but not a right to institute a suit as mortgagee for the sale of the mortgaged property, as that right remains vested in the holder of the charge or mortgage, namely, defendant 1. As regards interest the plaintiff appears to be entitled to recover it up to the date of repayment of his purchase-money from defendants 2 to 5 to an extent not exceeding the past and future maintenance due to defendant 1 on the date of plaintiff's instituting these proceedings. The appellate Court has exonerated defendant 1 rom interest and the plaintiff has not appealed. We allow defendant 3's appeal with costs here and in the Courts below, and we remand the plaintiff's suit to the Court of the District Munsif for being disposed of as a proceeding in execution under S. 47 (2), Civil P. C.

S.N./R.K. *Appeal allowed.*

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* A. I. R. 1919 Madras 896

KUMARASWAMI SASTRI, J.

Kurichetti Venkatasubbayya — Petitioner.

v.

Emperor—Opposite Party.

Civil Revn. Petn. No. 280 of 1918 Decided on 8th October 1918 from order of Dist. Munsif Ongole. D/- 2nd March 1918 in Small Cause Suit No. 440 of 1916.

(a) Criminal P. C. (1898), S 476—Power to direct prosecution is not limited to officer disposing of case—Successor can continue proceedings.

Section 476 does not limit the power to direct prosecution to the officer who disposed of a case. His successor-in office can continue the proceedings and direct prosecution under the section. 29 *Mad.* 331; 14 *I. C.* 201 and 32 *Bom.* 184, *Foll.* 34 *Cal.* 551 (*F. B.*), *Disappr.* [P 897 C 1]

(b) Criminal P, C (1898), S. 476—Proceedings under—Long pendency does not render sanction illegal—But party aggrieved may prove that he was prejudiced by delay.

The long pendency of proceedings under the section or unreasonable delay in passing orders will not per se render the sanction illegal. but it is open to the party aggrieved to prove that he was prejudiced by the delay and that sanction should be revoked on that ground: 1. *I. C.* 597 (*F. B.*), *Expl.* [P 897 C 1,2]

P. Chenchiah—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The plaintiff (petitioner) filed a suit on a promissory note. He got an ex parte decree which was set aside. He did not proceed with the suit and the District Munsif, on the plea of the defendent that the endorsement of payment was a forgery and that the amount of the note was altered, dismissed the suit. On the date of dismissal, 5th February 1917, the District Munsif instituted proceedings under S. 476, Criminal P C. He took evidence and reserved passing orders, but did not pass any orders though the inquiry was closed on 6th September 1917. He handed charge to his successor on 1st February 1918 and order was passed on 2nd March 1918 directing petitioner's prosecution.

Various objections have been taken to the legality of the order. The first is that the successor of the Munsif who passed orders had no jurisdiction to do so. There is nothing in the Criminal Pro-

cedure Code limiting the power to direct posecution under S. 476 to the officer who disposes of the case. As pointed out in *Runga Ayyar* v. *Emperor* (1), where a similar objection was taken, the power to act under S. 476 is given to the Court and not to the individual officer presiding over it. In *Rati Jha* v. *Emperor* (2) it was held that a sanction granted by the successor-in-office of the Judge or Magistrate before whom the offence was committed was valid. Reference has been made by Mr. Chenchiah to *Begu Singh* v. *Emperor* (3), where a Full Bench of the Calcutta High Court held that the powers conferred by S. 476 can only be exercised by the Judge who tries the case. This decision has been dissented from by the Bombay High Court in *Lakshmidas Lalji* In re (4) and is opposed to the ruling of the Madras High Court in *Runga Ayyar* v. *Emperor* (1), which I sitting as single Judge am bound to follow. It has been next contended that, as the Munsif who instituted proceedings under S. 476 closed the case without passing orders and as his successor re-opened proceedings by issuing fresh notices to the parties, the latter must be deemed to have instituted proceedings de novo in February 1918. Reliance has been placed in *Aiyakannu Pillai* v. *Emperor* (5) to show that the proceedings taken by the succeeding District Munsif are invalid. All that was decided in that case was that the powers conferred by S. 476 can be exercised by the Court

"only in the course of the judicial proceeding or at its conclusion or so shortly thereafter as to make it really the continuation of the same proceeding in the course of which the offence is committed."

It is no authority for the proposition that if proceedings are commenced so as to satisfy the above requirements, sanction will be invalid if there is unreasonable delay in the passing of final orders. In the present case the delay by the District Munsif who initiated proceedings is very great and, if I may say so, inexcusable but I do not see how the proceedings can be void for that reason. It is, of course, open to the petitioner to prove that he has been prejudiced by the delay and that sanction ought to be revoked on that ground, as it seems to me a scandal that proceedings under S. 476 should have been pending against petitioner from 5th February 1917 to 2nd March 1918. Mr. Chenchiah states that an important witness has been gained over by the defendant and it appears from the affidavit of the pleader who appears for the petitioner in the lower Court that this is so. Having regard to the long delay I am of opinion that it is not in the interest of justice that proceedings under S. 476 should be taken. I therefore set aside the order.

S.N./R.K. *Order set aside.*

(1) [1906] 29 Mad. 331.
(2) [1912;39 Cal. 463=14 I. C. 201.
(3) [1907] 34 Cal. 554 (F. B.)
(4) [1908] 32 Bom. 184.
(5) [1909] 32 Mad. 49=1 I. C. 597 (F. B.).

1919 M/113 & 114

A. I. R. 1919 Madras 897

ABDUR RAHIM AND OLDFIELD, JJ.

C. Rama Iyengar— Appellant.

v.

Anga Gurusami Chetti and *others*—Defendants—Respondents.

First Appeal No. 164 of 1916, Decided on 29th January 1918 against decree of Temporary Sub-Judge, Salem, in Original Suit No. 19 of 1915.

(a) Lease — Construction — Incidents of kayam saswatham patta and test of its character are those laid down by P. C. in 12 Cal. 117 as applicable to istimrari mokurari pattas.

The incidents of a kayam saswatham patta in the Madras Presidency and the tests for determining its character are those laid down by the Privy Council as applicable to istimrari mokurari pattas in Bengal in 12 *Cal.* 117 (*P.C.*).

[P 898 C 2]

(b) Lease—Construction — Terms such as 'including children or descendants' or 'from generation to generation' signify permanent grant — Terms circumstances and conduct help to determine whether it is permanent or for life.

In construing these pattas the use of such terms as including children or descendants,' from 'generation to generation' will signify grant of a permanent tenure, and their absence would generally import a life-interest. The terms of the patta, the circumstances under which it was made and the conduct of the parties may be taken into consideration in order to ascertain whether the grant was intended to be perpetual.

[P 898 C 2]

(c) Evidence Act (1 of 1872), S. 114—When can presumption of permanency of lease be drawn stated—Landlord and Tenant, permanent tenancy.

Where to the knowledge of the lessor or his heirs, the lessees under such grant have effected sales of the tenures and there have been Court auctions of the same for a consideration too large to be paid merely for a tenancy from year to year and the transfers have been recognized by the landlords who made no attempt to assert that the rights of the original grantees had ceased with their lives, the presumption is that the grant was permanent and heritable.

[P 899 C 1]

(d) Transfer of Property Act (4 of 1882), Ss. 105 and 111—S. 111 applies to leases permanent or otherwise—Act prejudicial to lessor's title works forfeiture—What disclaimer amounts to forfeiture stated.

Section 111, T. P. Act, read along with S. 105, applies to permanent leases as well as to leases for short terms, and the principles of the section govern leases granted before the passing of the Act. In every lease there is an implied condition that the lessee shall do nothing to prejudice the lessor's title, for breach of which the lessor may re-enter: 27 *Mad.* 26; *A. I. R.* 1915 *Mad.* 85 and 31 *I. C.* 184, *Expl.* and *Dist.* [P 899 C 2]

In order to make either a written or verbal disclaimer of the landlord's title sufficient to entail a forfeiture, it must amount to a direct repudiation of the relation of landlord and tenant, or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it. [P 900 C 2]

(e) Transfer of Property Act (4 of 1882), S. 111—Honest inquiry about landlord's title is not repudiation — Inquiry must be bonafide and within limits—Nothing short of complete identification with adverse claimant will work forfeiture.

A tenant honestly inquiring into the title of a claimant is not thereby guilty of disclaimer, nor will an omission to acknowledge the landlord by asking for further information be enough. It must depend on the language used by the tenant and his conduct in each case whether he has transgressed the limits of honest inquiry. Nothing short of his complete identification with an adverse claimant to the landlord will entail the penalty of forfeiture. [P 900 C 2, P 901 C 1]

(f) Transfer of Property Act (4 of 1882), S. 111—Disclaimer of title even of heirs or assignees work forfeiture.

Section 111 applies not only to disclaimer of the landlord's title but also to the title of his heirs, transferees and assigns. [P 901 C 1, 2]

(g) Transfer of Property Act (4 of 1882), S. 111—Denial of lessee's claim to be tenant does not entail forfeiture—Denial must be of landlord's title to land.

The denial by the lessor of the rights of the lessee will not take the case out of the rule regarding forfeiture if the title of the landlord is denied. The disclaimer which entails forfeiture is denial of the landlord's title to the land and not the denial of the claim of the lessee to be his tenant. [P 902 C 2]

(h) Transfer of Property Act (4 of 1882), S. 111 (g)—On denial of title suit for ejectment amounts to termination of lease.

In cases not governed by the Transfer of Property Act the institution of a suit in ejectment is a sufficient determination of the lease, where the lessee has forfeited the lease by denial of the landlord's title. [P 902 C 2]

V. C. Seshachariar and *Krishnaswamy Iyer*—for Appellant.

T. R. Ramachandra Iyer, *T. R. Krishnaswamy Iyer* and *S. Venugopal Chetti*—for Respondents.

Abdur Rahim, J.—The case of the appellant plaintiff in the suit was that the defendants were tenants from year to year and that he was entitled to eject them after giving proper notice as required by law. Should it however be held that they have a permanent leasehold right the appellant claims that the respondents having denied his title have incurred forfeiture and on that ground also they are liable to be ejected. The defendants are transferees of the land from the original grantee under what is called a kayam saswatham patta. The original lessees died long since and the case of the appellant is that the heirs of the former were holding the land merely as tenants from year to year and that is all the rights which the defendants can claim.

There have been several decisions of this Court with respect to kayam saswatham pattas, and we are bound by the principles regulating their construction as laid down in those cases. Those decisions applied to kayam saswatham pattas the well-known ruling of the Privy Council with reference to istimrari mokurari pattas reported as *Tulshi Pershad Singh* v. *Ramnarain Singh* (1), in which their Lordships held that though these words have a lexicographical significance of a permanent tenure, having regard however to the trend of the cases in which they have been interpreted in the Calcutta Courts they have when used without such phrases as "ba farzandan" (including children or descendants) or "naslan bad naslan" (generation after generation), a customary meaning importing only a life-interest. The Privy Council also laid down that in construing a patta, the other terms of the instrument, the circumstances under which it has been made and the conduct of the parties may be taken into consideration in order to ascertain whether the grant was intended to be perpetual inasmuch as those words are not inconsistent therewith though they do not themselves import that meaning. This decision was first applied in this Presidency in *Rajaram* v. *Narasinga* (2). Its effect was considered in *Foulkes* v. *Muthusami Goundan* (3) where the learned Judges did not express dissent from *Rajaram* v. *Narasinga* (2). The point was again considered recently in *Venkataramanna* v. *Venkatapathi*

(1) [1886] 12 Cal. 117=12 I. A. 205 (P.C.).
(2) [1892] 15 Mad. 199.
(3) [1898] 21 Mad. 503.

Nayani Varu (4) where his Lordships the Chief Justice and Coutts Trotter, J., though expressing doubts as to the applicability of the ruling in *Raman Nair* v. *Vasudeva Namboodripad* (5) to saswatham deeds in this Presidency thought it was too late to go back upon the decision in *Rajaram* v. *Narsinga* (2). As the question related to the meaning of words of conveyancing, I agree with the learned Judges that having regard to the decisions in the above-mentioned and other cases, we must follow in this Presidency, with reference to kayam saswatham deeds, the principle of interpretation enunciated in *Tulshi Pershad Singh* v. *Ramnarain Singh* (1) with reference to istimrari mokurari pattas. The saswatham deed itself is not forthcoming in this case. It was executed as far back as 1840. There is no evidence to show the circumstances under which the lease was granted. But the subsequent conduct of the parties leaves no doubt that the tenure contemplated was of permanent, heritable character. There have been sales of the tenure both by private treaty and at Court auction in some cases at least for a consideration too large to be likely to be paid merely for a tenancy from year to year and the transfers have been recognized by the landlords. After the original lessee's death, the leasehold interest was enjoyed by their heirs as of right, and no attempt appears to have been ever made to assert that the rights of the original grantees ceased with their lives. For about 60 years one uniform rate of rent has been paid. It was in fact only recently that an attempt has been made to question the permanent character of this estate. On this point, therefore I agree with the learned Subordinate Judge.

The next contention of the appellant is that the respondents have incurred forfeiture by denying his title as landlord. In answer it is first of all urged on behalf of the lessees that their estate being permanent and heritable the law regarding forfeiture has no application to it. The question was considered by Jenkins, J., in *Kally Dass Ahiri* v. *Monmohini Dassee* (6), where he negatived the lessee's plea, holding that even to a permanent lease the general rule relating to forfeiture applied. He pointed out that S. 111, Transfer of Property Act, read along with the definition of a lease in S. 105, applies to permanent leases as well. He further held that such leases granted before the Act were also governed by the same principles regulating the relation of landlord and tenant. These propositions were approved by Judicial Committee of the Privy Council in *Abhiram Goswami Mohant* v. *Shyama Charan Nandi* (7). As stated in Halsbury's Laws of England Vol. 18, p. 532, there is implied in every lease a condition that the lessee shall not do anything that may prejudice the title of the lessor; and that if this is done, the lessor may re-enter for breach of the implied condition. Reference was made at the Bar to *Raman Nair* v. *Vasudevan Namboodripad* (5), but all that was laid down in that case by Boddam and Bashyam Iyengar, JJ., was that a kanomdar's right as a mortgagee for a contractual term of years would not be affected by his denial of the mortgagor's title. Our attention was also drawn to the observations of Sadasiva Aiyar and Napier, JJ., in *Abbakka Shetthi* v. *Seshamma* (8) and Sadasiva Aiyar, J., remarks in *Kolangorath Raman Nayar* v. *Kannoth* (9) as to the caution required in applying the doctrine of forfeiture by denial of landlord's title in this country. I entirely agree as to the necessity for such caution and I shall presently state my reasons in support of it, but those decisions could not be taken to weaken the authority of the Privy Council ruling in *Abhiram Goswami Mohant* v. *Shyama Charan Nandi*. (7).

Then it is said that the lease in this case is nothing more than an agency to collect rents from the tenants on the land, and hence neither the provisions of the Transfer of Property Act nor the general law of landlord and tenant would be applicable to it. But it does come within the definition of a lease as given in S. 105 and no authority has been cited to show that before the Act such a grant was not subject to the ordinary incidents of a lease. It is next argued by the respondents' vakil that

(4) [1915] 29 I. C. 188.
(5) [1904] 27 Mad. 26.
(6) [1897] 24 Cal. 440.
(7) [1909] 36 Cal. 1003=36 I. A. 148=4 I. C. 449. (P. C.)
(8) A. I. R. 1915 Mad. 85=25 I. C. 944.
(9) [1915] 31 I. C. 184.

there was no such denial of the plaintiff's title in this case as would entail forfeiture. On behalf of the appellant, reference has been made to the English Law on the subject. It may be pointed out that strictly speaking the term "forfeiture" is in English Law, used only with respect to tenancies for a term of years, while in connexion with tenancies from year to year or for "other period" the word disclaimer is applied, though the operation both of disclaimer and forfeiture proceeds on similar grounds. The effect of a disclaimer is to do away with the necessity of a notice to quit, for as stated by Best, C. J., in *Doe d. Calvert* v. *Frowd* (10) a

"notice to quit is only requisite where a tenancy is admitted on both sides, and if a defendant denies the tenancy, there can be no need to end that which he says has no existence."

The Transfer of Property Act requires that in every case whether the tenancy is from year to year or for a term or is of a permanent character, the lessor should have done some act showing his intention to determine the lease. Whether the institution of a suit in ejectment is or is not sufficient will be considered seperately. In English Law it is necessary for the application of "forfeiture" to a tenancy for a term of years that the denial of the landlord's title should have been made in writing, while "disclaimer" may be constituted by spoken words of the tenant or by his conduct. But the Transfer of Property Act, while importing the general doctrine of English Law, does not recognize the distinction which that law draws between tenancies from year to year and for a term of years and thus has done away with the safeguard which the English Statute of Frauds provides with respect to the more valuable class of leases. Under the Indian Act even a permanent grant, such as the one in this suit is liable to be forfeited on account of any verbal expressions used by the lessee, if they can be construed as amounting to a repudiation of the relation of landlord and tenant. This in itself dictates the necessity of guarding against a wide construction of S. 111 and of exercising caution in applying English decisions relating to "disclaimer" to leases of a permanent and heritable nature. It may be mentioned here that the rule of law regarding forfeiture for denial of the landlord's title is founded on feudal principles [see arguments of Crossell and Crompton in *Doe d. Ellerbrock* v. *Flynn* (11)]

It is further to be borne in mind in this connexion that the Indian legislature, following the law of the country, has expressly exempted one large class of leases, viz., agricultural leases, from the provisions of Ch. 5 of the Act. It is necessary to examine carefully the provisions of the Transfer of Property Act to ascertain the exact conditions under which permanent leasehold tenures which are unknown to English Law, have been made liable to forfeiture. So far as forfeiture depends on any express contract of the parties, we are not concerned with it in this case Cl. (g)(2), S. 111 lays down:

"a lease of immovable property determines by forefeiture, in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself, and in either case the lessor or his transferee does some act showing his intention to determine the lease."

This language seems to have been borrowed frcm the judgment of Tindal, C. J., in *Doe d. Williams* v. *Cooper* (12), where he says:

"a disclaimer, as the word imports, must be a renunciation by the party of his character of tenant, either by setting up title in another, or by claiming title in himself."

It is the same principle which is expressed in *Doe d. Gray* v. *Stanion* (13):

"in order to make either a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord and tenant or to a distinct claim to hold possession of the estate, upon a ground wholly inconsistent with the existence of that relation which by necessary implication is a repudiation of it."

when, however, we come to the decided cases, in which the application of the doctrine has been invoked, it is rightly pointed out in Woodfall on Landlord and Tenant, at p. 388, that it is difficult, if not impossible, to reconcile them all. No good purpose will, therefore, be served by going through them. But it may be taken to be a sound general proposition that a tenant honestly inquiring into the title of a claimant, is not thereby guilty of disclaimer, for it is pointed out by Tindal, C. J., in the course of argument in *Doe d. Williams* v. *Cooper* (12) that there are authorities to that effect. Baron Parke also in *Doe d. Gray* v. *Stanion* (13) says: "An omission to acknowledge the landlord by asking for further in-

(10) [1828] 4 Bing. 557=1 Moo. & P. 480.

(11) [1834] 1 C. M. & R. 137=4 Tyr. 619.
(12) [1840] 1 Man. & Gr. 135=1 Scott, N. R. 36.
(13) [1836] 1 M. & W. 695=1 Tyr. & Gr. 1065

formation will not be enough." It must depend on the language used by the tenant and his conduct in each case whether he has transgressed the limits of honest inquiry. If he has clearly identified himself with the person claiming adversely to his landlord, so that his conduct amounts to renunciation of his character as tenant, forfeiture will follow. But nothing short of this will be sufficient. And further in this country, having regard to the inadequate character of legal advice available especially to the mofussil litigants, and the more or less primitive state of mofussil drafting, we should be justified in not placing too strict a ccnstruction on the expressions used by the tenat. In this case however there could be little doubt that the statements in the written statement filed by defendants 1 and 2 in Original Suit No. 704 of 1906, as appearing from Ex. H, amounted to a clear denial of the plaintiff's title. They set up in no ambiguous words the title of another person Kullappa Chetti, and alleged that the sale by Narasimha Naidu, under which the plaintiff derived his title, was fraudulent and invalid.

Then it is suggested that forfeiture by disclaimer of title does not extend to cases where the title is denied, not of a person who let the defendant into possession or to whom the defendant attorned by executing a lease in his favour or by paying him rent, but of the heir or assignee of such persons. The Transfer of Property Act in S. 111, Cl. (g)(2), while speaking of the lessee renouncing his character as such, lays down the condition that the lessor or his transferee must do some act showing his intention to determine the lease. That indicates that denial of the title of the lessor's transferee would amount to forfeiture. S. 109 generally lays down that the transferee of the lessor shall possess all the rights and be subject to all the liabilities of the latter. The right to determine the lease and to re-enter upon the land is an incident of the ownership of the land and vests in every person in whom the title to the property has vested eiter by transfer or by operation of law. The English decisions all proceed on that assumption and I need only mention *Doe de. Davies* v. *Evans* (14). There the defendant, a tenant from year to year had been paying rent to the tenant for life of the estate and on receiving notice from her to quit, wrote to her that she had promised that he should continue on as tenant from year to year and that she could not turn him out of possession. It was held by Baron Parke and the rest of the Court that this amounted to attornment to the tenant for life and disclaimer of the title of the trustees of the settlement, under which the tenant for life derived her title. So for as it appears, the defendant had never attorned to the trustees. In *Doe d. Gray* v. *Stanion* (13) the argument for the plaintiff was that in order to create a disclaimer it was not requisite that a tenant should act mala fide or claim the property himself, and the judgment in this case seemed to have proceeded on that basis. The Pleader for the respondent has relied on a ruling of the Calcutta High Court reported as *Durga Kripa Roy* v. *Sree Janoo Lathak* (15), a decision of Markby and Glover, JJ. There they held that there was no authority for the proposition that the statement by the tenant that he had a good title as against the assignee of the original landlord, but to whom he had not attorned or acknowledged as his landlord, would give rise to forfeiture. The case does not seem to have been properly argued before them, at any rate there is considerable authority in English law for the position that a disclaimer by a tenant from year to year of the title of his landlord or of the person for the time being entitled to the immediate reversion as assignee, heir, devisee, executor or administrator of the landlord will in effect determine the tenancy at the election of the landlord or other person so entitled (see Woodfall's Landlord and Tenant, p. 387).

In connexion with the question of forfeiture the facts may be shortly stated. The lease for the defendant's ancestors was granted more than sixty years ago by the then Mittadar. The Mitta comprising the land in dispute became vested in one Venkatarama Naidu and it would seem that his eldest son Narasimham Naidu acted as managing member of the family with the consent of his father. This Narasimha Naidu sold the property to the plaintiff, it was alleged, for discharging some family debts. Venkatarama Naidu, on the other hand, executed

(14) [1841] 9 M. & W. 48=11 L. J. Ex. 9.

(15) [1872] 18 W. R. 465.

a deed of sale in favour of Kullappa Chetty already mentioned. The defendants in the litigation that ensued supported Kullappa Chetty against the plaintiff and in fact it was alleged that Kullappa Chetty was their creature. The suit, Original Suit No. 104 of 1906, was brought by the plaintiff against the defendants and Kullappa Chetty to establish his title, and the plaintiff also alleged in that suit that the lease under which the defendants held was not binding on him though he did not seek any adjudication on that point. He sought and obtained a decree for rent, the issue as to title being decided in his favour. From that date forward the plaintiff has persisted in the allegation that the lease relied upon by the defendants is not valid and binding, and in this very suit his contention has been that the defendants were merely tenants from year to year and held no permanent, heritable tenure as alleged by them. We have had the case argued on the following points: (1) whether the appellants themselves having denied the respondent's rights as lessees, the denial on the part of the latter of the former's title to the land would not take the case out of the rule regarding forfeiture by denial of the landlord's title. There is no authority which recognizes such an exception, and on further consideration I am not satisfied that it can be well deduced from the principles which govern the law on the subject. That law which is founded on feudal notions is intended to protect the interests of the landlord and it may be that it does not afford corresponding protection to tenants against the landlords denying their rights but that is a matter for the legislature to consider. The disclaimer which entails forfeiture is denial of the landlord's title to the land, and not the denial of his claim that the defendant is his tenant.

(2) Whether any act on the part of the landlord determining a lease apart from and before the institution of the suit was necessary. The Transfer of Property Act does not govern the case. It has been ruled in *Padmanabaya* v. *Ranga* (16), after a full consideration of the authorities that in cases not governed by the Transfer of Property Act the institution of a suit in ejectment is a sufficient determination of the lease where the lessee forfeited the lease by denial of the landlord's title, and no other previous act determining the lease such as a notice to quit is necessary for maintaining the action. The learned Judges distinguished *Venkataramana Bhatta* v. *Gundaraya* (17), on the ground that that ruling proceeded on the provisions of the Transfer of Property Act though the Act in fact did not govern the case. The proposition laid down in *Padmanabaya* v. *Ranga* (16) has been followed in *Korapalu Narayana* (18), and I am satisfied on further consideration that it is correct and borne out by the authorities. The question whether the law is or is not otherwise under the Transfer of Property Act may require further consideration. I express no opinion on it.

(3). The question of waiver of forfeiture, it is rightly pointed out, was not raised in the lower Court and could not be considered for the first time in appeal.

4. As regards defendants 5 and 6 their interest in the land can only be as members of the joint family along with the other defendants and they are bound by the consequences of the act of defendants 1 to 3.

In the result, the judgment of the lower Court must be set aside and there will be a decree for the plaintiffs in the terms of the prayer in the plaint and the amount of mesne profits will be determined in execution. Under the circumstances, each party will bear his own costs throughout.

Oldfield, J.—I agree.

S.N./R.K. *Appeal allowed.*

(16) [1910] 34 Mad. 161=6 I. C. 447.

(17) [1903] 31 Mad. 403.

(18) [1913] 38 Mad. 445=20 I. C. 930.

A. I. R. 1919 Madras 902

SESHAGIRI AIYAR AND BAKEWELL, JJ.

Kunnath Madampil Kunjunni and *another*—Defendants—Appellants.

v.

Mannarghat Ramanunni—Respdt.

Second Appeals Nos. 1884 and 1989, of 1915, Decided on 28th April 1917, against decree of District Judge, South Malabar, in Appeal Suits Nos. 500 and 501 of 1910.

(a). Malabar Compensation for Tenants' Improvements Act (1900), S. 5 — Tenant claiming compensation must show that work has added to value of holding and is consistent with object of kanom.

Ordinarily a tenant who claims compensation for improvements under Madras Act 1 of 1900

is bound to prove that he has improved the property and that he has spent money in making the improvements. He must show that he has done work which has added to the value of the holding, that that work is suitable and that it is also consistent with the object with which he obtained the Kanom. [P 904 C 2; P 905 C 1]

(b) Malabar Compensation for Tenants' Improvements Act (1900), S. 5 (1)—Ejectment decree against tenant—He is entitled only to value of improvements either by himself or his predecessor-in-title.

Under S 5 (1), Malabar Compensation for Tenants' Improvements Act the tenant against whom a decree in ejectment is passed is only entitled to the value of the improvements made either by himself or by his predecessor-in-title. He is not entitled to the value of the improvements effected by every person other than the landlord. 17 *I. C.* 433, *Diss. From.*

(c) Evidence Act (1872), S. 58—Admission.

The Courts should not lightly ignore admissions made by parties to proceedings [P 904 C 2]

(d) Malabar Compensation for Tenants' Improvements Act (1900), S. 6 (3)—Ordinarily commissioner's report is to be supplemented by evidence given in the case—Order appointing second Commissioner to assess compensation is not direction for re-valuation—Term re-valuation is to be confined to cases under S. 6 (3).

The report of a Commissioner appointed by a Court is not equivalent to a judgment which is binding on the parties. Ordinarily, the Commissioner's report should be supplemented by the evidence which he gives in the case. The Commissioner should not only embody the statements of the parties but should give his own opinion on their contentions.

An order appointing a second Commissioner to assess the compensation should not be regarded as a direction for re-valuation. Re-valuation is a technical term and should be confined to cases mentioned in Cl. (3), S. 6.

Where a Commissioner has ignored the evidence and sent in a report based on guess work the direction to a new Commissioner to do that work properly is not a direction to re-value. Consequently the second Commissioner can only take into account the value prevalent when the first Commissioner made his report. [P 905 C 2]

(e) Malabar Compensation for Tenants, Improvements Act (1900), S. 7—S. 7 deals only with contracts limiting right to make improvement after contract.

Section 7 deals only with contracts which limit the right of the tenant to make improvements after the date of the contract. [P 906 C 2]

(f) Malabar Compensation for Tenants' Improvements Act (1900), S. 7—Settlement as to compensation before date of contract—S. 7 does not take away effect of such settlement.

Prima facie every person is entitled to enter into a contract settling the accounts between himself and another or settling the differences between them. If this right of the freedom of contract is to be taken away, it must be by express and clear words, and there is nothing in S. 7 which takes away the effect of a settlement as to compensation for improvement effected before the date of the contract. [P 906 C 2]

S. Srinivasa Aiyangar, C. Madhavan Nair and *P. Appu Nair*—for Appellants.

C. V. Ananthakrishna Aiyar and *A. Sivarama Menon*—for Respondents.

Judgment.—*S. A. No. 1989 of 1915.*

The plaintiffs, a Sthanee, granted a kanom of the properties in dispute for Rs. 71-6-11 to defendant 1 in the year 1873—Ex. D. In 1892 that kanom was renewed, the amount being fixed at Rs. 3,363-0 9. Ex. A is the counterpart executed by defendant 1 in that year. He assigned Ex. A to defendants 2 and 3. The present suit was brought for redemption. The main question related to the value of improvements. The Subordinate Judge awarded defendants 2 and 3 Rs. 19,009-3 7 which was increased by the District Judge in appeal to Rupees 43,552-5-10. Both parties have preferred second appeals. We shall first deal with the plaintiff's appeal. In considering the questions argued before us the contention of Mr. Ananthakrishna Aiyar, who appeared for the tenant, that whatever may be the value of the second appeal, our powers are governed by S. 100, Civil P. C., has to be borne in mind. Before dealing with the question of improvements, we may at once dispose of that portion of the appeal which complains against the finding that a portion of item No. 5 does not belong to the plaintiff. The learned Advocate-General, while drawing our attention to certain flaws in the reasoning of the Courts below, rightly conceded that there is legal evidence to support the finding. We must, therefore dismiss the second appeal with costs so far as this item is concerned.

The main contest centred upon the question, whether the defendants are entitled to any compensation for improvements in respect of items Nos. 1 and 2. The Subordinate Judge very summarily disposed of this question on the ground that, as items Nos. 1 and 2 were nilams and as there was no agreement in Ex. A and B to pay compensation for them, the defendants were not entitled to any. In appeal, the District Judge, although he dealt with the question more fully, has, in our opinion, wrongly thrown the onus of proof upon the plaintiff. Ordinarily, a tenant who claims compensation for improvements is bound to prove that he has improved the property and that he has spent money in making the

improvements. Admittedly no account showing the amounts spent on the improvements has been produced. Mr. Ananthakrishna Aiyar contended that if the tenant can show that the income derivable from the demised property has increased since the date of the kanom, that would be enough to entitle the tenant to claim compensation for the improvements. It may be conceded that under the Malabar Compensation for Tenants' Improvements Act the Jenmi and the tenant are regarded as co-partners in respect of the additional value imparted to the land by the labour of or by the expenditure of money by the tenant. In this respect the Malabar tenant is placed in a more advantageous position than tenants elsewhere. Nevertheless, prima facie, the tenant must prove certain things. Under S. 3, Cl. 3 Act 1 of 1900, improvement has been defined to be

"any work or product of a work which adds to the value of the holding, is suitable to it, and consistent with the purpose for which the holding was let, mortgaged, or occupied."

Consequently the tenant must show that he has done work which has added to the value of the holding, that the said work is suitable and that it is also consistent with the object with which he obtained the kanom. As regards the 1st of these requirements there can be no doubt in this case.

It is not suggested that the improvements made were not consistent with the kannm granted by the Jenmi. The tenant has still to prove that an additional value has been imparted to the holding by his work and that the work which he executed was suitable to the holding. If we turn to S. 5, it is clear that the burden is upon the tenant to prove, before he claims compensation, that he has made the improvements or that his predecessor-in-interest has made them. The learned vakil for the tenant contended with reference to S. 5 that if there were improvements on the land the tenant in possession is entitled to their value at the time of ejectment, if any person other than the landlord had made the improvements. We are unable to agree with this contention. Cl. (1) in S. 5 makes it clear that the tenant against whom the decree in ejectment is passed is only entitled to the improvements made either by by himself or by his predecessor-in-interest. The definition of the word tenant in the Act is not against this view. If *Thupran* v. *Mahad Kasim* (1) holds otherwise, we are unable to agree with it. In the present case there are very strong circumstances why the tenant should be called upon to establish his case. In Ex. A, the counterpart of the lease executed by defendant 1, he stated that:

"excepting items 1 and 2 which have been entered as nilams in the prior kanom deeds, as the value of reclamations of the properties which I have reclaimed at my expense in respect of the other schedule properties by converting them into double croplands has not been now examined and estimated and settled, you have agreed to give me, etc."

This clause in the agreement suggests on the facts of it that defendant 1 agreed in 1892 that he had made no improvements in respect of items 1 and 2. It may be that this presumption against him may be rebutted, and that he may be able to show that since that time improvements have been made by him. In that view, the evidence given by him will have to be examined to find out to what extent he has improved the properties and to what compensation he is entitled in consequence of those improvements. The District Judge has not addressed himself to this question. He has not realized the importance of admissions contained in Ex. A; the decision of the Judicial Committee in *Chandra Kunwar* v. *Chaudhri Narpat Singh* (2) shows that the admissions of the parties should not be lightly ignored. It is true as pointed out by Mr. Ananthakrishna Aiyar that the word nilam in Ex. A does not necessarily show that it was a double crop land. It certainly means arable land. As to whether defendant 1 has expended money and labour in converting it into double crop land, that is a matter which must depend upon the evidence given in the case. As we said before, Mr. Ananthakrishna Aiyar's suggestion that whoever might have improved the land although he be a person between whom and defendant 1 there is absolutely no connexion, still he is entitled before ejectment to claim the value of the improvements, is one which we are unable to accept. Therefore it was the duty of

(1) [1912] 17 I. C. 433.
(2) [1907] 29 All. 184=34 I. A. 27 (P. C.).

defendant 1 to have adduced evidence to prove his case.

There is another circumstance which also throws the burden upon defendant 1. In the written statement filed by him, he stated that though in the demise of 1872 items 1 and 2 were entered as nilams, all such lands were left uncultivated, that some of the plaint lands were forest lands and were not frequented by people generally. Here again he seems to admit that a great portion of items 1 and 2 were cultivable lands. Before the first Commissioner, the statements made by him show that he did not lay claim to having made considerable improvements upon these items. In Ex. 3-B he stated, as regards the major portion of item 1, that they were originally single crop lands and that they were dug and their level lowered and converted into double crop lands. As regards the other portions he contended that some of them were reclaimed from item 5 and others from item 6. On the other hand, the plaintiff's kariasthan contended that all of them were nilams. There seems to have been no suggestion before the Commissioner that the lands were waste and that they were converted into single or double crop lands by the exertion of defendant 1. As regards item 2, the contention before Commissioner 1 tended to negative any suggestion shat a major portion of that item was reclaimed by the defendant and converted into double crop lands. Under these circumstances, it was the duty of defendant 1 to have adduced sufficient and clear evidence to establish his right to compensation. The District Judge lays much stress upon the fact that the income at the time of the demise was only 212 1/2 paras of paddy, whereas in a suit brought by the plaintiff for use and occupation he estimated the income at almost 10 times that quantity. We do not think that the increase in the income is any criterion of increased value having been imparted to the lands by the tenant. It has to be remembered in the first place that Komu Menon, defendant 1 was a confidential agent of the Sthanee and in all likelihood a favourable rent was fixed as against him by his master.

The increase in the net income might be due to a number of other circumstances. The decision in *Thiruvatiyil Vattath* v. *Vishnu Barathikal* (3), was quoted as showing that if an increase in the income is proved, the presumption is that the tenant has improved the land. In our opinion the proposition has been too broadly stated. The District Judge has drawn attention Exs. 293 and 296 as showing that some improvements were made in a portion of item No. 1. In the first place, we are nat satisfied that A is really a portion of item No. 1. Evejn granting for argument's sake that it s so, it does not follow that because on a portion of item No. 1 some improvements were made, that is any indication that the whole of that property has similarly been improved. A is less than 2 acres in extent. One other circumstance we must mention before passing away from items Nos. 1 and 2 and it is this: the Commissioners who inspected the place and submitted their report have not given any relevant evidence in the case. There seems to be an impression in Malabar that a report of the Commissioner is equivalent to a judgment which is binding upon the parties. Ordinarily the Commissioner's report should be supplemented by the evidence which he gives in the case. In the present instance, the Commissioner only embodies the statements made by the parties and does not give his own opinion on their contentions. Consequently it is practically of no use. On the whole, we have come to the conclusion that the procedure adopted by the District Judge in throwing the onus upon the plaintiff, in not taking into account the admissions contained in Ex. A, in attaching artificial importance to the increase in the net income and in not considering the statements made before the first Commissioner vitiate the judgment altogether. We have therefore resolved to set aside his judgment in so far as it awards compensation for items Nos. 1 and 2 and to remand the appeal to him for fresh disposal. He will be at liberty to examine the Commissioners who have sent in their reports, with a view to ascertain whether any improvements were made by defendant 1; he can also consider any other evidence on the record to which his attention may be drawn by the parties on this question.

As regards item No. 3, we must dismiss the appeal with costs. There is no evidence connecting this item with the decree. Ex. 252, nor is there any evidence that compensation was estimated by the

(3) [1915] 28 I. C. 389.

decree or concluded by a contract between the parties. As regards items Nos. 4, 5 and 6, the Subordinate Judge fixed a particular sum as the amount of compensation payable to the tenant. The District Judge in appeal relied upon a notification published by the Government in February 1910 regarding valuation. It is true that the decree in ejectment was passed in December 1909. Strictly speaking, the notification of the Government is not evidence of the value of paddy in December 1909. But there can be no question that before the notification was issued inquiries must have been instituted, and having regard to the nearness of time, we see no reason to differ from the conclusion of the District Judge that the value of paddy in December 1909 was the same as that contained in the notification of the Government in February 1910. We must dismiss the appeal so far as these items are concerned with costs.

As regards items Nos. 7 and 8, the position is this: prior to 1872, one Muneappa was the tenant of the Jenmi in respect of these items. After the defendant 1, obtained the decree, he and the Jenmi sued Muneappa for redemption in 1882. A decree was passed directing the plaintiffs to pay Muneappa Rs. 3,000 odd. At the time of the renewal in 1892, defendant 1, was asked to pay this sum to Muneappa and to tack on that amount to his mortgage. The learned Advocate-General contended that this contract comes within the proviso to S. 19, Act 1 of 1900, as the amount due was settled by a contract in writing and registered. Mr. Ananthakrishna Aiyar, on the other hand argued that it is S. 7 of the Act of 1887 that applies to the contract. It is not necessary to decide whether S. 19, Act 1 of 1900 is not really retrospective and consequently as the improvements were claimed under the new Act, whether the question should not be decided with reference to that section. Even granting that S. 7 of the Act of 1887 applies, we are unable to hold that the settlement as to compensation come to in 1892 is not binding on the parties. That contract does not take away or limit the right of a tenant. It only settles the amount due under the mortgage at the time of the renewal. We therefore fail to see how this provision is obnoxious to S. 7. Further we are clear that that section deals only with contracts which limit the right of the tenant to make improvements after the date of the contract. Of course, we are bound by the decision of the Full Bench in *Kunhalloor Puthia Veetil Rayarappa Atioti* v. *Vathukoilath Parkum Punnisseri Kelappa Kurup* (4) to read the word "and" as meaning "or" Even in that view what the legislature prohibits the tenant from binding himself by are (a) contracts not to make any improvements, and (b) contracts settling the amount of the possible improvements in advance. The intention was not to prejudice the rights of the tenants by an a priori agreement without reference to the rights that may come into existence by the tenants working the property in a husbandlike manner. To this exception was added by the Act of 1900 by S. 19, which enabled the parties to settle the amount of compensation by a document in writing and registered.

The learned vakil for the respondent drew our attention to *Uthunganakath Avuthala* v. *Thazhatharayil* (5). The two learned Judges who composed that Bench took two different views of S. 7. Subramania Aiyar J., held that all contracts whether it related to improvements effected before the date of the contract or after, were within the mischief of the section. Davies, J., held that all improvements which were effected after January 1886 were within the section whether they were before or after the contract. With all deference we are unable to agree with either view. We are not at liberty, as Subramania Aiyar, J.. did, to embark upon a conjecture as to the policy of the legislature where the language of the section is plain and unambiguous. Prima facie, every person is entitled to enter into a contract settling the accounts between him and another, or for settling the differences between them. If this right of the freedom of contract is to be taken away, it must be by express and clear words; and we find nothing in S. 7, which takes away the effect of a settlement as to compensation for improvements effected before the date of the contract. As regards the view taken by Davies, J., we do not find any words in the section to justify the interpretation placed by the learned Judge.

(4) [1917] 40 Mad. 594=39 I. C. 741.
(5) [1897] 20 Mad. 435.

We must therefore reverse the decree of the District Judge as regards the compensation payable for these items. If any new improvements were made since 1892 or if the tenant has done anything to guard maintain or improve the improvements existing on that date, he will be entitled to compensation in respect of them. Otherwise the tenant is only entitled to the amount mentioned in Ex. A. The District Judge must now assess any fresh compensation that may be claimed in the light of the above observations. This must be done by the evidence on the record. Costs to be provided for in the revised decree.

In S. A. No. 1884 *of* 1915.

In this second appeal Mr. Ananthakrishna Aiyar argued that the valuation given by the appellate Court should be re-considered on three grounds :

(a) In the first place, he argued that the valuation of the paddy at the time when the second Commissioner sent in his report should be taken into account. We do not think the order appointing the second Commissioner to assess the compensation should be regarded as a direction for re-valuation. That is a technical term and should be confined to cases mentioned in Cl. (3), S. 6. Where a Commissioner has ignored the evidence and sent in a report based on guess work the direction to a new Commissioner to do that work properly is not a direction to re-value. Consequently the second Commissioner could only take into account the value prevalent when the first Commissioner made his report. The language of S. 6 renders this clear. The decision in *Velethemana* v. *Pathuma* (6) also support this view. See also *Kunhammad Kutti* v. *Panchara Allemea* (7). The District Judge is therefore right on this question. (b) The second complaint is that the District Judge is wrong in regarding the supplemental report of the Commissioner as unauthorized. It is clear from the orders to which our attention was drawn that a fresh report was called for. The District Judge is bound to apply his mind to that report. (c) The third contention is also well founded. At the time of the renewed demise, the Jenmi was under a contract to supply water to the tenant at a fixed rate. On the faith of the contract, the defendant reclaimed the land in such a way as to make it capable of receiving the water. If the contract had not existed, he might have improved the land in some other manner. Consequently we think that under S. 9 (1) the tenant's improvement has "caused an increase in the value of the net produce of the holding." The contention of the learned Advocate-General that, as no second crop could have been cultivated in most of the lands if the Jenmi's water was not utilized and that therefore the tenant must be deemed not to have contributed to the increase in the income, does not do justice to the language of the section. In estimating the net produce, the explanation to S. 9 shows that the tax payable for the water may be deducted as a cost of the cultivation. The method by which the income was estimated on the basis that no water was supplied is wrong.

We must set aside the decree of the District Judge and remand the appeal for disposal to him in the light of the above observations. No fresh evidence. Costs to aside.

S.N./R.K. *Appeals allowed.*

(6) [1912] 17 I. C. 131.
(7) [1916] 33 I. C. 746.

* A. I. R. 1919 Madras 907

SADASIVA AIYAR AND NAPIER, JJ.

Crown Prosecutor — Complainant — Petitioner.

v.

Bhagavathi —Accused—OppositeParty.

Criminal Misc. Petn. No. 403 of 1918, Decided on 23rd August 1918 to quash committal order of Court of 3rd Presidency Magistrate, George Town, Madras, D/- 26th July 1918.

*** Criminal P. C. (1898), Ss. 207, 254, 346 and 347— S. 254 is in no way limitation of right of Magistrate under S. 347 to commit case — Magistrate having powe to sentence adequately may still commit on such grounds as complicated questions of law arising or case being fit one to be tried by Jury or with aid of assessors.**

Section 254 makes it imperative on a Magistrate only to frame a charge and not to complete the trial to conviction or acquittal. That section simply lays down the procedure for the trial of warrant cases where the Magistrate considers it right and proper for himself to go on with the trial and is in no way a limitation of the right of a Magistrate given to him under S. 347 to commit a case for trial if he thinks that he should do so. [P 908 C 2]

Section 347 does not restrict the grounds on which a Magistrate should arrive at his opinion to commit a case to want of jurisdiction in himself or to his inability in his own opinion to

sentence the accused adequately. Even where he can inflict the maximum sentence for the offence he may still commit the accused for trial to the Court of Session or the High Court on such grounds as complicated questions of law arising or the case being a fit one to be tried by a jury or with the aid of Assessors: 24 *Cal.* 429; 1 *M. L. T.* 61 and 4 *I. C.* 812, *Disappr.*

[P 908 C 2]

Per *Napier, J.*— The powers of a Magistrate, who has taken a warrant case on his file for trial are as follows:—He may try it through himself if he has jurisdiction he may if he thinks he cannot inflict a proper sentence, act under S. 346 or 349 and send it to a higher Magistrate, or he may if he thinks that it is a proper case for Sessions commit the accused under S. 347 or if he has not power to commit send it to another Magistrate to commit under S. 346. [P 910 C 1]

Sydney Smith—for Petitioner.

V. *Viswanatha Sastri*—for Opposite Party.

Sadasiva Aiyar, J.—This is an application by the Crown Prosecutor for quashing the commitment made by the 3rd Presidency Magistrate, George Town Madras to the High Court Sessions of a case falling under Ss. 304 (a), I. P. C. punishable with 2 years imprisonment of either description or fine (of unlimited amount) or both and triable by a Court of Session or a Presidency Magistrate or a Magistrate of the First Class. The ground on which we are asked to quash the commitment is that under S. 254, Criminal P. C. a Magistrate ought to try a case himself till it ends either in a conviction or acquittal before him (see S. 258), unless he thinks that the offence could not be adequately punished by him and that in this case it was impossible for the Magistrate to entertain such an opinion because he had powers under the Code to inflict imprisonment of either description up to 2 years which is the maximum punishment provided for the offence. This argument in the first place ignores the fact that the offence is also punishable with fine of unlimited extent whereas the Presidency Magistrate's powers of fining are limted to the amount of Rs. 1,000 see S. 32, Criminal P. C. Cl. (a) and cases are conceivable where a rich man guilty under S. 304 (a) could more appropriately be sentenced to a fine of Rs. 5,000 by a Sessions Court than by a Presidency Magistrate with imprisonment and a fine of Rs. 1000. However this is a minor point.

The important question is whether S. 254 does make it imperative on the Magistrate if the offence could be adequately punished by him to try the case till the end and whether it imperatively forbids him from committing the case to the Sessions. So far as the words of S. 254 go that section only directs the Magistrate to frame a charge against the accused. What the Magistrate has to do after framing the charge must depend upon the provisions contained in the succeeding sections of the Code dealing with the further proceedings in the trials of warrant cases. In Ch. 24 containing general provisions as to inquiries and trials we have got three sections—Ss. 346 347a nd 349—which we were invited in the arguments to consider in this connexion. S. 346 relates to the procedure of a Magistrate other than a Presidency Magistrate in certain contingencies. That section may, therefore be ruled out. As regards S. 349, it relates to the procedure of a Magistrate of a Second or a Third Class under certain circumstances. That also has, therefore no material bearing in the consideration of the question before us. Then we have got S. 347, which gives very wide powers to a Magistrate. In any trial or proceeding before him and at any stage he can, even just before signing judgment, commit a case before him to a Court of Session or the High Court (provided of course, he is empowered to commit cases to that Court) if it appears to him that the case is one which ought to be tried by a Court of Session or the High Court. It does not restrict the grounds on which he should arrive at his opinion to want of jurisdiction in himself or to his inability, in his own opinion to sentence the accused adequately.

If he considers for instance that a complicated question of law arises or that some connected matter is already before the Court of Session or that the facts are such that trial with the aid of a jury or with the aid of Assessors (who may be chosen from experts in the particular matters involved in the case) would be a more satisfactory procedure. I see nothing in S. 347, to prevent a Magistrate from committing the case to a Court of Session. S. 347 does not say that the Magistrate is bound to put his reasons on record for entertaining the opinion that the case is one which ought to be tried by the Court of Session or the High Court. No doubt the decision of the Bench in *Queen-Empress* v. *Kayemullah*

Mandal (1) and the decisions of single Judges of the Allahabad High Court reported as *King Emperor* v. *Dharam Singh* (2) and *Emperor* v. *Jagmohan* (3) do support the contention of the Crown Prosecutor that unless the Magistrate thinks that he is unable to punish the accused adequately he ought not to commit the accused to the Court of Session. There are however two decisions, one in *Empress* v. *Kudrutoollah* (4) and the other (of a Full Bench of this Court) *Chinnimarigadu*, In the matter of (5), where there are observations which, in opinion, indicate that the committal by a competent Magistrate on the ground that in the Magistrate's opinion the case is a fit one to be tried by a Court of Session, cannot be interfered with by the High Court. And I think that the 24 Calcutta case *Queen-Empress* v. *Kayemullah Mandal* (1) and the two Allahabad cases *King-Emperor* v. *Dharam Singh* (2) and *Emperor* v. *Jagmohan* (3) have given much wider effect to the language of S. 254 than that language could properly support. That section makes it imperative on the Magistrate only to frame a charge and not to complete the trial to conivction or acquittal. I would therefore, dismiss this petition.

Napier, J.—I entirely agree. We are asked to exercise our powers under S. 215, Criminal P. C. and quash a commitment to the High Court made by the Presidency Magistrate. We can, of course, only do so on a point of law and we are, therefore not concerned with the reasons given by the Magistrate for making the commitment.

But it has been argued before us by the Crown Prosecutor that the commitment is bad in law in that the Magistrate has not certified that he cannot adequately punish the accused who is put up before him for trial and that even if he had done so, his reason would have been bad because he has in fact power to inflict the maximum punishment, The offence for which the accused has been committed is S. 304 (a), I. P. C. Now offences under this section are specifically stated in Sch. 2 of the Code to be triable by a Court of Session, a Presidency Magistrate or a Magistrate of the First Class. Therefore at the outest this suggestion of the Crown Prosecutor leads to a somewhat extraordinary position, that a Court of Session which is specifically empowered under the section cannot try the case because it cannot be committed to it by a First Class Magistrate.

It is suggested however by the Crown Prosecutor that Sch. 2, where it speaks of a Court of Session, had in mind that, although the commitment for offences is not one of the ordinary powers of the Magistrates of a Second and Third Class, still those Courts can be empowered under S. 206, and therefore that the trial by a Court of Session provided for in para. 8, Sch. 2 would arise in cases where the accused had been committed by a 2nd or 3rd Class Magistrate empowered in that behalf. It is a somewhat trained application of the provision. A more reasonable hypothesis seems to me to be that this allocation of this offence to the Court of Session as well as a Magistrate of the First Class is an indication that in some circumstances a Court of Session would be the proper tribunal to try the case.

Passing from that, we have to consider what are the powers possessed by Magistrates with regard to warrant cases. The Crown Prosecutor has suggested to us and, indeed this is the basis of the whole of his argument, that S. 254, Criminal P. C., is exhaustive and that there is no power in a Magistrate to commit a case for trial where he is competent to try it and it can be adequately punished by him. This is a somewhat startling proposition because, as my learned brother has pointed out, it is a frequent practice of Magistrates in this country to commit cases for trial to the Court of Session for other reasons, namely, convenience, complexity of facts or other matters. The Crown Prosecutor would have us hold that the whole of this procedure is wrong. Now, the whole of this argument hinges on the word "shall" which is to be found in S. 254. The Crown prosecutor argues that the section requires that he shall frame in writing a charge against the accused and carries with it a further requirement that, having done so, he shall proceed under the remaining sections of that chapter. I should have some difficulty in appreciating this argument were it not that it has

(1) [1897] 24 Cal. 429.
(2) [1906] 1 M. L. T. 61.
(3) [1909] 4 I. C. 812.
(4) [1877] 3 Cal 495.
(5) [1876] 1 Mad. 289.

found favour with a Bench of the High Court of Calcutta in a case reported as *Queen-Empress* v. *Kayemullah Mandal* (1). But with deference to the learned Judges, it seems to me that, in that decision, they ignore the very wide powers given by the Code to a Magistrate under Ss. 207 and 347. S. 207 provides the procedure on inquiry in cases which are exclusively triable by a Court of Session or the High Court, or in the opinion of the Magistrate, ought to be tried by such Court. There are therefore a class of cases which are not triable exclusively by a Court of Session but which ought to be so tried. If we turn to S. 347, which is in the chapter containing general provisions as to inquiries and trials, we find a wide and general power given to Magistrates with regard to cases coming before them for trial. The words are :

"If in any inquiry before a Magistrate, or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall stop further proceedings and commit the accused under the provisions hereinbefore contained."

If he is not empowered to commit for trial, he should proceed under S. 346. That section says that if it appears to the Magistrate that the case is one which should be tried or committed for trial by some other Magistrate, he shall stay proceedings and submit the case with a brief report to any Magistrate, to whom he is subordinate or to such other Magistrate having jurisdiction as the District Magistrate directs. That is to say, whether the Magistrate has power to commit or not, if he thinks that the case is one which ought, in his opinion, to be tried by a Court of Session, he has absolute power to stop any further proceedings in the trial by himself. If he can commit, he may, if he cannot himself commit he may send to a Magistrate who will commit. It seems to me to be impossible to argue successfully that a specific provision like this in S. 347, read together with S. 207 which lays down the procedure in inquiries in such cases, can be limited because S. 254 says that the Magistrate trying a warrant case shall frame a charge. Even if those words which are to be found in S. 254 had been repeated in Ss. 255 and 256, I should still be of opinion that they were no bar to the exercise by a Magistrate of his power to commit a case. That section simply lays down the procedure for the trial of warrent cases where the Magistrate considers it proper and right for himself to go on with the trial, and is in no way a limitation of the right of a Magistrate given to him under S. 347 to commit a case for trial if he thinks that he should do so.

The Crown Prosecutor has been unable to refer us to any section authorizing a Magistrate to commit for trial where he cannot inflict a proper sentence which, according to him is the proper course, whereas there is a distinct provision for submission to a higher class Magistrate in such cases to be found in S. 349. I am at a loss therefore to comprehend why the wide words of S. 347 should be curtailed by reference to S. 254 when there is a specific section, namely, S. 349 which deals with circumstances referred to in S. 254. My learned brother has referred to one case of this Court, *Chinnimarigdu, In the matter of* (5), and it seems tome to be conclusive on the point, for it lays down as axiomatic that it is competent to a Magistrate to say whether from the gravity of the matter or for any other sufficient reason the Sessions Court is the proper tribunal for the disposal of the case. To sum up, the powers of the Magistrate, who has taken a warrant case on his file for trial, are as follows : He may try it through himself if he has jurisdiction ; he may, if he thinks he cannot inflict a proper sentence, act under S. 346 or S. 349 and send it to a higher Magistrate, or he may, if he thinks that it is a proper case for Sessions, commit the accused under S. 347 or if he has not power to commit, send it to another Magistrate to commit under S. 346. This being my view of the law, I am of opinion that we have no jurisdiction to quash the committal in this case and that the trial before the Judge sitting in Session must go on.

S.N./R.K. *Petition dismissed.*

** A. I. R. 1919 Madras 911
Full Bench

AYLING, OLDFIELD, SADASIVA AIYAR, COUTTS-TROTTER, AND SESHAGIRI AIYAR, JJ.

Challagundla Varamma and *others*—Defendants—Appellants.

v.

Madala Gopaladasayya and *another*—Plaintiff and Defendant—Respondents.

Civil Appeal No. 317 of 1916, Decided on 8th March 1918, against decree of Temporary Sub. Judge, Guntur, in Original Suit No. 100 of 1915, D/- 12th April 1916.

(a) Limitation Act (9 of 1908), Art. 125—Suit by reversioner born before 12 years of alienation by widow for declaration against alienation being binding is barred.

A suit by a Hindu reversioner for a declaration that an alienation by the widow is not binding on him, is barred under Art. 125 where it is found that the plaintiff was born more than 12 years after the date of the alienation (*Authorities reviewed*). [P 920 C 1; P 921 C 1, P 923 C1]

(b) Hindu Law—Reversioner—Suit for conservation of property is representative.

A reversioner appealing to the Court for the conservation of property does so in a representative character. [P 920 C 2]

(c) Hindu Law—Reversioner—Suit—Cause of action—Invalid alienation raises only single cause of action for declaration of invalidity that has to be availed of by reversioners in their order—Immediate reversioner not availing fresh cause does not arise to next reversioner—Art. 125 applies—Same cause of action is to be availed of even by person becoming reversioners by adoption or birth—Limitation Act (1908), Art. 125.

Per *Sadasiva Aiyar, J.*—When a Hindu widow makes an alienation voidable against the ultimate reversionary heir at her death or re-marriage, a single cause of action for a declaration of its invalidity arises at once to be availed of by the next presumptive reversioner by bringing a suit on behalf of the whole body of successive reversioners till the opening of the reversion. and, in case the next presumptive reversioner, by collusion or some other act, precludes himself from availing himself of that single cause of action, to be availed of by the next reversioner in order of succession and so on, the suit, whenever brought, being based on the same single cause of action. [P920 C 1]

In the aforesaid events, Art. 125 is the only Article applicable to a suit based on such single cause of action. [P 920 C 1]

Several causes of action do not arise at different times to several reversioners when each preceding reversioner has lost his right to bring and conduct such a suit through collusion or other similar acts. [P 920 C1,2]

Where a new reversioner comes into being for the first time by natural birth or by adoption, (a) who gets preference, by modern Hindu Law, in respect of the status of presumptive reversionership over other persons who, till then, formed the body of reversioners or (b) who becomes entitled to sue by reason of collusion between the nearer reversioner and the alienee, a fresh cause of action does not arise in the new reversioner so coming into being as above entitling him to bring a suit for a declaration of the invalidity of the alienation. [P 920 C 1,2]

(d) Civil P. C. (1908), S. 11—Dismissal of suit by immediate reversioner or claim barred by time affects other reversioners in suit for declaration of invalidity of widow's alienation—38 Mad. 406 applies to suit for possession and not for declaration of invalidity of alienation — Hindu Law, reversioner.

Per *Coutts-Trotter, J.*—A representative reversionary suit which enures for the benefit of the whole class of reversioners equally enures to their detriment. If a reversioner who is competent to do so, challenges an alienation unsuccessfully or fails to challenge it within the period allowed by the Law of Limitation, the result is binding on his successors in the reversion. [P 920 C 2]

The meaning of the observation of the Privy Council in the case *A. I. R.* 1915 *P. C.* 124 (*P. C.*) above the right to relief existing in the reversioners in order of succession, is that such right exists where the claim is to possession, but the right to a declaratory relief arises simultaneously and jointly in favour of all the reversioners at the time of the alienation. [P 920 C2 P 921 C 1]

(e) Hindu Law—Reversioner — Suit by—Right to sue for declaration of invalidity of widow's alienation is joint right and remote reversioner cannot sue without impleading nearer ones.

Per *Seshagiri Aiyar, J.*—The observations of the Privy Council in the case *A. I. R.* 1915 *P. C.* 124 (*P. C.*) do not mean that the suit for declaration is not in respect of a right common to a body of persons. The reference to rights existing severally may be explained as indicating that the remoter reversioners can themselves be plaintiffs; "the order of succession" only suggests that it is not every remote reversioner who can come to Court without asking persons before him to undertake the task of getting their common right vindicated. The said decision lays down definitely that the reversioners as a body have a common interest and that the right litigated is a joint right. [P 921 C2 P 922 C 1]

***(f) Limitation Act (1908), S. 7—Principle of S. 7 applies to suits by reversioners to declare widow's alienation not binding—Limitation once begun runs against all reversioners—Hindu Law, reversioner.**

The general principle of law implied in S. 7 is applicable to the case of reversioners, that principle being that, if there are some persons in existence who are adults who could have safeguarded the common rights of themselves and of others similarly situated, the failure of the persons who are sui juris to litigate the right will start the cause of action not only against themselves but also against persons in similar circumstances. [P 922 C 2]

(g) Limitation Act (9 of 1908), Arts. 120 and 125—Art. 120 does not apply to suit by remote reversioner.

It is doubtful if the residuary Art. 120 is applicable to suits by remote reversioners. Art. 125,

though applicable in terms only to presumptive reversioners, applies equally to suits by remote reversioners who have the conduct of the litigation for the benefit of persons entitled to recover the property when the succession opens. In enacting Art. 125 the legislature must be deemed to have considered it sufficient to give this extraordinary relief of declaration to persons alive on the date of the alienation. [F 923 C 1]

V. Ramadoss—for Appellants.

P. Narayanamurthi—for Respondents.

Order of Reference

Wallis, C. J.—This is an appeal from the decision of the Subordinate Judge of Guntur giving the plaintiff a declaration that the sale deed executed by defendant 2, the widow of the last male owner, in favour of defendant 3 was void beyond the lifetime of defendant 2 and did not affect the reversionary rights of the plaintiff and defendant 1. The plaintiff, who is now one of the next reversioners, was not born until more than 12 years after the date of the alienation, and in these circumstances the Subordinate Judge has held that he was within time under Art. 120 read with S. 7, Lim. Act, as his right to sue accrued at the date of birth. The cases referred to by the Subordinate Judge [*Govinda Pillai* v. *Thayammal* (1), *Gazzal Veerayya* v. *Gazzala Ganamma* (2) and *Narayana Aiyar* v. *Rama Aiyar* (3)] are authorities for this view and have been followed quite recently in *Venkata Row* v. *Tuljaram Row* (4). On the other hand, *Ahkineri Sriramulu* v. *Mullapudi Ramayya* (5) is to the contrary effect, as is also the opinion expressed by the Full Bench in *Chiruvolu Punnamma* v. *Chiruvolu Purrazu* (6), which has been followed in the subsequent cases of *Krishnier* v. *Lakshmiammal* (7), *Guntupalli Ramanna* v. *Guntupalli Annamma* (8) and *Subbamma* v. *Madi Reddy* (9). The recent decisions of the Privy Council in *Venkatanarayana Pillay* v. *Subbammal* (10) and in *Janaki Ammal* v. *Narayanasami Aiyar* (11), that the reversioner's suit in these cases is a representative suit in which he represents not only himself, but the whole body of possible reversioners of whom the one who happens to be the nearest surviving on the death of the widow will succeed to the estate appears to necessitate a re-consideration of this question which has occasioned so much disagreement in this Court with a view of finally setting it, if possible, in the light of their Lordships' recent decision.

As pointed out by the Full Bench in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (6), the view that the reversioner's suit might be regarded as a representative one and the decision as binding on the other reversioners was put forward, but without deciding it by Sir Barnes Peacock in *Brojo Kishoree Dassee* v. *Sreenth Bose* (12) and again by the same high authority in the Full Bench case decided about the same time in *Nobind Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty* (13). in which he deals with the representative character of the widow in possession and holds that the next reversioners were not only bound by decrees obtained against her without fraud or collusion, but that in the Limitation Act of 1859 the words "cause of action" referred not to a new cause of auction accruing to the reversionary heirs personally and individually, but to the cause of action which accrued to the heir as representative for the time being of the deceased. Jackson, J., expressed the opinion that, after the decision in the *Shivaganga* case (*of* 9 *M. I. A.* 539) that the decrees against the widow were binding on the reversioners it was impossible to escape the position that an adverse possession which barred the widow would also bar heirs. Phear, J., also expressed the opinion that under the Limitation Act of 1859, the cause of action of the reversionary heirs was the same as that of the widow, and Macpherson, J., concurred merely pointing out that, where the widow had precluded herself from suing for possession by her own act the reversioner's cause of action for possession did not arise until her death, a view which is embodied in Art. 142, Lim. Act of 1871.

Applying these principles and without further discussing them Jackson, J., sit-

(1) [1905] 28 Mad. 57.
(2) [1912] 36 Mad. 570=16 I. C. 839.
(3) [1913] 38 Mad. 396=20 I. C. 625.
(4) [1917] 38 I. C. 270,
(5) [1902] 25 Mad. 731.
(6) [1906] 29 Mad, 390.
(7) [1908] 18 M. L. J. 275.
(8) [1913] 18 I. C. 710.
(9) [1915] 28 I. C. 632
(10) A. I. R. 1915 P. C. 124=38 Mad. 406=29 I. C. 298=42 I. A. 125 (P.C.).
(11) A.I.R. 1916 P. C. 117=39 Mad. 634=37 I. C. 161=43 I. A. 207 (P.C.
(12) [1868] 9 W. R. 463.
(13) [1868] 9 W. R. 505=B. L. R. Sup. vol. 1008.

ting with Glover, J., held in *Pershad Singh* v. *Chedee Lall* (14) that the reversioner's cause of action for a declaration that the widow's alienation was not binding on the estate accrued at the date of the alienation and was not revived in favour of the plaintiffs in the suit who had since been born and attained majority. The same view was held by the Bombay High Court in *Bhikaji Apaji* v. *Jaganath Vithal* (15), where it was held that the suit must be brought within six years from the date of the conveyance under S. 1, Cl. 16 of the Act of 1859. This decision was referred to with approval by the Privy Council in *Rani Anund Kunwar* v. *Court of Wards* (16) and the Bombay Court has adhered consistently to this view. It is next necessary to refer to certain subsequent dicta of the Privy Council which have sometimes been relied on in this Court as rulings that decisions in suits by reversioners are not binding on other reversioners. With reference to a suit governed by the Act of 1859, though instituted after the coming into force of the Act of 1871, Sir James Colvile delivering their Lordships' judgment in *Jumoona Dassya* v. *Bamasoondary Dassya* (17) reserved the question whether a decree in a suit by a next reversioner questioning an adoption would bind any reversioner except the plaintiff or bind the adopted son as between himself and anybody, but the plaintiff.

It was unnecessary to decide the point and the representative character of the reversioner's suit was not considered. In *Doorga Pershad Singh* v. *Doorga Konwari* (18) Sir Barnes Peacock delivering their Lordships' judgment found that the plaintiff was not the next reversioner, and as one of the reasons for not giving him a declaratory decree observed that if the suit should be decided in favour of Joy Munghul, the alience from the widow, it might not be final in his favour because the plaintiff might die in the lifetime of the widow and the estate might never come to him.

This observation may have been made with reference to the dictum of Sir James Colvile, and, having regard to the view already referred to which Sir Barnes Peacock had expressed in India, I do not think he intended to intimate any opinion of his own that the decree would not be binding. This is confirmed by the fact that he went on to point out that there were in existence persons who might be able to prove a preferential title to the widow herself as well as the plaintiff and who would not be bound by any decision in the suit to which they were no parties. A reversioner may be allowed to represent all possible reversioners who come after him, but there is not the same reason for allowing him to represent persons who claim in priority to the widow as well as to himself. Lastly in *Isri Dutt Koer* v. *Hansbutti Koerain* (19), a suit by the reversioner questioning an alienation by the widow, their Lordships referred to the reason given by the lower Court for refusing a declaratory decree, that the decision might after all not be binding on the actual reversioners and observed:

"the question of law is of such a nature that its decision, though not binding as res judicata between the widows and a new reversioner, would be so strong an authority in point of law as probably to deter either party from disputing it."

I do not think these dicta amount to more than cautious reservations by their Lordships on a point which was not before them for decision. In any case they were obiter and were made without reference to the representative character of the reversioners' suit as now established, an aspect of the question which was not referred to. The ruling of their Lordships in *Chand Kour* v. *Partab Singh* (20), that when the nearest reversioners sued and allowed the suit to be dismissed for default the decree would not bar other reversioners from suing, does not appear to me to involve the present question. Unfortunately the question never came directly before their Lordships for decision, and I think the difficulties in this Court have been largely occasioned by treating these dicta as authority for the proposition that the decision in a reversioner's suit questioning an alienation by the widow is not binding on subsequent reversioners. Now that the representative character of the reversioner's suit is established, I do not think these dicta preclude us from holding that the decision in a representative

(14) [1871] 15 W. R. 1.
(15) [1873] 10 B. H. C. R. 351.
(16) [1881] 6 Cal. 764=8 C. L. R. 331=8 I. A. 14 (P.C.)
(17) [1875] 1 Cal. 289=3 I. A. 72. (P.C.).
(18) [1879] 4 Cal. 190=5 I. A. 149. (P.C.).
(19) [1884] 10 Cal. 324=10 I. A. 150 (P.C.).
(20) [1889] 16 Cal. 98=15 I. A. 156 (P. C.).

suit must be binding as between the persons who are represented and the opposite parties in the suit. All the cases in this Court on which the Subordinate Judge has relied, *Govinda Pillai* v. *Thayammal* (1), *Gazzala Veerayya* v. *Gazzala Ganamma* (2), *Narayana Aiyar* v. *Rama Aiyar* (3), *Venkata Row* v. *Tuljaram Row* (4), to which may be added *Abinash Chandra Mazumdar* v. *Horinath Shaha* (21) which follows *Govinda Pillai* v. *Thayammal* (1), will be found to proceed upon the authority of the decision of the Full Bench of the Allahabad High Court in *Bhagwanta* v. *Sukhi* (22). In that case, Strachey, C. J., rested his opinion on the ground that the reversioners in such a suit do not represent the whole body of reversioners. "If", he observed:

> "the nearest reversioner could be held, as the Hindu widow has been held, to represent fully the whole estate, it would no doubt follow that the limitation which would bar that reversioner would bar other reversioners, just as a decree passed against the nearest reversioner would in that case operate as res judicata against the more remote. But, so far as I know, that has never been held to be the relation in which one reversioner stands to another."

That is the relation in which the nearest reversioner stands to the others under the recent decision, and therefore the decision of the Full Bench in *Bhagwanta* v. *Sukhi* (22), and the cases which followed it can no longer be considered as of authority on this question. As I have already said, Bashyam Aiyangar and Moore, JJ., in *Akkineri Sreeramulu* v. *Mullapudi Ramayya* (5) held that a declaratory suit questioning an alienation by the widow was finally barred unless brought within twelve years from the date of the alienation (Art. 125). In *Ayyadorai Pillai* v. *Solai Ammal* (23) Subramania Aiyar and Davies, JJ., took the same view with regard to a reversioner's suit during the widow's lifetime to question an adoption, holding it finally barred unless brought within six years from the date of adoption. In *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib* (24) Subramania Aiyar and Boddam, JJ., in deference to the Privy Council dicta to which I have referred and also relying on *Bhagwanta* v. *Sukhi* (22), felt bound to overrule the contention that in a suit by a presumptive reversioner questioning an alienation he represents the whole body of possible reversioners, and that consequently on the death of the plaintiff reversioner the right of continuing the suit survives to the next presumptive reversioner. This is one of the decisions expressly overruled by the Privy Council in *Venkatanarayana Pillai* v. *Subbammal* (10).

In Bombay the representative character of the reversioner's suit has all along been recognized. In this Court the first attempt to assert it was made by Subramania Aiyar and Sankaran Nair, JJ., in their order of reference in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (6). The question was whether a decision in a suit by a reversioner questioning an adoption was binding on another reversioner. A Full Bench of five Judges answered it in the affirmative after examining the question with regard to limitation as well as to res judicata. They felt a difficulty, in the face of the Privy Council dicta to which I have already referred, in holding that the decision in a reversioner's suit to question an alienation was binding on subsequent reversioners, but they laid down that in such a suit the next reversioner represents the other reversioners (p. 401). On this basis they proceeded to refer at pp. 407 and 410 to the question of limitation as regards a reversioner's suit to question an alienation during the lifetime of the widow, and expressed the opinion that it was barred if not brought within twelve years from the date of the alienation. Having regard to the fact that the opinion of the Full Bench as to the representative character of the reversioner's suit has since been confirmed by the Privy Council, I think the opinion of the Full Bench on the question now before us, though it may be said to have been obiter, is entitled to great weight.

In *Kommeneni Chinna Veerayya* v. *Kommeneni Lakshminarasamma* (25) and *Arunachellam Pillai* v. *Vellaya Pillay* (26), the Full Bench decision was not held to overrule the decision in *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib* (24) that a reversioner's suit to question an alienation abates on the death of the plaintiff and cannot be continued by the other reversioners, al-

(21) [1905] 32 Cal. 62.
(22) [1900] 22 All. 33.
(23) [1901] 24 Mad. 405.
(24) [1904] 27 Mad. 588.
(25) [1912] 37 Mad 406=15 I. C. 213.
(26) [1912] 15 I. C. 461.

though that decision proceeded on the express ground that the suit was not a representative one. It was also held not to affect the present question in *Gazzala Veerayya* v. *Gazzala Ganamma* (2) and *Narayana Aiyar* v. *Rama Aiyar* (3). In this state of things a reversioner died while his suit questioning an adoption was pending in appeal before the Privy Council, and this Court reported that according to its decisions the surviving reversioner could not be allowed to continue it. It thus became necessary for their Lordships to decide whether the reversioner's suit was a representative suit or not. The Full Bench decision of this Court in *Chiruvol Punnamma* v. *Chiruvolu Perrazu* (6) was cited on the one side and *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib* (24), *Govinda Pillai* v. *Thayammal* (1), *Kommeneni Chinna Veerayya* v. *Kommeneni Lakshminarasamma* (25) and *Arunachellam Pillay* v *Vellaya Pillay* (26) were referred to on the other. Their Lordships decided that in suits to question adoptions and alienations the reversioner sues in a representative capacity on behalf of himself and other reversioners.

Their Lordships observed that the respondents relied on certain decisions of the Madras High Court which they contended established that adjudications in suits brought by next reversioners questioning transactions by the widow during her lifetime were not res judicata as against contingent reversioners and that consequently

"on the death of the presumptive reversioner the others have each in order of succession a separate right of suit and cannot claim to prosecute an action brought by the deceased reversioner as they do not derive their right through him."

This contention was rejected by their Lordships. They considered the representative character of the reversioner's suit, whether to question an alienation or an adoption, so clear that the test of res judicata applied in some of the decisions of this Court could be treated as irrelevant and they therefore abstained from any pronouncement on these decisions. If however the suit be a representative suit the idea that the decision may not be binding as between the parties represented in the suit and their opponents appears to me almost to involve a contradiction in terms. I have sought to show that the decisions referred to proceed on inferences drawn from certain observations in Privy Council cases which were rather in the nature of reservations on points not before the Court than of obiter dicta and that even considered as dicta they do not express the considered opinions of their Lordships with reference to the representative character of these suits. Now that the representative character of the suit is established we must I think hold the decision binding on those who are represented in it whether born or unborn. It also follows I think that as pointed out by the Full Bench the cause of action of all the reversioners is the same and arises on the date of alienation and that the question dealt with in *Rani Anund Kunwar* v. *Court of Wards* (16) as to when a remoter reversioner is to be allowed to sue is merely a question as to which reversioners should have the conduct of the suit which is instituted on a cause of action common to all.

In the opinion of the Full Bench though the point did not arise for decision having regard to the fact that the presumptive reversioner sues not on his own behalf alone but on behalf of all other possible reversioners as well the language in which the suit is described in Col. (1), Art. 125, is large enough to include a suit in which owing to exceptional circumstances a reversioner other than the nearest reversioner is allowed to be the plaintiff and have the conduct of the suit and in this view the article applies to all suits by reversioners to question alienations during the widow's lifetime. If this be not so they were of opinion that Art. 120 must be applied and that as one cause of action arises to the whole body of reversioners on the date of alienation, and they have no separate causes of action their right to sue must be deemed to accrue within the meaning of Art. 120 on the date of the alienation. This would appear to be in accordance with the policy of the legislature which might on the one hand have allowed the nearest reversioners to sue for declaratory relief at any time during the lifetime of the widow or on the other hand have prescribed that the adoption or alienation must be questioned, if at all within a fixed period from the date of its taking place but has taken a middle course and whilst allowing the rever-

sioners to wait if they choose until the widow's death has permitted them to sue during her lifetime for declaratory relief within a prescribed period only. The object no doubt was to afford an inducement to bring these declaratory suits which are in the nature of suits to perpetuate testimony while the recollection of the facts is still fairly fresh and this object will be to a great extent defeated if each reversioner as he becomes the nearest is to have a fresh starting point of limitation.

In this view the present suit is barred, but as there are decisions the other way, at least one of which is subsequent to the decisions of the Privy Council in *Venkatanarayana Pillay* v. *Subbammal* (10) and *Janaki Ammal* v. *Narayanasami Aiyar* (11) I would refer to a Full Bench the question whether the present suit is barred by limitation.

Kumaraswami Sastri, J.—I agree to the question being referred to the Full Bench.

Opinion

Sadasiva Aiyar, J.—The facts out of which the question of law referred to this Full Bench arises may be shortly stated thus:

Butchayya, a Hindu, died in 1890. Defendant 2, his mother inherited his properties with the rights and powers of a female heir. She sold the plaint properties in 1891 to defendant 3. The then presumptive reversioner P. W. 1, who was entitled at once to sue for a declaration on behalf of the whole body of successive presumptive reversioners (including defendant 3), failed to bring such a suit within the twelve years allowed to him by Art. 125, Lim. Act, that is within November 1903. Defendant 3 who was benefited by defendant 2's alienation would of course, not bring any such suit. Meanwhile, the plaintiff and defendant 1, (minors even at the date of this suit), were born to Butchayya's stepsisters and they on their birth became nearer presumptive reversioners than even P. W. 1. The plaintiff, having been born in July 1910, brought this suit to avoid the alienation in October 1915 within six years of his birth. The short question referred to the Full Bench is whether this suit is barred by limitation.

To enable us to solve this question, arguments were addressed to us on the following:

Questions:—1 (a) When a Hindu widow makes an alienation voidable against the ultimate reversionary heir at her death or re-marriage, does a single cause of action for a declaration of its invalidity arise at once to be availed of by the next presumptive reversioner by bringing a suit on behalf of the whole body of successive reversioners till the opening of the reversion, and in case the next presumptive reversioner by collusion or other act precludes himself from availing himself of that single cause of action to be availed of by the next reversioner in the order of succession and so on, the suit whenever brought being based on the same single cause of action? 1 (b) Is Art. 125 the only article applicable to the suit based on such single cause of action if 1 (a) is answered in the affirmative, or (2) do several causes of action arise at different times to several reversioners when each preceding reversioner has lost his right to bring and conduct such a suit through collusion or other similar acts? (I shall use the word "reversioner" for brevity as including a set of reversioners standing on an equal footing as among themselves.) 3 (a) If each successive reversioner gets a new cause of action, does that cause of action spring up not only when the previous reversioner loses his right by collusion, etc.,—positive act but also when such right is lost by laches and consequent bar by limitation? 3 (b) If (2) and 3 (a) are answered in the affirmative, what is the period of limitation and what is the Article of the Limitation Act governing a suit by the succeeding reversioner? 4. Where a new reversioner comes into being for the first time by natural birth or by adoption (a) who gets preference by modern Hindu law in respect of the status of presumptive reversionership over other persons who till then formed the body of reversioners or (b) who becomes entitled to sue by reason of collusion, etc. (see questions 2 and 3 (a),) does a fresh cause of action arise in the new reversioner so coming into being as above entitling him to bring a suit for declaration of the invalidity of the alienation? 5. If (4) is answered in the affirmative, what is the period of limitation for the suit by the new reversioner and what is the governing Article of the Limitation Act? (It will be seen from the facts of this case that it falls under the heading four above and that

only questions 4 and 5 directly arise in this case).

My Lord the Chief Justice in his well-considered Order of Reference (if I may be permitted to say so with respect) expresses his strong inclination to answer questions 1 (a) and 1 (b) in the affirmative, (that is, that there is only one cause of action arising on the date of the alienation to be availed of on behalf of all the body of reversioners in a single representative suit and that that cause of action is governed by Art. 125) and to answer questions 2 to 4 in the negative. I entirely agree with the said conclusions and the reasons given for such conclusions. I shall shortly consider the decisions of this Court from *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib* (24) downwards in which observations inconsistent with the above conclusions occur. These decisions are *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib* (24), *Govinda Pillai* v *Thayammal* (1), *Gazzala Veerayya* v.*Gazzala Ganamma* (2), *Kommeneni Chinna Veerayya* v. *Kommeneni Lakshminarasamma* (25), *Arunachellam Pillay* v. *Vellaya Pillay* (26), *Narayana Aiyar* v. *Rama Aiyar* (3) and *Venkata Row* v. *Tuljaram Row* (4).

As regards *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib* (24), *Arunachellam Pillay* v. *Vellaya Pillay* (26) and *Kommeneni Chinna Veerayya* v. *Kommeneni Lakshminarasamma* (25), the law laid down in those three cases to the effect that when the next presumptive reversioner who has brought a suit to set aside an alienation dies, the suit abates finally and the next man entitled to stand as presumptive reversioner cannot carry it on but ought to bring a fresh suit of his own has been directly overruled by the decision of their Lordships of the Privy Council in *Venkatanarayana Pillai* v. *Subbammal* (10), the dicta laid down in which have been confirmed by their Lordships in *Janaki Ammal* v. *Narayanasami Aiyar* (11) and though the above three cases of this Court were quoted before their Lordships by the counsel for the respondents in the case of *Venkatanarayana Pillai* v. *Subbammal* (10) to support his contentions, he was unsuccessful.

In *Govinda Pillai* v. *Thayammal* (1) learned Judges answered the question 3 (a) to the effect that even the loss of the right to sue by the bar of limitation through the laches of previous sets of reversioners would vest a new cause of action in a reversioner of a succeeding class that if the latter was not in existence at the date of alienation, a new cause of action vested in him at his birth, (question 4) that he had six years under Art. 120 from when his cause of action arose and if the six years expired before he attained majority, he was entitled under S. 7, Lim. Act, to three years from his attaining majority to bring his suit. I am convinced in my mind that the reasons given for the conclusions in *Govinda Pillai* v. *Thayammal* (1) decided by Davies and Benson, JJ., are inconsistent with the reasons given in the unanimous and fully considered opinion of the Full Bench of five Judges of this Court (including the same learned Judges, Davies and Benson, JJ.) in *Chiruvolu Punnmama* v *Chiruvolu Perrazu* (6), Sir S Subramania Aiyar as the Officiating Chief Justice being a member of the Bench which made the reference to the Full Bench consisting of Sir Arnold White, C, J., Subramania Aiyar, Davies, Benson and Moore, JJ. The Full Bench case of *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (6) was no doubt a suit by a reversioner to set aside an adoption, while that of *Govinda Pillai* v. *Thayammal* (1) was one to set aside an alienation by the widow, but as pointed out in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (6) (at pp. 400 and 410) and by their Lordships of the Privy Council in *Venkatanarayana Pillai* v. *Subbammal* (10) (at p. 412 *of* 38 *Mad.*), there is no distinction in principle between the two kinds of suits "as regards the position of the plaintiffs." Both *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib* (24) and *Govinda Pillai* v. *Thayammal* (1) are referred to in the Full Bench decision in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (6) both in the arguments and in the judgment at pp. 399, 400 and 410 and though it is not expressly said that they are dissented from, the whole reasoning (see pp. 400 and 410) indicates in my opinion that they were not approved of.

As regards *Gazzala Veerayya* v. *Gazzala Ganamma* (2), I agreed with Sundara Aiyar, J., in the judgment pronounced by him that notwithstanding *Chiruvolu Punnamma* v. *Chiruvolu Per-*

razu (6), the decisions in *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib* (24) and *Govinda Pillai* v. *Thayammal* (1) were still good law because there were several dicta of the Privy Council to the effect that one reversioner did not claim through another as regards suits to set aside alienations. We thought that those dicta constrained us to decide cases of suits to set aside alienations differently from the way in which they ought to be decided if the principles enunciated in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (6) were logically applied. In *Narayana Aiyar* v. *Rama Aiyar* (3) there are certain obiter observations by me approving of *Gazzala Veerayya* v *Gazzala Ganamma* (2), the decision itself in *Narayana Aiyar* v. *Rama Aiyar* (3) being one dismissing the suit on the ground that the plaintiff reversioner was estopped from questioning the alienations. In *Venkata Row* v. *Tuljarama Row* (4) there is again an obiter dictum (at p. 36 *of* 1917 *M. W. N.*) that a minor not born on the date of an alienation gets an independent cause of action from the date of his birth, notwithstanding that there were nearer reversioners who by collusion with the widow or by having allowed 12 years to elapse from when they were entitled to come in as plaintiffs did not or could not attack the alienation. The suit in that case also was dismissed on a wholly independent ground, namely, that the Court had a discretion to grant the declaratory relief and that that case was not a proper one to grant such relief.

As regards the dicta of the Privy Council, which were relied on in several cases in the other High Courts (I shall not refer to those cases in detail) and in this Court even after the decision in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (6), I entirely agree with my Lord in his observatione about them in his Order of Reference: and as I am not likely to add to the cogency and the strength to the arguments found in the said observations by putting them in my own language, I shall certainly not attempt to do so. Considering the outstanding fact of "the identity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights *Venkatanarayana Pillai* v. *Subbamml* (10)," I think it is impossible to hold that several suits could legally be maintained founded ou such an identical interest and involving the same questions of law and fact, so far as the dispute about the validity of an alienation is concerned. The inconveniences of holding otherwise have been cogently pointed out in the Full Bench decision in *Chiravolu Punnamma* v. *Chiruvolu Perrazu* (6). The act complained of is "to the common detriment" of the body of reversioners as a whole, just as the relief sought is intended for their common benefit; see *Venkatanarayana Pillai* v. *Subbammal* (10). If several suits are allowed to be brought so that the matter once sued on with the then presumptive reversioner as plaintiff could be litigated over and over again

> "to the detriment and injury of all parties, the position of affairs would become almost intolerable"

as when the adjudications in favour of or against a Karnavan as such were denied before *Vasudevan* v. *Sankaran* (27) to have a binding character with reference to the other members of the tarwad and led to such a position. The justice and expediency of making adjudications in such cases final as far as possible is manifest, and if the whole existing body of reversioners, both near and remote, can be made parties (as has been now settled) and the conduct of the suit can be allowed by the Court to any of them on sufficient grounds (just as it was taken away on appeal from the plaintiff and given to other worshippers in the Mamudi temple case), there is no injustice whatever in applying Art. 125, so far as a suit for the declaration of the invalidity of an alienation by a female heir is concerned and in further holding that there should be only one representatine suit brought in the interest of all the reversioners, though the Court in its discretion will, as a rule not allow a remoter reversioner to institute and have the conduct of such a suit except on sufficient grounds (such as collusion, acts amounting to estoppel, gross laches, risk of the disappearance of necessary evidence, reasonable danger of the right to sue becoming barred by limitation if the remoter reversioner is not allowed to institute the suit and so on).

If such is not the rule, Art. 125, evidently intended to discourage belated de-

(27) [1897] 20 Mad. 129.

claratory suits, might as well be removed from the Statute of Limitations. If the second contingent reversioner can wait for nearly six years after the first presumptive reversioner is barred, the third contingent reversioner again for nearly six years after the second is barred and so on, and if newly born reversioners can wait till nearly three years after each attains majority to bring a suit, notwithstanding that living reversioners failed during 50 years after the alienation to bring such a suit or even failed in suits brought by them before the new plaintiff was born, the object of Art. 125 is almost wholly defeated. The argument based on the supposed injustice of barring a man's right of suit before he is even born does not impress me. If the unborn future members of a whole community (say a Vadagalai community, as in the illustration suggested by my learned brother Oldfield, J., in the course of the argument) could be barred from the exercise of a vital mode of worship by limitation owing to the long established adverse acts of a rival community, I do not see why the failure of existing members of a body to bring a representative suit for the benefit of unborn members also should not bar suc hunborn members: see also *Muhammad Amir* v. *Sumitra Kuar* (28).

It must be remembered that even, the very first presumptive reversioner has only a possibility of succeeding or spes successionis: *Bahadur Singh* v. *Mohar Singh* (29) and *Amrit Narayan Singh* v. *Gaya Singh* (30). In conceding a right of suit to persons possessing an interest of this defeasible character, the case-law provided a very exceptional remedy and (if I may be permitted to say so with respect) an anomalous remedy. It must also be remembered that under the more ancient and liberal Hindu law, a wife as heir of her husband succeeding as his remaining half and a mother succeeding to her son who was her own flesh and blood had full and absolute rights of ownership and it is only mediaeval picus text interpolators and reactionary commentators with low views of women's position and morals that took advantage of texts intended for the chivalrous protection of the properties if women by men, a Vedic text about women being Niriudryas (whose meaning was twisted and perverted beyond re-cognition), aud more moral precepts to widows as to the conduct of noble Sadhwees that had made a female heir almost a trustee for the future and unascertained reversioner who might happen to be the heir of her husband or her son at her death instead of making the inheritance pass to her own heirs. I confsss that I have no sympathy whatever with these problematical reversioners and unless the law compels me to do so, I am not inclined to unduly favour them. It was argued that because the heir at the death of the widow is allowed under Art. 141 a period of 12 years from her death to recover possession of the alienated property, there is no harm inallowing numerous declaratory suits also during her lifetime to different persons without any reference to the lapse of time since the date of alienation. Apart from the difference between a declaratory suit and a suit for possession, the alienee has in a suit for possession brought against him by the ultimate heirs after several years the advantage of the rulings of the Privy Council that the evidence of the necessity for and of the inquiries made about the necessity for a long standing alienation should be considered indulgently in favour of the validity of the alienation.

Lastly it seems to me that it is a glaring anomaly that while an alienee from a mortgagee or even a trustee is protected after 12 years from the date of the alienation under Art. 134, while an alienee even from a minor's guardian is protected after three years from the data of the minor's attaining majority under Art. 44 when even a son supposed to have equal rights with his father in the ancestral property if he is born after an alienation by his father cannot acquire by birth any right to attack that alienation, a reversioner with a spes successionis and not born till several years after an alienation by a female heir should have 12 years from the date of the death of the Hindu female heir (who has certainly greater rights of ownership than a guardian or a trustee) to sue for possession of a property alienated by her, say more than 60

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(28) A. I. R. 1914 All. 441=24 I. C. 97=36 All. 424.
(29) [1902] 24 All. 94=29 I. A. 1 (P. C.).
(30) A. I. R. 1917 P. C. 95=45 Cal. 590=44 I. C. 408=45 I. A. 35 (P. C.)

years before her death. I am wholly unable to understand why the legislature should have been so very solicitious about such remotely contingent interests. If the legislature decides against a recent proposal made in the Local Legislative Council to allow Courts to grant sanctions to alienations by widows so as to make the title of the alienee thereafter unquestionable, I hope that Art. 141 would at least be modified by the addition of a clause

"or 21 years from the date of the alienation not declared invalid by decree in an appropriate suit whichever term first expires."

The first column of the article might also be made clear by confining its operation to Mahomedans governed by Hindu law through custom. In *Garikipati Paparayudu* v. *Garikipati Rattamma* (31) I stated :

"the very object of allowing a suit by a contingent reversioner has been unfortunately, if I may be permitted to say so, defeated to a very large extent by the decisions which are binding on us, to the effect that a decree passed in favour of or against such a reversioner is not binding on a remoter reversioner. I might be permitted to hope that the legislature should see fit to enact that the decree in a suit bona fide brought and litigated by the then nearest reversioner is binding on the remoter reversioners."

I am glad that the recent pronouncement of the Privy Council in *Venkatanarayana Pillai* v. *Subbammal* (10) has the effect of overruling the decisions which I referred to in the above passage. But so far as suits for possession on the death of the female heir are concerned, the assistance of the legislature is still necessary. In the result, I would answer the questions (1a) and (1b) formulated by me in the affirmative, and questions (2) and (4) in the negative. Questions (3a), (3b) and (5) do not arise on these negative answers to the other questions. As regards the question directly referred to us, I agree with the answer in the affirmative suggested in the judgment of my Lord.

Coutts-Trotter, J.—The history of the case-law on the subject in this Presidency has been so exhaustively reviewed by learned Chief Justice in his Order of Reference that no useful purpose would be served by covering the same ground. The only point we have really to determine is whether the decision of the Privy Council in *Venkatanarayana Pillai* v. *Subbammal* (10) concludes the question referred to us. That decision was cited in a later decision of the Privy Council [*Janaki Ammal* v. *Narayanasami Aiyer* (11)], as expounding the law on the subject and establishing the doctrine that a reversionary heir appealing to the Court for the conservation of the property does so in a representative capacity. In *Venkatanarayana Pillai* v. *Subbammal* (10) a reversioner brought a suit to set aside an adoption by a widow. Pending an appeal to His Majesty in Council he died. The Privy Council decided that his grandson might be brought on the record as appellant in his place and that the appeal did not abate by reason of the death of the original appellant. The decision was based on the express ground that the suit was a representative one and enured for the benefit of the whole class of reversioners. It seems to me impossible to escape from the logical conclusion that, if it enures for the benefit of all, it must equally enure to the detriment of all. As the learned Chief Justice says in his Order of Reference, to hold otherwise would almost be a contradiction in terms. One sentence in their Lordships' judgment was pressed upon us by Mr. Narayanamurthi as indicating that their Lordships did not mean to question the right of each reversioner, as he became nearest in succession, to litigate his own claims unhampered and unaffected by anything done or left undone by his predecessors in the line of succession. The sentence appears on p. 414 of the Indian Law Reporters 38 Madras [*Venkatanarayana Pillai* v. *Subbammal* (10)] and is worded as follows :

"The right to relief on the part of the reversioners exists severally in order of succession, and arises out of one and the same transaction impugned as invalid and not binding against them as a body."

The right to relief in the sense of the right to obtain possession of the property no doubt exists in order of succession, but I take their Lordships' judgment to mean that the right to relief of a declaratory nature against the transaction impugned arises simultaneously and jointly for all the reversioners at the moment the act is done. It follows in my judgment that if a reversioner who is competent to do so challenges an alienation or an adoption unsuccessfully or fails to challenge it within the period allowed by the Law of Limitation, the result is

(31) A. I. R. 1914 Mad. 422=17 I. C. 508=37 Mad. 275.

binding on his successors in the reversion. The argumentum ab inconvenienti is pressed upon us, that so to decide would open the door to fraudulent and collusive actions between the widow and the nearest reversioner bartering away the rights of subsequent reversioners. I think the answer to be that proof of such fraud and collusion would at once invalidate the result which was sought to be achieved. It appears to me that the hardship of allowing an alienee or an adopted son to be harassed by an endless series of suits by successive reversioners, each raising the same point and each more difficult to meet with the lapse of time, is infinitely greater. The result is that, in my opinion, the present suit is barred ; and that *Govinda Pillai* v. *Thayammal* (1), *Gazzala Veerayya* v. *Gazzala Ganamma* (2), *Narayana Aiyar* v. *Rama Aiyar* (3) and *Venkata Row* v. *Tuljaram Row* (4) are no longer law.

Ayling, J.—I would answer the question in the affirmative, and concur in the judgment of Courts-Trotter, J.

Oldfield, J.—I desire to express no opinion except on the question directly referred to us ; and I would answer it in the affirmative for the reasons given by Courts-Trotter, J., in his judgment.

Seshagiri Aiyar, J.—The case law is fully discussed in the Order of Reference made by the learned Chief Justice. I entirely agree with the conclusion he has come to. I shall only refer to two or three cases and to the limitation and the Specific Relief Acts to make my position clear. It is not denied that the object of a suit by a reversioner for a declaration either that the adoption is invalid or that the alienation is void beyond the lifetime of the alienor is to perpetuate testimony. The party suing gets no immediate benefit. It very often happens that the ultimate benefit of the declaration is enjoyed by somebody else.

It is clear therefore that the nature of the suit is to obtain a pronouncement not for the personal benefit of the plaintiff nor for obtaining any immediate relief to himself. The right of suit is given by S. 42, Specific Relief Act, which has been framed according to Mr. Collett, once a Judge of this Court and who has written a commentary upon the Act, upon the basis of the Scotch Law. According to the English Law a declaration of right was obtainable only as introductory to some other relief with the Chancery Court proceeded to award: see *Robert Fisher* v. *Secretary of State* (32). But apparently under the Scottish action of declarator, declaratory actions were entertained for making a matter clear which was then doubtful although no immediate relief was expected or granted. Very likely it is this principle of the Law of Scotland that has been accepted by the framers of the Indian Code. It is clear that the right of suit is given only with a view of dispelling a cloud which may attach to the title when the lifeestate ends. The fact that in India widows in possession of their husbands' properties have been found to alienate them in favour of strangers to the prejudice of the possible claimants at the end of a long period of suspense, might have induced the legislature to give to the reversioners a right of suit, while the evidence was still available and fresh, to contest the action of the widow, leaving it to the actual heir on the death of the widow to avail himself of that relief before taking possession of the property. Prima facie, therefore it may be taken that the right agitated is not an individual right but a corporate right.

Mr. Narayanmurthi strongly relied upon the course of decisions beginning with *Rani Anund Kunwar* v. *Court of Wards* (16) for the proposition that the right possessed by each reversioner is a several or individual right and not a common right. In my opinion these decisions do not help the learned vakil. What was decided in these cases was that if the immediate or presumptive reversioner does not sue to perpetuate the testimony, a remoter reversioner can institute such a suit. It must be remembered that in such suits the presumptive reversioner is almost invariably impleaded as a defendant. The suit is really one brought on behalf of the person who is unwilling to litigate the matter. We are familiar with cases wherein a trustee of a temple does not take action when he should, his co-trustee or the beneficiary, as the case may be, brings a suit impleading the unwilling trustee as a defendant. In such cases it is not an individual right possessed by the co-trustee or the beneficiary that is being contested in Court; it is the right belonging to the trust itself that is really

(32) [1899] 22 Mad. 270=26 I. A. 16 (P. C.).

litigated. In England there are cases where the cestui que trustent have been compelled to use the name of the trust in suits brought by the beneficiaries. Similarly a suit brought by a remoter reversioner, which ought to have been instituted by the presumptive reversioner, is not an action which is special to himself but is one in which he is interested along with the defaulting reversioner. Therefore I do not think that the cases from *Rani Anund Kunwar* v. *Court of Wards* (16) leading up to *Jhandu* v. *Tarif* (33) are any authority for the proposition that each reversioner has a separate right.

There can be no doubt that the cause of action is one and the same. But what has strenuously argued was that the right of suit upon the single cause of action is different in the case of each reversioner. Reliance was placed for this proposition upon a sentence in the judgment of the Judicial Committee in *Venkatanarayana Pillai* v. *Subbammal* (10) At page 414 (of I. L. R. 38 Mad.) their Lordships observe:

"The right to relief on the part of the reversioners exists severally in order of succession, and arises out of one and the same transaction impugned as invalid and not binding against them as a body."

I do not understand this sentence to lay down that the suit for declaration is not in respect of a right common to a body of persons. The reference to rights existing severally may be explained as indicating that the remoter reversioners can themselves be plaintiffs; "the order of succession" only suggests that it is not every remote reversioner that can come to Court without asking persons before him to undertake the task of getting their common right vindicated. I do not think that this sentence can be construed in the way the learned vakil contended for. The decision of the committee on the other hand lays down definitely that the reversioners as a body have a common interest and that the right litigated is a joint right. It is stated on p. 412 (of 38 *Mad.*):

"It is the common injury to the reversionary rights which entitles the reversioners to sue."

And again at the top of p. 413 (of 38 *Mad.*) it is stated:

"There remains the outstanding fact of identity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights."

The next point for consideration is, granted it is a joint right and that any conclusion ccme to in a suit brought by one of the reversioners will be binding upon the others also, does it follow that the failure to institute a suit by the reverisoners precludes others from suing for such a relief ? S. 11, Expl. 6, Civil P. C., enunciates the principle of res judicata where action has been brought to vindicate a right common to the plaintiff and to others. Notwithstanding the statement in the judgment of the Privy Council in *Venkatanarayana Pillai* v. *Subbammal* (10) that a consideration of the question of res judicata is irrelevant, I hold with the learned Chief Justice that it is impossible to resist the conclusion that if the right litigated is a commcn right and if that litigation has been honestly conducted, the other reversioners are affected by the bar of res judicata. This is a logical result of the decision of the Judicial Committee; the next step may be reached by the application of the principle contained in S. 7, Lim. Act. The principle of that section is that if there are some persons in existence who are adults who could have safeguarded the common rights of themselves and of others similarly situated, the failure of the persons who are sui juris to litigate the right will start the cause of action not only against themselves but also against persons in similar circumstances. In my opinion the general principle of law implied in this section is applicable to the case of reversioners.

The last argument of Mr. Narayanamurthi related to the construction of Art. 125, Lim. Act. In terms, that article applies only to the presumptive reversioner. I was rather inclined to think that the suggestion contained in the Full Bench decision in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (6) at the top of p. 409 that the words "Hindu . . . who if the female died," etc., in the article would comprehend, for the purposes of the article, a remote reversioner allowed by law to sue in his stead, was somewhat far-fetched; but it seems to me on further consideration that if a remote reversioner has only the conduct of the litigation not for himself but on behalf of the body of reversioners and for the benefit of the person who is entitled to re-

(33) A. I. R. 1914 P. C. 34=37 All. 45=27 I. C. 892 (P. C.)

cover when the succession opens, there is nothing wrong in holding that the article is applicable not only to the presumptive reversioner but also to the remote reversioner as well. If my suggestion that the remote reversioner is really suing in the name of the presumptive reversioner is right, the article is clearly applicable. The proper way to look at these suits is to regard the plaintiff reversioner as being entrusted with the conduct of litigation on behalf of a body of persons: ordinarily, the nearest reversioner is the person most competent to conduct it: he has the right of preference; but circumstances may show that the position of dominus litis should be taken away from his hands and should be entrusted to another. That, in my opinion, is the true principle underlying suits by remote reversioners. At present I am rather doubtful whether the residuary Art. 120 is applicable to suits by remote reversioners. There is an observation about it in *Venkata Row* v. *Tuljaram Row* (4), but as that decision has gone up to the Privy Council, it is not necessary to discuss the question any further.

Mr. Narayanamurthi then argued that even supposing Art. 125 applied to remote reversioners, it cannot apply to a person who was not in existence on the date of the alienation. I am inclined to agree with him in this contention. The articles in the Limitation Act must be construed reasonably, and if a cause of action accrues at a time when a person was not born, he must not be affected by it. But I do not think that that conclusion really affects the matter. The law must be taken to have intended to provide for cases of persons who were only in existence on the date of the alienation or adoption. As I stated at the outset, the main object is to perpetuate testimony and that object can be gained ordinarily by persons who were alive at the date of the alienation and who were capable of bringing before the Court circumstances showing that the alienation is not binding. The rights of the actual heir are not jeopardised. It looks by the language of Art. 125 as if the legislature considered it sufficient to give this extraordinary relief of declaration only to persons alive on the date of the alienation. The decision in *Gazzala Veeraya* v. *Gazzala Ganamma* (2) is exactly in point and I think that it was rightly decided. The obiter dicta contained in the judgments of the Judicial Committee in the various cases referred to by Mr. Narayanamurthi have been explained away by the learned Chief Justice, and I do not wish to add anything to that discussion. I would, for the reasons given, answer the question in the affirmative.

S.N./R.K. *Reference answered in the affirmative.*

A. I. R. 1919 Madras 923

SADASIVA AIYAR AND SPENCER, JJ.

Prayaga Doss Jee Varu—Appellant.

v.

Venkama Naidu and *others*— Defendants—Respondents.

Second Appeals Nos. 1126 and 1437 to 1439 of 1914, Decided on 16th October 1917, against decrees of Dist. Judge, North Arcot, in Appeal Suits Nos. 792, 670, 718 and 719 of 1913.

(a) Landlord and Tenant—Tenancy—Incidents—Mathiri Kasavu and Sadalwar are incidental charges payable by raiyat with rent.

Mathiri kasavu (straw rent) and sadalwar are charges incidental to a raiyat's holding and are payable with the rent: 27 *I. C.* 688; *Foll.* [P 924 C 2]

(b) Landlord and Tenant—Rent — Rate—Garden rate is payable when based on contract or custom.

A landlord is entitled to charge garden rates for crops grown with the aid of water from wells sunk by a raiyat if they are based on any contract, express or implied, with the raiyat or any local usage. [P 925 C 2]

(c) Madras Estates Land Act (1908), S. 13 (3)—Scope—It does not preserve distinction between rents payable by custom or contract as in S. 11, Act 8 of 1865— Enhanced rent claimed on basis of custom—Court can inquire whether the custom is based on contract.

Section 13 (3), Act 1 of 1908 does not preserve the distinction between local usage and contracts for rents, express or implied, contained in S. 11, Act 8 of 1865. [P 925 C 2]

Where therefore a claim for enhanced rent is not based expressly in the plaint on a contract with the raiyat, express or implied, but on custom it is competent for the Court to go into the question whether the usage is the result of a valid contract: 31 *I. C.* 539, *Diss. from.* [P 925 C 2]

(d) Practice — Pleadings — Pleadings in Mofussil Court should not be strictly construed.

Pleadings in the Mofussil Courts, which are losely drawn up and so do not contain exhaustive statements as to the basis of claims and defences, describing in accurate legal language the alternative and distinctive ways of founding and describing the rights put forward therein, should not be taken too literally and the substance of the averments should be looked into. [P 925 C 2]

(e) Evidence Act (1872), S 114 —Presumption of agreement and of consideration for it can be drawn from fact of long payable of enhanced rent.

Where enhanced rent has been paid by tenants for a long period of time, not only can the existence of an agreement to pay rent at such rate be presumed but the consideration for the same can also be presumed. Both presumptions are presumptions of fact. [P 925 C 2]

(f) Madras Estates Land Act (1908), S. 13 (3)– Scope– It does not operate retrospectively to affect contracts to pay enhanced rent for improvements made before Act.

Section 13 (3), Madras Estates Land Act would not affect the liability of raiyats to pay enhanced rents, if the improvements were made before the Act and if there had been a contract between the landlord and the tenant entered into before the passing of the Act to pay rent at such rates. [P 924 C 2]

(g) Madras Estates Land Act (1908), S. 13 (3)— Not charging rent for site for well would amount to consideration for contract to pay enhanced rent.

Where wells are sunk by a raiyat in estate poramboke the mere abstention of the landholder from charging rent on the sites occupied by the wells might amount in law to a consideration for a contract to pay enhanced rates. [P 924 C 2]

(h) Madras Estates Land Act (1908), S. 13 (3)—Advantage of those improvements made without consent of landlord and prejudicially affecting his other land cannot be claimed.

An improvement made by a raiyat which prejudically affects another land of the landholder, if made without his consent in writing would not be an improvement of which the raiyat could claim the advantage provided by S. 13 (3) of the Act. [P 924 C 2]

S. Srinivasa Iyengar, *S. Gopalasami Iyengar* and *K. Srinivasa Iyengar*— for Appellant.

Judgment.—In all these second appeals the appellant is the Mahant of Tirupati and the respondents are the raiyats of Karvetnagar Estate. In all of them the question arises whether the landholder was entitled to charge garden rates for crops grown with the aid of well water. In Second Appeals Nos. 1437 to 1439 and 1440 to 1447 there is a question whether the landholder was entitled to charge for a second crop cultivated on dry land with the aid of well water. In Second Appeals Nos. 1440 to 1447 there is a further question whether the District Judge was right in disallowing the charge for mathiri kasuvu (straw rent), and in Second Appeals Nos. 1437 to 1439 whether he was right in disallowing the charge for sadalwar (stationery) which he allowed in the former batch.

In *Venkata Perumal* v. *Ramudu* (1) mathiri kasuvu and sadalwar were treated as charges incidental to the tenure of the land and payable with the rent. Following that decision we allow the appeals in this respect. On the question common to all these appeals, the lower Courts are unanimous in finding that the wells were sunk at the cost of the raiyats without any assistance from the landholder, but they have not decided whether they were sunk before or after the introduction of the Madras Estates Land Act, nor has the District Judge recorded any finding as to the length of time that these garden rates have been in force, although the Sub-Collector stated in his judgment that it was admitted that these rates had been accepted in all faslis from 1243 onwards. There is evidence that a number of wells are outside the holdings which they irrigate and are either in poramboke or in the patta land of other raiyats. The District Judge was of opinion that it was immaterial whether the well was actually situated in the plaint lands or not. We cannot accept this view. In certain conditions it would be very material. An improvement which prejudicially affected another land of the landholder, if made without his consent in writing, would not be an improvement of which the raiyats could claim the advantage provided by S. 13 (3) of the Act: vide the definition of improvement in S. 3 (4).

In a similar case, coming from the same district, this Court in *Govind Doss* v. *Gurram Chinnappa Naidu* (2), dealing with the case of wells sunk in estate poramboke, held that the mere abstention of the landholder to charge rent on the sites occupied by the wells might amount in law to a consideration for a contract to pay enhanced rates.

In *Govind Doss* v. *Gurram Chinnappa Naidu* (2) and *Venkata Perumal* v. *Ramudu* (1) it was decided that S. 13 (3) would not affect the liability of raiyats to pay enhanced rents if the improvements were made before the Act and if there had been a contract between the landlord and the tenant entered into before the passing of the Act to pay at such rates. It was moreover, held in *Govind Doss* v. *Gurram Chinnappa*

(1) [1915] 39 Mad. 84=27 I. C. 688.
(2) [1915] 27 I. C. 869.

Naidu (2) and in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (3) that an implied contract to pay increased rent might be presumed from a continued payment for a number of years at such rates. We do not follow the learned Judges who decided *Arunachelum Chetty* v. *Syyad Ahamed Ambalam* (4) that only the existence of agreements can be presumed by such payments spread over a long period of time but that consideration for such agreements cannot be presumed. Both presumptions are presumptions of fact. There is no principle by which Courts are to be enabled to make the one presumption and disabled from making the other. In *Armugam Chetty* v. *Jagaveera Rama Venkateswara* (5) this is recognized by one of the learned Judges who decided *Arunachelum Chetty* v. *Syyad Ahamed Ambalam* (4). For he says there:

"Of course the consideration may be of the same implied nature as the covenant to pay."

In *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa* (3) Subbramania Aiyar, J., declared that a presumption of consideration might be justified on the lost grant principle, on the ground that after a great many years it would be unfair to compel the landholder to prove consideration; but he declined to presume consideration on the facts of tha case, for the reason that there would be no difficulty in the landholder proving what the consideration was if payments had been made at a higher rate for short periods ranging only from 1 to 18 years. It was contended that as the plaintiff did not claim the enhanced rate on the basis of a contract supported by the consideration proceeding from him in the shape of an undertaking not to charge rent for the well— poramboke sites on which the tenants had sunk wells, and as he did not even set up an implied contract to be presumed from very long continued payments of higher rents, this Court could not in second appeal allow him to raise for the first time the question of the right of enhancement based on contract. Reliance is placed for this contention cn the decision in *Arunachelum Chetti* v. *Syyad Ahamed Ambalam* (4), already quoted. But the distinction between contract rates and customary rates is a very subtle one as between landlords and tenants. No doubt S. 11, Act 8 of 1865, makes some distinctions between local usage and contracts for rents, express or implied, but S. 13 (3), Madras Act 1 of 1908, does not preserve this distinction. It is impossible to expect to find in the pleadings in Mofussil Courts exhaustive statement as to basis of claims and defences expressing in accurate legal language the alternative and distinctive ways of founding and describing the rights put forward in the pleadings. The facts and the evidence to prove a contract, where the contract is a very old one, are almost the same as those on which a custom to pay enhanced rents has to be proved if such a custom is valid. In the cases of *Govind Doss* v. *Gurram Chinnappa Naidu* (2) and *Venkata Perumal* v. *Ramudu* (1) the claim put forward to enhanced rent was based on usage and the question whether the usage might have been the result of a vaild contract was gone into by this Court without objection. As the learned Judges in the case reported as *Arunachelum Chetty* v. *Syyad Ahamed Ambalam* (4) refused to allow the claim to enhancement tc be based on a contract owing to their construction of the language of Sir Subramania Aiyar's judgment in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (3) (as regards whether consideration can be presumed from the evidence of long usage to pay higher rent) and as we differ from that construction, we do not feel ourselves bound by that decision to decline to make a remand so as to have a finding from the lower appellate Court on the question of express or implied contract.

We must therefore call for fresh findings from the District Judge on the following questions: (1) In which of these appeals are the wells which irrigate the raiyat's holling situated in land for the occupation of which the landlord might legally but has not in fact, charged any additional rent? (2) In each of these cases were the wells constructed before or after the passing of Madras Act 1 of 1908? (3) For how many years in each case have the raiyats been paying these increased garden rates without protest? The findings should be returned within two months from this date. Fresh evi-

(3) [1905] 28 Mad. 444.
(4) [1915] 31 I. C. 539.
(5) [1910] 35 Mad. 134=8 I. C. 330.

dence may be adduced. Ten days are allowed for filing objections.

Findings.—I am directed to submit findings on three new issues as specified in the judgment of the High Court. In Appeal Suits Nos. 364 to 371 of 1913 corresponding to Second Appeals Nos. 1440 to 1447 of 1914 on the file of the High Court the parties have entered into a compromise that the rates of rent claimed in Fasli 1319 are to be considered as the proper rates payable by the raiyats and that the suits should be dismissed accordingly each party bearing his own costs throughout. Findings are therefore unnecessary in these suits. As regards the other four suits the defendant in Appeal Suit No. 792 of 1913 and the plaintiffs in Appeal Suits Nos. 670, 718 and 719 of 1913 are ex parte. The appellant called the Village Monegar who is also a raiyat owning lands there. He says he knows the lands of the plaintiffs in Appeal Suits Nos. 670, 718 and 719 of 1913 (Second Appeals Nos. 1437, 1438 and 1439 of 1914), but he does not know the defendant in Appeal Suit No. 792 of 1913 (Second Appeal No. 1126 of 1914). No new wells have been dug in the last 10 or 12 years, and all wells have been in existence as long as he can remember (he is now aged 30). When crop-war rent is charged the sites of the wells are allowed free of rent. No rents other than crop-war have ever been paid. The plaintiff in Appeal Suit No. 718 of 1913 was examined as P. W. 1 in the lower Court and he then alleged that he had dug a well three years previously and bought another one, and he had never previously raised wet crops. He however accepted a patta in the usual general terms. On the other hand P. W. 4, plaintiff in one of the compromised suits stated that the rates now entered in the pattas had been entered in pattas as long as he could remember that is for more than 50 years, and that such rates had been collected. P. W. 3 plaintiff in Appeal Suit No. 719 of 1913, stated in the original trial that he irrigated his crops with water from wells dug by him but he has not now appeared to say when he dug his wells.

As regards Appeal Suit No. 792 of 1913 (Summary Suit No. 434 of 1912) the karnam stated in the original trial that no well had been sunk during his time, but he does not seem to have had knowledge of the village prior to Fasli 1319. The raiyat's witness stated that wells had been sunk 10 years previously and he admitted that the rates of rent claimed had been in force to his knowledge for 20 or 25 years. As regards the issues now remanded by the High Court I must find that : (1) in no case has the landlord charged rent for the sites of wells though he might legally have done so; (2) the wells concerned in these suits were constructed before the passing of Madras Act 1 of 1903 and (3) the raiyats have been paying these rates without protestf rom time immemiorial. With reference to the new issue 3, I might perhaps remark that these suits relate to lands in the Karvetnagar zamindari, in which it has been the immemorial custom to issue pattas based upon the original crop sharing principle. These pattas provided rates for all crops and if a raiyat grew an inferior crop he paid less rent, but if he grew a superior crop he paid more rent irrespective of the source of irrigation. The contract is the original and ancient one, though clauses or rates relating to superior wet crops may not come into operation, unless or until water is available for irrigation. One consideration for paying higher rates when superior crops are raised is the understanding that lower rates or no rent at all shall be paid when inferior crops are raised or the lands lie waste from unavoidable circumstances. The system is in accordance with the custom of the country to adjust the demand in accordance with the ability of the individual to pay.

Judgment.—*Second Appeal No.* 1126 *of* 1914. The findings are accepted. The result is that the second appeal is allowed and the decree of the lower appellate Court is varied accordingly with costs in this Court to be paid to the appellant by the respondent.

Second Appeals Nos. 1437 *to* 1439 *of* 1914. The findings are accepted and the suits are dismissed with costs throughout of the appellant. Vakil's fee in each case is Rs. 12. (Second Appeals Nos. 1440 to 1447 of 1914 were adjourned for one week to enable the parties to file properly stamped petitions of compromise).

S.N./R.K. *Appeals allowed.*

A. I. R. 1919 Madras 927

SADASIVA AIYAR AND SPENCER, JJ.

Jampana Somadu—Defendant — Appellant.

v.

Venkata Ramaya Appa Row and *another*—Plaintiffs—Respondents.

Second Appeal No. 1569 of 1917, Decided on 31st October 1918, against decree of Deputy Collector, Kistna, in Appeal Suit No. 134 of 1915, D/- 18th September 1916

(a) Madras Estates Land Act (1908), S. 153—S. 153 as amended by Madras Estates Land Amendment Act (1909), S. 8—Lease to non-occupancy raiyat for more than 5 years granted before Act—Tenant holding over—Suit for eviction in Revenue Court is competent.

Section 153, Madras Estates Land Act, as amended by S. 8, Madras Act 4 of 1909, gives ample power to a landholder to sue in a Revenue Court to evict a non-occupancy raiyat occupying land in his estate under a lease for more than five years granted before the commencement of the Act and holding over after the expiry of the term: 19 *I. C.* 225, *not Appr.* Per *Sadasiva Aiyar, J.*—The Amendment Act of 1909 was intended to add one more independent ground to the grounds (a) to (e) in S. 153 of the Act of 1908 on which the tenant was liable under unamended section to be ejected at the suit of the landlord.

[P 928 C 2; P 928 C 2]

(b) Civil P.C. (1908), O. 8, Rr. 3 and 5—Allegations in plaint not traversed in written statement cannot be denied afterwards.

Where the land from which it is sought to eject a tenant is alleged to be "old waste" and this is not traversed in the written statement, the defendant cannot, under O 8, Rr. 3 and 5 afterwards plead that the land is not "old waste"

[P 927 C 2]

(c) Madras Estates Land Act (1908), S. 45—Mesne profits can be awarded.

It is competent to a Revenue Court to award mesne profits. [P 928 C 1]

P. Nagabushanam—for Appellant.

T. Ramachandra Rao—for Respondents.

Spencer, J.—This suit was brought by the Court of Wards Manager of the estate of Mirzapuram on behalf of the minor zamindar, who is a landholder under the Madras Estates Land Act 1 of 1908), to evict the defendants on the expiry of their lease in Fasli 1322. In second appeal, three questions were argued: first, whether the land in suit is "old waste," secondly, whether the tenants of "old waste" can be ejected, and thirdly, whether mesne profits can be decreed by a Revenue Court. It was asserted in para. 3 of the plaint that the lands in the schedule of the plaint were "old waste," and in the written statement there is no specific denial of this fact. Therefore applying Rs. 3 and 5, O. 8, Civil P. C. (5 of 1908), the defendants must be taken to have admitted the fact that the land in suit was "old waste" and it is not open to them now to set up a contention to the contrary. The defendants held on a lease for 10 years from Faslis 1313 to 1322 under a registered Muchilika, dated 24th April 1903. S. 153, Cl. (e), Madras Estates Land Act provides for the ejectment by suit of a non-occupancy raiyat on the ground that the term of this lease has expired in cases where he has been admitted to occupation under a registered lease for a term exceeding 5 years. To this section a provision was added by S. 8, Madras Act 4 of 1909 (Madras Estates Land Amendment Act) which runs thus:

"Nothing in this section shall affect the liability of any person who is a non-occupancy raiyat according to the provisions of this Act to be ejected on the ground of expiry of the term of lease granted before the commencement of this Act."

It has been held that this addition to Act 1 of 1908, not being worded as a proviso, furnishes an additional ground of ejectment (see the notes at page 197 of Mr. Krishnamachariar's Madras Estates Land Act). Whether this view is correct or whether the words thus added were intended merely to amplify and explain the preceding section, it is clear that the section as it now stands gives ample power to a landholder to sue in a Revenue Court to evict a non-occupancy raiyat occupying land in his estate under a lease for more than five years granted before the commencement of the Act and holding over after the term has expired. Where the words of the section are so plain, it is impossible for the defendants to contend that the Act does not provide for their being ejected after the term of their lease has expired. The only authority in their favour is that in *Chaganti Atchaparaju* v. *Kristna Yachandrulavaru* (1), where it was held that raiyat of "old waste" could not be ejected on the ground of expiry of a term of lease contained in a contract entered into before the Act came into force. But this decision overlooked Cl. (e), S 153, in so far as it contained an observation in two places that S. 153 did not make the expiry of the lease a ground for ejectment. This was pointed out by me in *Ponnuswamy Padayachi* v

(1) [1913] 38 Mad. 63=19 I. C. 225.

Karupudayan (2), where the correctness of that decision was doubted and *Ponnuswamy Padayachi* v. *Karupudayan* (2) has since been followed by Oldfield, J., in *President, Dirtrict Board, Tanjore* v. *Kannuswamy Thondaman* (3). It is suggested that the defendants, who are raiyats of "old waste," are not necessarily non-occupancy raiyats within the meaning of the proviso to S. 153. But this contention is inconsistent with S. 6, Cl. (3) of the Act, and in Mr. Ramadoss's Commentary on the 'Estates Land Act' at p. 256 and in Mr. Krishnamachariar's book at p. 195 a category of non-occupancy raiyats is given which includes raiyats of "old waste."

From the definition in S. 3, Cl. (7) and (12), it is clear that a "raiyat" is the term used in the Act for a tenant of "raiyati" land and that land may be "old waste" and yet be "raiyati land," the term "old waste' merely denoting that it has not been occupied for 10 years by anyone with a right of occupancy. The last question is whether mesne profits can be decreed by a Revenue Court. On this point, I think that S. 45 authorizes a Revenue Court to award this form of rent. In *Kamulammal* v. *Athikari Sangali Subba Pillai* (4) it was held that a Revenue Court has this power against any persons, even trespassers, in unlawful possession of raiyati land. Another question that was referred to in the District Court but not taken in second appeal, is that of the jurisdiction of the Revenue Conrts to try a suit of this nature. Such a contention could not be raised with any chance of success, in view of S. 153, read with Art. 19 of part A of the Schedule to the Act, and in view of the recent decision in *Yelikeyalli Venkaya* v. *Venkataramayya Apparao* (5). It is not necessary to do more than to point out for the District Judge's information that he was mistaken in supposing that the case in *Ponnuswamy Padayachi* v. *Karupudayan* (2) would support an objection on the score of jurisdiction of the Revenue Court in this case, seeing that the lease on which the defendants occupied the plaint land and held over on its expiry was one for a term exceeding 5 years, for which Cl. (e), S. 153, expressly provideed and that *Ponnuswamy Padayachi* v. *Karupudayan* (2) dealt only with leases for a period of less than 5 years which terminated before the Act came into force, for which there is no express provision in S. 153, and thus no jurisdiction is conferred upon the Col'ector by Art. 19 of part A to the Schedule which applies to suits for eviction under this section only (see column 2) and the words "before the Collector" in S. 153. As the contentions raised by the appellant's vakil have failed, the second appeal must be dismissed with costs.

Sadasiva Aiyar, J.—I wish to add only a few words on the additional provision enacted in 1909 and added to S. 153, Estates Land Act. The body of the section enacts that a non-occupancy raiyat (including a non-occupancy raiyat in possession of "old waste") shall be liable to ejectment on one or more of the grounds (a) to (e) mentioned therein "and not otherwise." Then this addition of 1909 by the Legislature enacted that

"nothing in this section shall affect the liability of any person who is a non-occupancy raiyat according to the provisions of this Act to be ejected on the ground of the expiry of the term of a lease granted before the commencement of this Act.

I find it impossible to hold that this addition was not intended to add one more independent ground to the grounds (a) to (e) on which the tenant was liable under the unamended section to be ejected at the suit of the landlord. The ingenious argument of Mr. Nagabhushanam that this addition cut down the meaning of the plain language of Cl. (e) so as to confine the expression "a registered lease" found in that clause to a lease executed after the Act came into force and so as to exclude a registered lease deed executed before the Act came into force, did not interest me at all as valid. It is difficult to believe that the Legislature, while granting the right to the landlord to eject on the expiry of the lease term a tenant of "old waste" to whom a registered lease deed for a term exceeding five years was granted after the Act came into force, intended to refuse the same right to eject to the landlord if the lease deed whose term was expired had been granted before the Act. As regards the other points dealt with in the judgment of my learned brother, I express my concurrence and I have nothing to add.

S.N./R.K. *Appeal dismissed*

(2) A. I. R. 1915 Mad. 705=38 Mad. 843.
(3) [1916] 35 I. C. 121.
(4) [1919] 48 I. C. 615.
(5) [1918] 43 I.C. 711.

* A. I. R. 1919 Madras 929

SPENCER AND KRISHNAN, JJ.

Thangi Shettithi— Plaintiff —Appellant.

v.

Duja Shetti and *others*—Defendants—Respondents.

Second Misc. Appeal No. 26 of 1917, Decided on 16th July 1918, against order of Dist. Judge., South Canara, in Appeal Suit No. 100 of 1916.

*** Limitation Act (1908), Art. 182 (5)—Mortgage decree—Application for payment out of money deposited as security for costs is step-in-aid of execution**

An application by a decree-holder for payment out of money deposited in Court to be credited towards the decree amount is an application for a "step-in-aid of execution" within the meaning of Cl. (5), Art. 182, Sch. 1 Lim. Act. [P 930 C 1]

A fortiori is this the case where the deposit was made only as security and an order of Court is necessary to make it available for payment towards the decree amount. 8 *Cal.* 89; 10 *Cal.* 549; 11 *Cal.* 227 and 23 *Cal.* 196, *Dist.*; 2 *Mad.* 174: 16 *Mad.* 452; 17 *Mad.* 165; 22 *Bom.* 340 and 6 *All.* 366, *Foll.* [P 930 C 1]

Plaintiff obtained a mortgage decree against defendant for sale of their family property mortgaged to her. Defendant 6, against whom the decree was ex parte, applied to set it aside. His application was granted and a re-trial was ordered on his depositing Rs. 500 as security for costs. The amount was paid and the Court again passed a decree for sale in favour of plaintiff. Plaintiff applied for payment out of the said sum of Rs. 500 to her towards her decree amount and the payment was ordered The plaintiff filed the present application in execution more than three years after the date of the revised decree, after giving credit for the Rs. 500 recovered in the previous application:

Held: that the previous application was an application for a "step-in-aid of execution" within the meaning of Art. 182, and that therefore the present application, which was made within three years of the former was not barred.

[P 930 C 2]

B. Sitarama Row—for Appellant.

K. P. Lakshmana Rao—for Respondents.

Judgment.—The question that arises for decision in this case is whether plaintiff's application for the execution of the revised mortgage decree for sale in Original Suit No. 57 of 1909 is barred by limitation or not. The application was made more than three years from the date of that decree but plaintiff relies on his Execution Petition No. 17 of 1914 as giving him a fresh starting point under Cl. 5, Art. 182, Lim. Act. The lower Courts have differed in their view on the question whether that petition can be treated as one made in accordance with law for execution or to take some step-in-aid of execution, the Subordinate Judge holding in the affirmative and the District Judge in the negative. The decree-holder is the appellant before us. To understand the nature of his contention it is necessary to state the circumstances in which Execution Petition No. 17 of 1914 came to be put in. Plaintiff sued the defendants, who are members of an Aliyasanthana family, for the recovery of her mortgage money by sale of the defendants' family property mortgaged to her and obtained a decree for sale. That decree was an ex parte one against defendant 6. He applied to set it aside and the Court granted his application on his furnishing security for costs. He accordingly deposited in Court a sum of Rs. 500 as security. The case was re tried, but the Court again passed a decree in plaintiff's favour. That is the revised decree which is sought to be executed now. That provided that the mortgaged property should be sold and the sale proceeds, after defraying the expenses of the sale, be applied in paying plaintiff her mortgage amount, interest and costs Rs. 5, 379 4-4 and the balance, if any be paid to defendants and that if any balance still be due to the plaintiff it be paid by defendant 1 as ejaman of the family; it also directed defendant to pay Rs. 22 for plaintiff's costs in the re-trial. In 1914 plaintiff applied against all the defendants to execute the above decree, praying that the sum of Rs. 500 paid into Court by defendant 6 be paid out to her towards the decree amount. That application is the Execution Petition No. 17 of 1914 referred to above. Notice was ordered to all the defendants; defendant 6 appeared and opposed but it is not clear from the record before us whether the other defendants appeared or not. The Court after hearing arguments directed that the Rs. 500 be paid to the plaintiff on account of costs and towards the partial satisfaction of the decree amount due to her. It may be mentioned that the costs included in the amount for which the property was ordered to be sold are more than Rs. 500. This money was subsequently paid out to plaintiff by the Court on her application. Plaintiff's present application gives credit for it towards the decree amount.

The District Judge holds that Execution Petition No. 17 of 1914, though in form an execution petition is in substance only an application for payment to the

decree-holder of a sum of mony deposited in Court by one of the judgment debtors and as such is not an application to take any steps-in-aid of execution. He relies on the rulings of the Calcutta High Court in *Hem Chunder Chowdhry* v. *Brojo Soondury Debee* (1), *Fazale Imam* v. *Metta Singh* (2), *Gunga Pershad Bhoomick* v. *Debi Sundari Dabea* (3) and *Ananda Mohan Roy* v. *Hara Sundari* (4) in support of his view distinguishing the Madras decisions cited to him viz., *Venkatarayalu* v. *Narasimha* (5), *Kerala Varma Valiya Rajah* v. *Shangaram* (6) and *Koormayya* v. *Krishnamma Naidu* (7), on the ground that the money in the present case was not realized by any execution process. That does not seem to be a valid distinction. The District Judge overlooks the fact that as the money was deposited only as security, an order of the Court was necessary to make it available for payment towards the decree amount. An application to the Court for such a purpose and for payment out of the money is thus clearly necessary, and such an application is one in execution of the decree itself.

In the Calcutta case *Hem Chunder Chowdhry* v. *Brojo Soondury Debee* (1), which is followed in the subsequent cases money was deposited towards the decree amount and no order of Court was necessary to make it available for the decree-holder's application being merely for payment out. In the present case an order of Court was required to make the money available for the decree and getting such an order is a step in aid of execution. The Calcutta cases may therefore be distinguished. It may however be pointed out that even on the question as to whether an application for payment out of money in Court in execution is or is not an application for a step-in aid of execution there is a clear difference of opinion between the Calcutta High Court and this Court. We must adhere to our view as there is no proper reason to depart from it. That view has been accepted by the Bombay and the Allahabad Courts. vide: *Bapuchand Jethiram Gujar* v. *Mugutrao* (8) and *Paran Singh* v. *Jawahir Singh* (9). As pointed out by Farran, C. J., in the Bombay case execution is not fully completed till the money has been actually paid by the Court to the judgment-creditor or to some one on his account: see p. 344. The judgment of the District Judge on the point cannot therefore be supported.

Mr. Lakshmana Rao for the respondents has however tried to support the order of the lower appellate Court on another ground. He contended that under the decree in question as it is worded no application for payment of money could have been made except for Rs. 22, costs of the re-trial and therefore Execution Petition No. 17 of 1914, so far as it prayed for the payment of the decree amount in general was not in accordance with law as it asked for a relief not granted by the decree and in so far as it asked for the payment of Rs. 22 by defendant 6 it was of no avail to save limitation against the contending defendants 1 and 4 as that part of the decree was not a joint decree under Expl. 1, Art. 182, Lim. Act. He relied on the case reported as *Ramakrishna Kadirvelusami* v. *Eastern Development Corporation* (10) for the first part of his argument. We need not however consider whether we should follow this ruling for in the paesent case the plaintiff's application to which the defendants were all made parties, was actually allowed by the Court and her prayer to have the money paid towards the decree amount was granted. So long as that order is in force the defendants cannot be heard to say that the plaintiff's application was not in accordance with law. If the order was vitiated by any irregularity defendants should have applied to set it aside; they have not done so. The first part of this contention of the respondents should therefore be overruled and the second part need not be considered.

In the result the order of the District Judge must be reversed and that of the Subordinate Judge restored with costs in this and the lower Courts. The application for execution will be returned to the Court of the Subordinate Judge for further disposal.

S.N./R K. *Order reversed.*

(1) [1882] 8 Cal. 89.
(2) [1884] 10 Cal. 549.
(3) [1885] 11 Cal. 227.
(4) [1896] 23 Cal. 196.
(5) [1878-80] 2 Mad. 174.
(6) [1893] 16 Mad. 452.
(7) [1894] 17 Mad. 165.
(8) [1898] 22 Bom. 340.
(9) [1884] 6 All. 366.
(10) [1918] 43 I. C. 537.

A. I. R. 1919 Madras 931

COUTTS-TROTTER, J.

Clan Line Steamers Ltd.—Plaintiffs.

v.

Municipal Council of Cocanada—Defendants.

Civil Suit No. 219 of 1917, Decided on 2nd November 1910.

(a) Madras District Municipalities Act, (1884), S. 53—Company having chief office at one place executing shipping orders through that office at another port—It is not liable to pay profession tax at latter place.

Where a Company which has a head office at one place, where it pays profession tax, also carries on subsidiary business in another Municipal town through an agent who does not however act independently and except under instructions from the head office, the Company is not liable to be assessed to profession tax at the latter place. [P 936 C 2]

Plaintiffs, a shipping Company regi-tered in Glasgow, owned a line of steamers plying between English ports and the East Their chief office in India was in Madras, where they were represented by Messrs. Gordon Woodroffe and Co, and where they paid profession tax. They were also represented at Cocanada by Messrs. Ripley and Co., whose functions were to disburse the plaintiffs' steamers at Cocanada, negotiate with shippers for shipment of their cargo on plaintiffs' boats and receive payment by commission. The arrangements for shipping were made by Ripley and Co. through Gordon Woodroffe and Co. at Madras, the booking space was made by order of Gordon Woodroffe and Co. and bills of lading were signed by Ripley and Co.:

Held: that looking to the substance of the matter the business of making contracts on behalf of the plaintiff Company was carried on and controlled in Madras and that the activities of the Cocanada agents did not constitute a carrying on of business there by the plaintiff Company so as to render them liable for payment of profession tax to the defendants, the Cocanada Municipality. [P 936 C 2]

(b) Madras District Municipalities Act (1884), S. 53 — Person merely soliciting orders at particular place cannot be said to be carrying on his trade there—Court must look at the question broadly and in substance.

A merchant does not exercise his trade or calling in overy place where he has customers. If all that a merchant does in any particular place is to solicit orders he cannot be said to exercise or carry on his trade in that place, what is done there being only ancillary to the exercise of that trade. [P 933 C 1]

It is the duty of a Court to look at the question broadly and in substance rather than fix on some small incident in the conduct of the business and say that because there is a feature of business which involves the Company entering into some contract within a particular jurisdiction, it carries on business there. [P 934 C 1]

(c) Bill of lading—Bill of lading is evidence of contract of affreightment, not contract itself.

A bill of lading is evidence and sometimes conclusive evidence of the contract of affreightment, but is not the contract of affreightment, itself. [P 935 C 2, P 936 C 1]

D. Chamier and *Pandalai* for *King* and *Partridge* -for Plaintiffs.

Venkatasubba Row and *Radhakrishnayya*—for Defendants.

Judgment.—This is a case of considerable general importance and, accordingly, although the sum of money involved is not large it has been brought as a test case to this Court. The plaintiffs, the Clan Line Steamers Ltd., are a Company incorporated under the English Companies' Act having their registered office and their head place of business in Glasgow. They own a line of steamers which ply between English ports and the east calling, among other places, at ports in Southern India, among them Madras and Cocanada on the Coromandel coast in Godavari District. The defendants are a District Municipality constituted under the Madras District Municipalities Act of 1884, and they have demanded a profession tax from the plaintiff Company. The tax has been paid by the plaintiff Company under protest and they now sue to recover it. The claim is for three instalments, but I need only concern myself with the third which was demanded on 18th January last and paid on 30th, the other two being time-barred. The tax is leviable under S. 53 of the Statute on every person who, within the Municipality, exercises any one or more of the arts, professions, trades, or callings specified in Sch. A. Sch. A, Cl. 1, will cover the plaintiff Company either under (i) as carrying on business as a Company or under (ii) as shipowners, if they can be said to carry on business within the Municipality at all.

The question is ultimately one of fact, but the facts must be examined in the light of their legal significance, and this has been discussed in a number of cases in England. I need not concern myself with the few Indian cases that were cited, because they do not profess to add anything to the principles derivable from the English authorities. Before going to those authorities I will state the broad outlines of the facts of this case. I shall have to go into them in greater detail hereafter. The agents for the Clan Line in Madras are Messrs. Gordon Woodroffe and Co. It is not disputed that the Clan Line carry on business in

Madras and they in fact pay profession tax to the Madras Corporation. It is said that they also carry on business in Cocanada through a firm of Messrs. Ripley and Co. Ripley and Co., are a firm of merchants at Cocanada, and for the past eleven years they have had an arrangement with Gordon Woodroffe and Co., as representing the Clan Line, whereby they disburse the Clan Steamers at Cocanada, negotiate with the shippers for shipment of their cargo on Clan boats and receive payment by commission. The question is whether their activities at Cocanada to use a non-committal phrase, constitute a carrying on of business there by the Clan Line within the meaning of the authorities.

These authorities fall into two classes, which I may call for the sake of brevity the tax cases and the jurisdiction cases. As pointed out by Cotton, L.J., in *Erichsen* v. *Last* (1), there is a clear distinction between the two classes of cases, a distinction which I shall endeavour not to lose sight of, but I do not think that the jurisdiction cases must be wholly rejected. It seems to me that they contain enunciations of principle which can be applied at least mutatis mutandis to the other class of cases. The first case is *Erichsen* v. *Last* (1) itself. The question there was, whether a foreign telegraph company established at Copenhagen was liable for income-tax in the United Kingdom as exercising a trade within the United Kingdom. The company had cables with terminals at Newbiggin and Peterhead worked by employees of the company at Newcastle and Aberdeen respectively. It had a London office where messages were received for transmission via Denmark to various places abroad. It was held that they carried on a business in the United Kingdom, and I think the gist of the decision is contained in the following passage from the judgment of Brett, L. J.:

"I should say that wherever profitable contracts are habitually made in England, by or for foreigners, with persons in England because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil the contracts is done abroad."

The next case is *Werle* v. *Colquhoun* (2). Werle and Co. were a French firm of wine merchants, in fact the proprietors of Veuve Clicquot Champagne, and the question was whether they carried on business in England through their agents Fenwick Parrot and Co. in Frenchurch street. The ground of the decision was clearly this: that contracts for the purchase of wine were made by Fenwick Parrot and Co. in England though they were transmitted to Werle and Co. to be executed from France. Lord Esher, M. R., says thus at p. 760:

"Upon the authority of that case [viz., *Erichsen* v. *Last* (1)], if authority is required, but certainly on the facts of the present case, I have not a doubt that here there was a trade carried on in England where the contracts were made. The making of contracts in such a case as the present is the whole substance and essence of the trade, and so the appellants exercised a business in England."

Fry, L. J., at p. 761 says:

"They do not make merely an occasional contract through these agents, but they are in the habit of making contracts through them. Those contracts are so made in England. Now, pausing there, it appears to me that a most important part, perhaps the most essential part, of the business of a champagne merchant was exercised by the appellants through the intervention of their agents within the United Kingdom."

There was a distinct finding in that case that the agents did not merely make themselves the channel for the transmission of orders which could only be accepted by the principals in France, but actually concluded contracts binding on the principal This is clear from what Lord Esher says on p. 758:

"The agent is, if he can, to obtain orders for the purchase of the wine at the fixed price. It is suggested that he had no authority to receive these orders as contracts, but that all he could do was to forward them to Rheims for acceptance there. It seems to me that the inference is irresistible to the contrary.

The next case is *Grant* v. *Anderson* (3). That was a jurisdiction case, the question in which was whether a writ against a Scottish firm could be served upon their London agent. In it appears clearly the distinction between the tax cases and the jurisdiction cases, which I take to be broadly this: that a person is liable to be taxed if he carries on business within the jurisdiction but he can only be sued if he can be said to have a place of business within it. At the same time the Judges both in the Divisional Court and in the Court of Appeal clearly intimate that, in their opinion, the state of things in that case did not amount even to carrying on business in London,

(1) [1884] 8 Q. B. D. 414=51 L. J. Q. B. 86.
(2) [1888] 20 Q. B. D. 753=57 L. J. Q. B. 323.
(3) [1892] 1 Q. B. 103=61 L. J. Q. B. 107.

apart from the question of having a place of business there. There the defendants had an agent named McCallum with a London office. He obtained orders for them in London which he transmitted to Scotland to his principals to accept or not as they chose. Lord Esher says at p. 116:

"If he gets an order which they accept, he gets a commission, but if they do not accept it, he gets no commission. When he gets an order he has no power himself to accept it; all he has to do is to send it on to Scotland, that the defendants may say whether they will accept it or not, and in most cases, if they do accept it, they deal directly with the person giving the order."

A little later he says: "His business is to obtain orders which are in law and in fact mere proposals." *Grainger & Sons* v. *Gough* (4) was another case of a French champagne merchant, in this instance Roederer and Sons. This was a tax case. The decision again went on the broad ground as to whether contracts were made for the sale of Roederer's wine in England. See Lord Herschell at p. 334 and Lord Watson at p. 340, and specially the observations of Lord Herschell at p. 335:

"In the first place, I think there is a broad distinction between trading with a country and carrying on trade within a country. Many merchants and manufacturers export their goods to all parts of the world, yet I do not suppose any one would dream of saying that they exercise or carry on their trade in every country in which their goods find customers. When it is said, then, that in the present case England is the basis of the business, that the wine was to be consumed here, and that the business done would remain undone but for the existence of the customers in England, I cannot accept this as proof that M. Roederer carries on his trade in this country. It would equally prove that every merchant carries on business in every country to which his goods are exported. . . . . How does a wine merchant exercise his trade? I take it, by making or buying wine and selling it again, with a view to profit. If all that a merchant does in any particular country is to solicit orders, I do not think he can reasonably be said to exercise or carry on his trade in that country. What is done there is only ancillary to the exercise of his trade in the country where he buys or makes, stores, and sells his goods."

The *La "Bourgogne"* (5) was a jurisdiction case, but inasmuch as it decided that the defendants had a place of business in England, it is obviously a case that can be relied upon by the present defendants for the less wide proposition that the business was carried on within the jurisdiction, if the facts are truly analogous to the facts of the present case. A French Steamship Company were lessees of an office in London of which they paid the rent, where they established a certain Fanet with the title of Agent General. In that capacity he secured freight and passage engagements, collected freight and transmitted it to the Company, paid dues and forwarded and delivered goods carried by the Company. It was held that the business that was carried on by him was the business of the Company. *Dunlop Pneumatic Tyre Co.* v. *Actien Gesellschaft Fur Motor &c. & Co.* (6) was a very peculiar case and was a jurisdiction case. A foreign firm took a stand at the Crystal Palace cycle show and installed in charge of it an agent to exhibit its goods and take orders for them. It was held that, during the show, the Company had a place of business in England. Again the chief test applied was whether or no contracts were concluded binding upon the Company at the stand. In *Lovell and Christmas* v. *Commissioner of Taxes* (7) the appellants carried on a business of provision commission agents, having produce consigned to them from New Zealand, which they sold on commission. They made advances through New Zealand. Banks to the consignors of the produce against the security of the shipping documents. They kept a salaried servant in New Zealand, who made an arrangement with the shippers as to the produce they would send and fixed the amount of the advance that was to be made. It was held that the business was not carried on in New Zealand but that the business was the selling on commission in the London market.

This is a strong case, because the appellants actually kept a salaried servant devoting his whole time to their affairs in the country where the tax was sought to be levied. The reason for the decision I conceive to be that Messrs. Lovell and Christmas were not themselves purchasers of the goods but only agents to sell on commission. It is difficult to see how it could be argued that there was not a making of contracts by the Company in New Zealand. There were at least the contracts involved in the advances made against the shipping

(4) [1896] A. C. 325=65 L. J. Q. B. 410.
(5) [1899] A. C. 431=68 L. J. P. C. 104.
(6) [1902] 1 K. B. 342=71 L. J. K. B. 284.
(7) [1908] A. C. 46=77 L. J. P. C. 31.

documents, which must have entailed on the New Zealand shippers the obligation to repay any sum by which the price realized by the produce in London might fall short of the advance made against it. I take it that their Lordships must have held that the transactions regarding the advances were so subsidiary and ancillary to the main business of sale in London that it was right to regard the Company as substantially carrying on their business in London and nowhere else. I regard the decision as a clear indication that it is the duty of a Court to look at the question broadly and in substance rather than fix on some small incident in the conduct of the business and say,

"here is a feature of your business which involves your entering into some contracts within this jurisdiction, therefore you carry on business here." *Saccharin Corporation* v. *Chemische Fabric von Heydcon Actiengesellschaft* (8)

does not assist me not merely because it is a jurisdiction case but because, as is apparent from the judgment of the Lords Justices, it turned entirely on the weight to be attached to different parts of the evidence in the case. One important feature of it was that the agent apparently had in his possession and control a stock of his principals' goods of which he could dispose without consulting them. *Aktiesselskabet Dampskib "Hercules"* v. *Grand Trunk Pacific Railway* (9) only decided, that if the directors of a Company transact their financial business within the jurisdiction it does not avail them that their railway underaking is situated and carried on outside it. *O'Kura* v. *Forsbacka Jernverks Aktiebolag* (10) is a jurisdiction case, but there is one passage in the judgment of Buckley, L. J., which, I think, has an important bearing on the present case. In that case the defendants were a Swedisb Corporation who employed in London as agents the firm of C. & J. Svedburg. C. & J. Svedburg were the London branch of C. & J. Svedburg at Stockholm in Sweden. At page 720 the learned Lord Justice says:

"Whenever they (i. e., C. and J. Svedburg) sell the defendants' steel they do so expressly as agents and after submitting the inquiry to their Stockholm house, who in turn obtain from the defendants the price and terms upon which they are prepared to sell. When the agents in London have obtained the price and terms they submit them to the buyers, and if the buyers accept them, they then sign the contract as agents for the defendants. The agents have never sold any steel manufactured by the defendants except as agents and in the manner indicated. They have no control over the way in which the defendants do their business and have no general authority from them with regard to making contracts."

It is clear that the learned Lord Justice was not considering the question as to whether they had a place of business merely but as to whether they were carrying on a business, for he says at page 718:

"If the acts relied on in this case amount to a carrying on of a business, there is no doubt that those acts were done at a fixed place of business."

Therefore the sole question for determination was whether that which took place amounted to a carrying on of a business in London and the decision of the Court of Appeal was that it did not. In *Thames and Mersey Marine Insurance Co.* v. *Societa di Navigazione a Vapore del Lloyd Austriaco* (11) the decision was adverse to the foreign firm on very strong facts. The following observations of Buckley, L. J., seem to me to have some bearing on the present question:

"The test in each case is to find the answer to the following question, does the agent in carrying on the foreign Corporation's business make a contract for the foreign Corporation or does the agent in carrying on the agent's own business sell a contract with the foreign Corporation?"

These being the principles by which I am to be guided the facts of the present case must be examined. I had before me two witnesses, Mr. Strouts, the manager of the Shipping Department of Gordon Woodroffe and Co., and Mr. Hunter, a partner in the firm of Ripley and Co., who is in charge of their Cocanada business

They have placed the whole of the relevant facts and documents before the Court, and their evidence, as one would expect, is not challenged in any respect. I do not think any question arises with regard to cargo discharged at Cocanada. As a matter of fact hardly any cargo is discharged at Cocanada, as it is almost exclusively an exporting town. If, by chance, any cargo does go there it is discharged from the ship into lighters provided by the holders of the bills of lading and it is not handled by Messrs. Ripley and Co. They may occasionally collect freight and transmit it to Gordon Woodroffe and Co., but I do not think it is in evidence that they actually have done so, and Mr. Venkatasubba Row did not invite me to draw any conclusion in his favour from anything that took place

(8) [1911] 2 K. B. 516=80 L. J. K. B. 1117.
(9) [1912] 1 K. B. 222=81 L. J. K. B. 189.
(10) [1914] 1 K. B. 715=83 L. J. K. B. 561.
(11) [1914] 111 L. T. 97=30 T. L. R. 475.

in regard to cargo discharged at Cocanada. The whole discussion ranged round the course of business with regard to cargo shipped at Cocanada. Ripley and Co. made the arrangement to act for the Clan Line Steamers with Gordon Woodroffe and Co. some ten years ago, and the letters evidencing that arrangement have been put in. They are themselves fairly large shippers. They get commission on their own shipments and a smaller commission on other people's shipments. In the important matter of booking space in outgoing ships for cargo to be embarked at Cocanada it is abundantly clear that they have no controlling voice whatever. Most of the arrangements for shipments are made by the Cocanada merchants with Gordon Woodroffe and Co. in Madras either directly or through shipping brokers in Madras. Sometimes the Cocanada shippers apply to Ripley and Co. to get them space on a Clan Line Steamer. Ripley and Co. have no authority to give space even for a box of cigars without the previous authorization of Gordon Woodroffe and Co. If application is made to them for cargo room they forward it to Gordon Woodroffe and Co. at Madras, and Gordon Woodroffe and Co. generally send what is called an engagement form to the intending shipper. If time is short, Gordon Woodroffe and Co. telegraph to Ripley and Co. instructions as to what amount of room is available for the proposed shipper. The course of business is clearly seen from a specimen letter dated 30th August 1916 relating to SS. Maclachlan. On receiving authorization from Gordon Woodroffe and Co., Ripley and Co. issue a shipping order to the shipper. Armed with this he takes his goods to the ship, obtains the mate's receipt and in due course the bill of lading. The bill of lading is signed by Ripley and Co., for the Master. Occasionally it happens that goods are put on board in a slightly damaged condition. The shippers are, of course, anxious to obtain clean bills of lading and can only do so on signing indemnity forms. These are addressed to Ripley and Co., and a specimen was put in of a firm of Vavasseur and Co. Ltd., dated 2nd May 1917. They also collect freight and disburse the ship. Most of the course of business is clear from the specimen account dated 15th September 1917 relating to the voyage of the Clan Stuart. With regard to the disbursements a large portion of them consists in payments for stores supplied to the ship.

The evidence regarding these stores is that contracts are made by Gordon Woodroffe and Co. with the suppliers at Cocanada for certain rates for each article in the schedule. Ripley and Co. have nothing to do with the formation of those contracts. When the ship arrives off Cocanada, the Captain specifies what quantity he wants of each article. The goods are put on board by the contractor and Ripley aud Co. pay the bill according to the scheduled rates in the contract.

Three points have been taken for the defendants. The first is with regard to the booking of cargo space. It is said that in those cases where the shipper applies at Cocanada to Ripley and Co. for cargo space and ultimately gets from them a shipping order, that constitutes a making of a contract by the Clan Line at Cocanada. It is said that the fact that Ripley and Co. cannot make the contract without the express authority of Gordon Woodroffe and Co. is not to the point, and that the fact remains that they do make the contract. The contention seems to be disposed of by the observations of Buckley, L. J., in *O'Kra* v. *Forsbacka Jernverks Aktiebolag* (10) which I have already cited. Even apart from that, I think the course of business here shows clearly that in the vast majority of cases the real contract is made direct with Gordon Woodroffe and Co. at Madras by means of the engagement form and that the shipping order is a mere piece of office machinery to carry out the contract contained in the engagement form. In the occasional case where the shipper applies so late as to necessitate telegraphic communication to Madras, I think that Ripley and Co. are and are recognised to be mere conduit pipes to obtain the assent of Gordon Woodroffe and Co, to the proposal of the shipper; and I do not think that Ripley and Co. can in any real sense be said to make a contract with the shipper.

The next point relied upon was that Ripley and Co. signed the bill of lading and it is said that, as they signed the contract of affreightment, that is conclusive of the matter. The bill of lading is no doubt evidence of the contract of affreightment and in most cases it is practically conclusive evidence of it; but

it is never perhaps, and certainly very frequently not, the contract of affreightment itself: see per Lord Bramwell in *Sewell* v. *Burdick* (12) and Scrutton on Charterparties and Bills of Lading, Article 3. It is not the contract of affreightment where there is a charterparty: nor I think where there is any antecedent document undertaking the carriage of the goods. In this case it is clear that the real contract of affreightment is contained in the engagement form or in the telegram of authorization in the exceptional cases where there is no time to send an engagement form. I am therefore of opinion that there is nothing in the fact that Ripley and Co. sign the bills of lading to warrant the deduction that the Clan Line carry on business at Cocanada. The modern practice of having bills of lading signed by the local agents rather than by the captain is one of commercial convenience, it having become evident that the commercial side of the ship's business can be better transacted in an office with a proper clerical staff than by the master. But suppose that this case had arisen in the old days when the bills of lading were signed by the master who is unquestionably the agent of the shipowners, if the contention on this point for the Municipal Council were sound, it would follow that the Shipping Company transacted business within the meaning of the taxing Statutes at every port of call at which the master of the ship gives bills of lading. Such a conclusion to my mind is commercially too absurd to be accepted.

The last contention on behalf of the Municipal Council is a highly technical one and is based on that unfortunate S. 5, Contract Act. The argument is this: Suppose an intending shipper to forward through Ripley and Co. a request for cargo space to Gordon Woodroffe and Co. at Madras; Gordon Woodroffe and Co. send an engagement form to Ripley and Co. at Cocanada, to hand on to the shipper. That form contains the acceptance and completes the contract. And it is argued that as the contract only becomes complete when the acceptance reaches the shipper, the contract is finally made at Cocanada, because Gordon Woodroffe and Co., could recall that at any moment before it reached the shipper: Ripley and Co. acted entirely under their orders, and therefore the posting of the engagement form at Madras to Ripley and Co. was not an irrevocable acceptance of the offer. The first thing I have to say about this is that there is no evidence that that has ever actually been done. Mr. Strouts says that the regular thing is to post the engagement form to the shipper direct and he knows of no instance where in fact it was sent through Ripley and Co. Mr. Hunter says that he can recall no actual instance either, but he says quite frankly that he is not prepared to say that it never happened and that if Gordon Woodroffe and Co. did send an engagement form filled in with the name of a particular shipper at Cocanada he would, as a matter of course, hand it over to the shipper. Apart from that question of fact I think the argument though superficially ingenious is really unsound. If such a transaction took place I think the only possible inference is that the shipper, who knows that Ripley and Co. have no authority to accept or reject until they hear from Gordon Woodroffe and Co., must be taken to hand Ripley and Co. his request to be forwarded to Madras for acceptance or rejection there and not for aeceptance or rejection at Cocanada. I think he may be regarded as selecting Ripley and Co. as a mere channel for ascertaining whether or no Gordon Woodroffe and Co. have accepted his offer in Madras. In any case I think that even if this case did occasionally happen once in a way and did amount, in odd instances, to a contract being technically in law concluded in Cocanada, I ought to take the broader view in obedience to the authorities and look to see where in substance the business of making contracts of the Clan Line was carried on and controlled. That was clearly in Madras and I must hold that the Clan Line does not carry on the business of shipowners in Cocanada. That conclusion is not affected by the fact that Ripley and Co. put the name of the Clan Line on their office paper and describe themselves as its agents. More than one case shows that this is an immaterial factor.

There must be judgment for the plaintiffs for Rs. 50 and taxed costs. I will certify for two counsel and costs of filing suit at Cocanada.

S.N./R.K. *Suit decreed.*

(12) [1885] 10 A. C. 74=54 L. J. Q. B. 126.

A. I. R. 1919 Madras 937

WALLIS, C. J. AND SPENCER, J.

Subbaraya Goundan and *others*—Defendants—Appellants.

v.

Muthayammal and *others* — Plaintiff and Defendants—Respondents.

Appeal Suit No. 65 of 1917, Decided on 14th February 1918, against decree of Dist. Judge, Trichinopoly, in original Suit No. 26 of 1916.

Will—Devise of share in property in which testator had mortgagee's interest and spes-successionis — Mortgagee's interest passes to beneficiary.

In a partition between the plaintiff's husband and his brother a certain Mitta fell to the share of the latter who died subsequently. His widow mortgaged it to the plaintiff's husband and his three sons. As the latter also were the widow's reversioners, the plaintiff, his three sons and his brother's widow entered into an agreement that on the widow's death the Mitta was to be divided into four shares of which the plaintiff's husband and his three sons were each to take a share. The plaintiff's husband who predeceased his brother's widow, devised his one-fourth share in the Mitta to the plaintiff :

(1) *Held* : that though the agreement as a mere spes successionis was inoperative the devise of the mortgage interest of the testator passed by his will to his widow. [P 937 C 2, P 938 C 1]

(2) That it was a question of the testator's intention as to what he intended to convey.

[P 937 C 2]

M. O. Parthasarathi Aiyangar and *M. O. Tirumalachariar*—for Appellants.

T. R. Venkatarama Sastri and *R. Satyamurthi Aiyar*—for Respondents.

Judgment.—The plaintiff's husband by his will devised to her his one-fourth share in a Mitta, which had fallen on partition to his brother and had been mortgaged by the brother's widow to the plaintiff's husband and to his three divided sons. A further agreement, Ex. C, to which the widow, the plaintiff's husband and his three sons were parties, provided that on her death the Mitta should be divided into four shares, of which the plaintiff's husband and his three sons should each take one share. The plaintiff's husband was the next reversioner and his sons were remoter reversioners and they were none of them competent to transfer their reversionary interests. Consequently the agreement Ex. C was so far void and all that the plaintiff's husband had at the time of his death was a one-fourth share in the mortgage executed by the widow in favour of himself and his sons, as he predeceased the widow. It has been contended before us that in these circumstances the testator's mortgage interest in the Mitta did not pass to his widow, the plaintiff, under his devise of one-fourth of the Mitta. The English cases show that in this as in other cases it is a question of the testator's intention. Jarman, Vol. 1, Ch. 12, states it to be clear that a leasehold estate will pass under the description of freehold, citing *Dennad Wilkins* v. *Kemeys* (1). In England as pointed out by Jarman, Ch. 21, devise of lands does not prima facie include the beneficial interest in a mortgage on the lands because though the legal estate is in the mortgagee and passes to his heir or the devisee under his will, the heir or devisee is treated as merely a trustee for the person entitled to the mortgage debt, either as legatee under the will, or as a personal representative of the deceased, if it is otherwise undisposed of. Account has to be taken of these considerations in construing English wills, and therefore Mr. Jarman states that in his opinion it is

"not universally true that an express devise of lands, or (which seems to be the same in effect) a devise of all the testator's lands in a particular place he having no other than mortgaged lands there will carry the beneficial interest to the devisee, though the affirmative has been sometimes laid down in very unqualified terms."

A recent unqualified statement of this kind is to be found in Halsbury's Laws of England, Vol. 23, p. 702, S. 1324. In *Woodhouse* v. *Meredith* (2) it was held that there was enough to show that it did whereas in *Bowen* v. *Barlow* (3) it was held that it did not. In India, where the legal interest is divided between mortgagor and mortgagee just as it is between lessor and lessee and where there is no distinction between realty and personalty as to descent the question of ascertaining the testator's intention from the terms of the will is less complicated. In the present case it is apparent from a perusal of the will that the testator regarded himself as already entitled to dispose of the one-fourth of the Mitta under the terms of Ex. C and intended to do so. It is true that this agreement, Ex. C, as to a mere spes successionis was it is now settled inoperative but the testator is not likely to have been aware of this. He clearly intended

(1) [1808] 9 East. 366=103 E. R. 612.
(2) [1816] 1 Mer. 450=35 E. R. 739.
(3) [1873] 8 Ch. 171=42 L. J. Ch. 82.

to dispose of any interest he had in favour of his widow. The decision of the Subordinate Judge was right and the appeal is dismissed with costs. Time for redemption three months from this date.

S.N./R.K. *Appeal dismissed.*

A. I. R 1919 Madras 938

ABDUR RAHIM AND OLDFIELD, JJ.

K. A. Subbarayalu Nayudu — Appellant.

v.

Sundararaja Nayudu and *others*—Defendants.

Civil Appeal No. 53 of 1917, Decided on 5th November 1917, against order of Sub Judge, Mayavaram, D/- 17th October 1916.

Limitation Act (1908), Art. 181—Mortgage suit—Appeal against preliminary decree—Decree confirmed—Application for decree for sale—Limitation commences from date of appellate decree—Civil P. C. (1908), O. 34, R. 5 (2).

The right to apply for a final decree for sale in a mortgage suit arises on the expiration of the time fixed for payment by the original decree and the limitation applicable is that contained in Art. 181. [P 938 C 2]

Where however an appeal is preferred against the preliminary decree, the right to apply for a final decree accrues from the date of the appellate decree, even though it merely confirms the decree of the first Court: 42 *I. C.* 93 and 41 *I. C.* 268, *Foll.*; *A. I. R.* 1915 *All.* 336, *not Foll.*; 16 *I. C.* 799; 31 *Mad.* 28 and 15 *Mad.* 170, *Dist.* [P 939 C 1]

T. V. Muthukrishna Aiyar for *K. S. Jayarama Aiyar*—for Appellant.

T. Rangachariar, *P. S. Vaidhinadha Aiyar* and *M. S. Venkatarama Aiyar*—for Respondents.

Judgment.—The question involved in this appeal is one of limitation. The appellant's assignor obtained a preliminary decree on a mortgage which allowed six months for payment of the mortgage amount, in default of payment, the property was to be sold. The decree was passed on 4th August 1910 and the six months' time would expire on 4th February 1911. In the meantime, an appeal had been preferred against the preliminary decree, and the appellate Court in the result upheld the decree of the first Court on 11th April 1913. The present application for a final decree under O. 34, R. 5, Civil P. C., was made on 26th January 1916, that is, within three years from the date of the appellate decree but more than three years after the expiration of the six months from the date of the decree of the first Court. The Subordinate Judge has held that the application is barred reckoning time from 4th February 1911, the date on which the six months allowed by the original decree expired. He seems to have proceeded upon a ruling of a Division Bench of the Allahabad High Court in *Madho Ram* v. *Nihal Singh* (1), but that decision has been overruled by a later Full Bench decision of that Court in *Gajadhar Singh* v. *Kishen Jiwan Lal*.(2). There is also a decision of this Court to the same effect in *Nimmala Mahankali* v. *Kallakuri Subba Rao*(3). We are inclined to accept this view of the law. There is no doubt that Art. 181, Lim. Act applies. That article says that every application, for which no period of limitation is provided elsewhere in Sch. 1, is to be made within three years from the date when the right to apply accrues. The question before us then is, when did the right to apply for a final decree accrue to the appellant. No doubt, if there had been no appeal preferred against the preliminary decree, his right to apply would arise on the expiration of six months from the date of the original decree; but there having been an appeal and a decree of the appellate Court, it is that decree which is to be enforced.

The appellate decree, ordinarily speaking, must be taken to supersede the decree of the first Court. Further, as pointed out by the Allahabad High Court, if the contention of the respondents were to be accepted, there would be more than one final decree, which, we do not think, could have been within the contemplation of the legislature. Mr. T. Rangachariar appearing for respondent 5 has argued that the decision of the Full Bench of the Allahabad High Court and of this Court already referred to are wrong; and, in support of this contention, has referred us to the case of *Thathara Nanabha Chetty* v. *Kuppal Krishnammal* (4), *Ramaswami Kone* v. *Sundara Kone* (5) and *Manavikraman* v. *Unniappa* (6). But those cases do not seem to us to have any application to the present case. In all those cases, the question was, where

(1) A. I. R. 1915 All. 336=38 All. 21=30 I. C. 494.
(2) [1917] 39 All. 641=42 I. C. 93.
(3) [1917] 41 I. C. 268.
(4) [1912] 16 I. C. 799.
(5) [1908] 31 Mad. 28.
(6) [1892] 15 Mad. 170.

the original decree lays down a certain period of time for the performance of certain conditions and that time has expired whether by reason of the mere fact that there has been an appeal and the appellate Court has confirmed the decree of the lower Court without extending the time fixed by the first Court for the performance of the condition, the time laid down by the first Court is to be imported into the decree of the appellate Court. All that those decisions lay down is that in such cases, the time fixed by the first Court could not be made part of the decree of the appellate Court without the appellate Court having expressly made it so. We have no hesitation in accepting that proposition, but in this case the decree-holder has not to perform any act for which any period of time was fixed by the first Court and therefore it is difficult to say how the principle underlying the decisions relied on by Mr. T. Rangachariar can apply to the present case. It was contended that here also there was six months' time given for the payment of money by the mortgagor as a condition precedent and the properties could not be sold before this time expired. Hence it is argued that the right to apply under Art. 181, Lim. Act must be taken to arise after the expiration of the six months. But this overlooks the fact that an appeal had been preferred from the decree of the first Court. Although the appellate Court confirmed the decree of the first Court ultimately the right to apply for a final decree must, in our opinion, be taken to accrue from the date of the appellate decree, which is the binding decree in the matter.

We reverse the judgment of the Subordinate Judge; the petition will be remanded to the lower Court for disposal according to law. Costs will abide the result.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 939

WALLIS, C. J. AND SPENCER, J.

Chiravuri Pattabiramaraju — Defendant—Appellant.

v.

Kallapalli Tirapatiraju and *others*—Plaintiff and Defendants—Respondents.

Civil Appeal No. 131 of 1917, Decided on 11th April 1918.

Hindu Law—Adoption—Widow adopting without bona fide attempt to obtain advice of sapindas—Consent of remoter reversioner interested in adoption obtained—Adoption is invalid.

An adoption made by a Hindu widow without a bona fide attempt to obtain the advice of her husband's sapindas, ignoring a nearer reversioner and securing the assent of one more remote, is invalid. [P 940 C 1,2]

A Hindu widow made no attempt to adopt a son for 15 years after her husband's death but on her death-bed adopted her sister's daughter's son with the consent of a remote reversioner who was interested in the adopted boy after sending a threatening letter to the nearer reversioner that if he did not give his consent within 24 hours, she would adopt:

Held: that the adoption was invalid. [P 941 C 1]

P. Narayanamurthi and *P. Rajagopalan*—for Appellant.

B. Narasimha Row and *T. Rangachariar*—for Respondents.

Judgment.—The suit was brought to establish the plaintiff's title, as nearest reversioner, to succeed to certain immovable properties on the death of his eldest brother's widow Chinna Achayya and to recover possession of the said properties together with mesne profits and costs. The suit was opposed by defendant 1 a minor alleged to have been adopted by the widow with the consent of her husband's sapindas three days before her death. The plaintiff further based his claim upon a deed of surrender alleged to have been executed in his favour by the widow three days before the adoption. When the Sub-Registrar came to the village on being sent for to register this deed, Chinna Achayya denied having executed it and consequently it was not registered. It has however become unnecessary to decide any questions as to the genuineness and validity of the surrender deed as the plaintiff is undoubtedly entitled to succeed upon his relationship alone if it be found that no valid adoption was made. The case both at the original trial and at the hearing of the appeal preferred by defendant 1 who was unsuccessful in opposing the suit in the Temporary Sub-Judge's Court, turned upon the second issue, whether Achayya had authority from her husband to adopt, and if not, whether she obtained the assent of the sapindas and whether such assent was sufficient to validate the adoption.

There is no evidence that Achayya was authorized by her husband to adopt a son after his death. The only oral

evidence on the point is to be found in the statements of D. W's. 5 and 6 and that is against the theory that she had her husband's authority. The adoption deed (Ex. 1) only mentions that she had the assent of one of the Sapindas and the notice to the plaintiff (Ex. 3) contains a mere assertion that her husband at the time of his death requested the plaintiff to see that an adoption of a boy to be selected by his wife was made, not that he then and there authorized her to adopt. We may therefore proceed to consider the second part of this issue.

The circumstances under which the sapindas were consulted are most important for arriving at a just conclusion. Achayya's husband died about the year 1900. For 15 years she made no attempt to adopt a son in order that she might perpetuate her husband's lineage and enable him to attain beatitude. When she was on her death-bed she was taken to the house of Somaraju, the son of another brother of her husband, probably as the Sub-Judge observes, to remove her from the plaintiff's influence. While there she was given a written authority (Ex. 2) to adopt by Somaraju who is a more remote reversioner than the plaintiff, and she issued a notice (Ex. 3) to the plaintiff threatening that, unless he gave her the necessary authority within 24 hours, she would adopt a son on the strength of the authority of the more remote reversioner. These two documents purport to have been written on the same day (18th December 1915) as the surrender deed in the plaintiff's favour is alleged to have been executed and it is probable that Somaraju gave his authority to adopt (Ex. 2) even before the notice (Ex. 3) reached the plaintiff, seeing that the plaintiff deposed that he did not get it till late at night. They suggest that the widow when dying, was very much under the influence of her relations, who were squabbling as to who should get her property. Finally on 21st December she adopted her own sister's daughter's son, an infant one year old, who, as we understand, was not within the gotra of her deceased husband. There is no question that this child (defendant 1) was in fact adopted, but we think that the learned Subordinate Judge was right in holding that the adoption was invalid because there was no bona fide effort on the part of the widow to take the opinion of the sapindas in the way that the law requires.

An adoption made without such bona fide effort is invalid: vide *Veera Basavaraju* v. *Balasurya Prasadarao* (1). To apply the test laid down by the Judicial Committee in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (2), can it be said in this case that there is such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives or in order to defeat the interest of this or that sapinda, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband. The answer must under the above stated circumstances, be in the negative. For 15 years, Chinna Achayya did not take the trouble to do anything towards making an adoption. In her last illness she seems to have made up her mind, or rather in all probability it was made up for her by her sister's daughter's husband Bangarraju, the father of defendant 1, to adopt a child out of the family of her own relation, and do so at all costs. Instead of consulting the advice of the nearest sapinda beforehand it is clear, to adopt the words of Bashyam Aiyangar, J., in *Subrahmanyam* v. *Venkamma* (3)

"that she was determined to ignore him and not care for his advice or even give him an opportunity to advise her."

The evidence of D. Ws. 7 and 8 that prior to Ex. 3 Chinna Achayya orally asked the plaintiff for his assent to the adoption, was rightly disbelieved by the Subordinate Judge, as D. W. 7 was proved to have been gained over and to be an untrustworthy witness and as D. W. 8 was highly interested, being the natural father of the adpoted boy. Ex. 3 contains a threat of an intention to act on the authority of Somaraju, the remoter sapinda, in preference to the plaintiff if he would not consent within 24 hours, it assumes that the plaintiff will not give his consent and that he is actuated by the improper motive of getting the whole property for himself. As the learned Sub-Judge observes, this document shows that Chinna Achayya,

(1) A. I. R. 1915 Mad. 316=25 I. C. 3.
(2) [1876-78] 1 Mad. 174=4 I. A. 1 (P. C.).
(3) [1903] 26 Mad. 627.

when she gave the notice, had made up her mind to adopt and that she had no idea of consulting the plaintiff in the matter. The object of getting the consent of sapindas to adoption has been declared in *Venkamma* v. *Subramaniam* (4), which was followed in *Venkatarama Raju* v. *Bapamma* (5) to be to get an independent judgment on the expediency of the proposed adoption, but as observed by Seshagiri Aiyar, J., in *Adusumalli Krishnayya* v. *Adusumalli Lakshmipathi* (6), the widow has no right to assume that it would be useless to consult the nearest reversioners, who are the natural advisers and protectors of the widow. There is not much of bona fide consultation about a threatening letter couched in the terms of Ex. 3. We are therefore clearly of opinion that in this case there was an absence of any bona fide attempt to obtain the advice of the deceased husband's sapindas before the adoption was made, and it follows that the adoption of defendant 1 was in consequence not a valid adoption. This appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(4) [1907] 30 Mad. 50=34 I. A. 22 (P. C.).
(5) A. I. R. 1915 Mad. 759=26 I. C. 888=39 Mad. 77.
(6) [1916] 32 I. C. 253.

A. I. R. 1919 Madras 941

SESHAGIRI AIYAR, J

A. Subba Rao—Plaintiff — Petitioner.

v.

Parasurama Pattar — Respondent.

Civil Revn. Petn. No. 1096 of 1916, Decided on 12th October 1917, from decree of Sub-Judge, South Malabar at Palghat, D/- 20th July 1916 in Small Cause Suit No.363 of 1916.

Limitation Act (9 of 1908), S. 19—Acknowledgment may be express or implied—What amounts to acknowledgment illustrated.

An acknowledgement of liability which operates to save limitation under S. 19, Limitation Act, may be expressas well as implied. [P 941 C 2]

The assignee of a subscriber to a chit fund wrote to the manager of the fund asking for payment of the subscription amount due to his assignor. The manager replied:

"You have not shown me the deed of assignment under which you make the claim. Further I have been issued an injunction order prohibiting me from paying the amount to anybody. A third party named Sundara Row has sent me a notice that the amount was due to him...you are informed that you must send me the amount of subscription and I cannot give you credit for anything:"

Held: that the letter amounted to an acknowledgment of liability: 25 *Cal.* 844 (*P. C.*) and 20 *I. C.* 27, *Appl*; 6 *Mad.* 182: 20 *Mad.* 239 and 12 *I. C.* 378, *Dist.* [P 942C 1]

K. Govinda Menon—for Appellant.

T. R. Ramachandra Aiyar and *Sivarama Menon*—for Respondent.

Judgment.—The plaintiff's suit was dismissed by the Subordinate Judge on the ground that it was barred by limitation. He held that Ex. B did dot contain an acknowledgment of liability. I am unable to agree with him. It is necessary to state the facts which led to the writing of Ex. B, before deciding whether it contains an acknowledgment of liability. The plaintiff was a subscriber to a chit fund of which the defendent was the manager. The assignor of the plaintiff was entitled to some money from this defendant and the plaintiff's case is that that money was assigned to him. Thereupon he wrote to the defendant a letter asking him to credit towards the chit the amount due under the assignment deed in his favour and to pay him the balance of the subscription amount. In reply to that Ex. B was written. Ex. B contains these statements:

"You have not shown me the deed of assignment under which you make the claim. Further I have been issued an injunction order prohibiting me from paying the amount to anybody. A third party named Sundara Row has sent me a notice that the amount is due to him."

After making these statements, the letter goes on to say:

"The position of affairs is this. Therefore you are informed that you must send me the amount of subscription and I cannot give you credit for anything"

The question now is whether these statements amount to an acknowledgment of liability. Mr. Sivarama Menon did not seriously contest the proposition that an acknowledgment may be implied as well as express. The judgment of the Judicial Committee in *Sukhamoni Chowdhrani* v. *Ishan Chunder Roy* (1) says that we can spell out such an acknowledgment provided the liability is shown to be subsisting. There is also a decision of the Allahabad High Court in *Megh Raj* v. *Mathura Das* (2), where the learned Judges point out that a liberal construction should be placed upon documents purporting to be acknowledgments. My construction of Ex. B is that the writer acknowled-

(1) [1898] 25 Cal. 844=25 I. A. 95.
(2) [1913] 35 All. 137=20 I. C, 27.

ged that the amount mentioned in the assignment bond is due and owing, but that he is unable to pay because no assignment deed was shown to him and also because there were counter-claimants who claimed the amount for themselves. In my opinion Ex. B does contain an acknowledgment of liability. The learned vakil for the counter-petitioner has drawn my attention to several authorities of this Court, but as I read them, they do not affect the present question. In *Venkataramanayya* v. *Srinivasa Rau* (3), a debtor wrote to say that he had a mulgeni right, and it was sought to infer from that that a general tenancy was acknowledged, and that therefore a chalgeni tenancy could be implied, though there was certainly no acknowledgment of the particular right claimed by the creditor. In *Periavenkan Udaya Tevar* v. *Subramanian Chetty* (4) there was no acknowledgment of any subsisting liability. In *Andiappa Chetty* v. *Devarajulu Naidoo* (5) the debtor wanted to look into the accounts and then say whether anything was due.

These and the other authorities quoted do not help me in coming to a conclusion one way or the other. As I said before, *Sukhamoni Chowdhrani* v. *Ishan Chunder Roy* (1) is the only case which comes near the present one, and in that case the Judicial Committee implied an acknowledgment from the language used. In my opinion, Ex. B does impliedly say that the debt is due, but that the defendant is unable to pay it because of the circumstances mentioned by him in that letter. In this view I think I must reverse the decision of the Subordinate Judge and direct him to dispose of the case on the merits. Costs to abide the result.

S.N./R.K. *Case remanded.*

(3) [1883] 6 Mad. 182.
(4) [1897] 20 Mad. 239.
(5) [1911] 36 Mad. 68=12 I. C. 378.

*A. I. R. 1919 Madras 942

SADASIVA AIYAR AND NAPIER, JJ.

Patrachariar—Defendant—Appellant.

v.

T. R. M. S. Ramaswami Chettiar and *another*—Plaintiffs—Respondents.

Second Appeal No. 69 of 1918, Decided on 25th September 1918, against decree of Dist. Judge, Trichinopoly' in Appeal Suit No. 78 of 1917.

*** Civil P. C, (1908), S, 66 (1)—Suit against certified purchaser by person alleging that purchase was for his benefit when maintainable stated,**

A suit lies to eject a certified purchaser at a Court sale by a person alleging that the purchase was really effected for his benefit, if the relief is not sought on the ground that the certified purchaser was only a name-lender for the plaintiff, but on certain facts which establish certain other kinds of legal relations between the parties which entitle the plaintiff to rely on them as involving and creating effectual legal claims in his favour. [P 943 C 2]

S. Rangachariar—for Appellants.

S. T. Srinivasa Gopalachariar—for Respondents.

Sadasiva Aiyar, J.—Defendant 1 is the appellant. The facts found are that he was the paid agent of the plaintiff Ramaswami Chetty in the year 1911, that the plaintiff obtained a decree against the judgment-debtor to whom the plaint house belonged, and that in execution of that decree the plaint house was sold and purchased by defendant 1 with his master's money in his hands and for the benefit of his master (the plaintiff) though without the knowledge of his master, The sale certificate was issued to defendant 1 and he got delivery for his master in 1912. The plaintiff afterwards dismissed defendant 1 from his service. Till such dismissal defendant 1's intention was to hold possession of the house for his master and the master adopted and retained the purchase. On his dismissal he refused to vacate for the first time and then this suit was brought to eject him. The legal defence set up by defendant 1 (appellant before us) is that S. 66 (1), Civil P. C., is a bar to the suit. That section no doubt is very widely worded. It says:

"No suit shall be maintained against any person claiming title under a purchase certified by the Court in such a manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims,"

If the section has to be construed in an absolutely literal way, I think there is very great force in the contention of the appellant, because on such construction, the plaintiff cannot succeed in this suit except on the ground that the purchase by defendant 1 was made by him on behalf of the plaintiff as plaintiff's agent. The question however seems to be concluded by authority. In *Bodh Singh Doodhooria* v. *Guneschnnder Sen* (1) their Lordships of the Privy Council had

(1) [1873] 19 W. R. 356=12 B. L. R. 317 (P.C.).

to consider the meaning of the corresponding S. 260 of Act 8 of 1859, which provided that:

"any suit brought against the certified purchaser on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agre ement the name of the certified purchaser was used, shall be dismissed with costs."

It must be admitted that the section of Act 8 of 1859 just now quoted contains the words "though by agreement the name of the certified purchaser was used," which do not appear in S. 317, Civil P. C, of 1882 or in S. 66 of the present Code. In construing the provisions of S. 260 of Act 8 of 1859, their Lordships say:

"They were designed to check the practice of making what are known as benami purchases at execution sales, i. e., transactions in which *A* secretly purchases on his own account in the name of *B*. Their Lordships think that they cannot be taken to affect the rights of members of a joint Hindu family, who by the operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition howsoever made by a member of the family in his sole name, if made by the use of the family funds."

Then we have a recent decision of the Privy Council reported as *Ganga Sahai* v. *Kesri* (2). That was decided in a suit brought when S. 317 of Act of 1882 was in force, and in that case also their Lordships state at p. 554 of (*I. L. R.* 37 *All.*):

"In their Lordships' opinion the provisions of that section (S. 317), have no application to the present case. They were designed to create some check on the practise of making what are called benami purchases at execution sales for the benefit of judgment-debtors, and in no way affect the title of persons otherwise beneficially interested in the purchase."

It is obvious therefore that their Lordships did not consider the omission of some words found in S. 260 of Act 8 of 1859 (and which I have already referred to) from S. 317 of the Act of 1882 as material in the construction of the latter section. Their Lordships expressly refer with approval to the case in *Bodh Singh Doodhooria* v. *Guneshchunder Sen* (1), decided by the Board in 1873, that case being also reported in 12 Bengal Law Reports 317. The same view of the provisions of S. 317, has been taken by this Court in *Sankunni Nayar* v. *Narayanan Nambudri* (3) and *Kumbalinga Pillai* v. *Ariaputra Padiachi* (4). The result of the decisions seems to be that if the plaintiff does not seek relief merely on the ground that the certified purchaser was a name-lender, but relies upon a certain state of facts as establishing certain other kinds of legal relations between himself and the certified purchaser which entitle him to rely on those relations as involving and creating effectual legal claims in favour of the plaintiff over the property purchased, he could rely on such facts and circumstances in support of his legal claims. I think especially that the facts of the case in *Kumbalinga Pillai* v. *Ariaputra Padiachi* (4) are in principle on all fours with this case, and following that decision, I would dismiss the second appeal with costs.

Napier, J.—I agree that the point is settled by authority which binds us.

S.N./R.K. *Appeal dismissed.*

(2) A. I. R. 1915 P. C. 81=37 All. 545=30 I. C. 265=42 All. 177 (P.C.).

(3) [1894] 17 Mad. 282.

(4) [1895] 18 Mad. 436.

A. I. R. 1919 Madras 943

WALLIS, C. J. AND SESHAGIRI AIYAR, J.

Garuda Sanyasayya—Defendant—Appellant.

v.

Nerella Muthemma and *others*—Plaintiff and Defendants—Respondents.

Civil Appeal No. 380 of 1917, Decided on 31st July 1918 against decree of Dist. Judge, Vizagapatam, in Original Suit No. 2 of 1916.

(a) Hindu Law—Debts—Father—Misappropriation of trust funds by trustee — Son is liable.

Under Hindu Law the son of a trustee of a public charity is liable for the funds of the trust misappropriated by his father. The fact that the father was guilty of a criminal offence does not affect the liability of the son. [P 944 C 2]

(b) Hindu Law—Debts—Father—Avyavaharika explained.

An Avyavaharika debt only means a debt not opposed to good morals : 12 *I. C.* 609, *Appr.*; 32 *Bom.* 348, *Diss. from.* [P 944 C 2]

(c) Trusts—Accounts—Period of accountability.

The Courts have a discretion in limiting the period for which accounts should be rendered by a trustee of public charity. [P 944 C 2]

(d) Civil P. C. (1908), S. 92 — Scheme in respect of choultry — "Interested" meaning explained.

In a suit for settling the scheme of a public choultry, the residents of the locality where the choultry is situate and who are also members of the community for whose benefit the charity was founded, are persons having an "interest" in the charity within the meaning of S. 92, Civil P. C. [P 944 C 1]

P. Narayanamurthy—for Appellant.

V. Ramesam—for Respondents.

Judgment. — This is a suit for the removal of defendant 1 from trusteeship of a certain charity and for settling a scheme of management. The District Judge directed his removal and framed a scheme. In appeal to this Court a large number of questions were argued. We agree in the main with the conclusions on facts come to by the learned District Judge. We hold that there was a dedication of the choultry to charity under Ex. E. We see no vagueness in the trust deed and we further agree with the District Judge that the whole of the choultry, not simply a portion of it, was dedicated to the charity.

Mr. Narayanamurthy argued two questions of law, on which it is necessary to say a few words. We do not agree with him that the plaintiffs are not entitled to institute the suit under S. 92, Civil P. C. They are residents of the locality in which the choultry is situated and are members of the community for whose benefit the charity was founded. In our opinion, these facts give them sufficient interest to institute the suit. The second question relates to the liability of defendant 1 for the application of the funds of the charity by his grandfather and father. It was strenuously argued before us that defendant 1 is not liable because his father and grandfather must be deemed to have criminally misappropriated the funds. The facts are, the grandfather or some time conducted the charity. Later in his life, he neglected it and appropriated the income to his own use. The father, who was under the deed of trust entitled to the office of the trustee, never applied the income for purposes of charity. In our opinion the exceptions contained in the text of Usanas quoted by Vijnaneswara do not cover the present case.

After enumerating in the same language as the other Rishis the categories of father's debts for which the sons are not liable, Usanas and Vyasa add a supplementary category of debts which are Avyavaharika and Vijnaneswara follows them in this. There has been much difference of opinion as to the meaning to be given to this word. Literally it means not usual or business like, but having regard to the context and to the fact that this category was introduced by these two Rishis alone as supplementary to the categories given by the majority of the Rishis, most of which relate to debts of an objectionable character, we agree with Mookerjee, J., in *Chakouri Mahton* v. *Ganga Proshad* (1) in preferring Colebrook's translation "not opposed to good morals." The decision in *Durbar Khachar* v. *Khachar Harsur* (2), strongly relied upon by the learned vakil for the appellant, seems to have been doubted in *Ramkrishna Trimbak* v. *Narayan Shivrao Aras* (3) and has not been accepted as good law in *Chakouri Mahton* v. *Ganga Proshad* (1) and in *Sumer Singh* v. *Liladhar* (4) and *Venugopal Naidu* v. *Ramanadhan Chetty* (5). We prefer to follow these latter decisions. At the same time we are not prepared to say with Sadasiva Aiyer, J., in the latter case that every obligation:

"which is supportable as valid by legal arguments and on which a right could be established in the creditor's favour in a Court of justice"

will be binding on the son. It was the duty of the trustees to collect the income and their subsequent misappropriation of it does not affect the liability to account which they incurred by reason of the collection. The fact that the misappropriation amounted to a criminal offence appears to us to be irrelevant. In our opinion the son is accountable for the misappropriation of the trust funds by his father and grandfather. The subtle distinction drawn between accountability and debts by Mr, Narayanamurthy does not commend itself to us. The further question is whether defendant 1 should be held liable for all the collections not accounted for by his predecessors. He succeeded to the office of trustee two years before the suit. His father succeeded to the trusteeship in 1884 and was the manager of the family and of the charity until 1914. In our opinion defendant 1 should be made liable only for collections during the last 12 years. It is not denied that Courts have a discretion in fixing the period for which accounts should be rendered. In *Attorney-General* v. *Exeter, Mayor of* (6) Sir Thomas Plumer, Master of the Rolls, said:

(1) [1912] 39 Cal 862=12 I. C. 609.
(2) [1908] 32 Bom. 348
(3) [1916] 40 Bom. 126=31 I. C. 301.
(4) [1911] 33 All. 472=9 I. C. 624.
(5) A I. R. 1914 Mad. 654 = 14 I. C. 705=37 Mad. 458.
(6) [1822] Jacob 443.

"It has, I think, been properly stated on both sides that there is no fixed limit of time in directing an account against a trustee of a charity. Notwithstanding the case which has been cited from a very inaccurate book, the statute of limitations is not the rule . . . . It does not however follow that relief will be given after a great length of time, it being the constant course of Courts of Equity to discourage stale demands; even in cases of fraud, in which, if recent, there would have been no doubt, lapse of time has induced the Courts to refuse their interference. In cases of charities this principle has often been acted on. When there has been a long period, during which a party has, under an innocent mistake, misapplied a fund, from the laches and neglect of others, that is ,from no one of the public setting him right, and when the accounts have in consequence become entangled, the Court, under its general discretion, considering the enormous expense of the inquiries, the great hardship of calling upon representatives to refund what families have spent, acting on the notion of its being their property, has been in the habit, while giving the relief, of fixing a period to the account."

In the present case defendant 1's grandfather and father had been left in the sole enjoyment of the charity properties without being called upon to account for their administration. Defendant 1 himself has not been shown to have been benefited by their conduct. In these circumstances we have decided to fix 12 years as the limit of time for which accounts should be rendered by defendant 1. Subject to this modification the appeal will be dismissed with costs of the plaintiffs to come out of the charity. We may mention that in the framing of the scheme, defendant 1 may be nominated, if otherwise not disqualified, to be one of the trustees of the charity..

S.N./R.K. *Decree modified.*

A. I. R. 1919 Madras 945

ABDUR RAHIM AND NAPIER, JJ.

Mappillai Kadir Rowther—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 808 of 1917 and Criminal Revn. Petn. No. 654 of 1917, Decided on 26th February 1918, from order of Sess. Judge, Madura, in Criminal Misc. Petn. No. 49 of 1917.

Criminal P. C. (5 of 1898), S. 499 — Bail bond not mentioning date of appearance in portion filled in by surety but mentioned in portion signed by accused— Bail bond must be read as a whole and is not invalid on that account.

An accused person, who was committed to take his trial at the Sessions Court, was released on bail. The bail bond was in form No. 42, Criminal P. C., the accused binding himself to appear at the Sessions Court on a specified date. Below his signature was the undertaking by the surety that he shall cause the accused's appearance at the Sessions Court for the trial, and that in case of the accused making default, he shall be liable to forfeit the amount of the security. The latter declaration did not however mention the date for accused's appearance. The accused having made default, the security was forfeited.

Held: that the bail bond should be read as one document and the undertaking by the surety should be read as referring to the date mentioned in the portion of the bond signed by the accused, and that therefore the bond was rightly forfeited for accused's default of appearance.

[P 946 C 1]

T. M. Krishnasami Aiyar — for Petitioner.

P. R. Narayanasami Aiyar—for the Crown.

Order.—The petitioner stood bail for a person charged with an offence under S. 395, I. P. C., in the sum of Rs. 6,000. The bond is in form No. 42, which is in accordance with S. 499, Criminal P. C. The bond was taken when the case was committed to the Sessions, and the part of the bond signed by the accused states that he undertook to appear on 1st November 1917 at the Court of Session at Madura to answer a charge against him. The part which is signed by the petitioner is in these words :

"We jointly and severally hereby declare ourselves and each of us sureties for the said Alagappa Tevan that he shall attend Court every day of the preliminary inquiry, and as the case has been sent for trial to the Sessions Court, Madura, that he shall appear before the said Sessions Court, to answer the charge against him (the words in the printed book "should the case be sent" being a mistranslation) and in case of his making default therein, we bind ourselves to forfeit to His Majesty the King-Emperor of India the sum of Rs. 1,000."

By some oversight apparently, the words in the form as given in the Code "that he shall attend Court every day of the preliminary inquiry" were left standing though the case had already been committed. But the next passage makes it clear that the case had been committed to the Sessions Court. The result would be that as the preliminary inquiry was over, the undertaking that the accused shall attend Court during the preliminary inquiry must be treated as surplusage, but the undertaking that the accused shall appear before the Sessions Court to answer the charge against him still remained. The date when the accused was to appear at the Sessions Court is given in that part of the bond which is signed by the accused.

The argument before us of the learned pleader for the petitioner is that we must treat the portion signed by the accused and the portion signed by the petitioner as two separate bonds quite independent of each other, and must be read one without reference to the other. That is not a sound contention. The bond is in accordance with the form given in S. 5, Criminal P. C., and it is clear that it is to be regarded as one document. That that was the intention of the legislature is to be gathered from the terms of S. 499, for it speaks only of one bond to be signed by the accused, and if he is released on bail, to be signed by the sureties. No doubt the word is "and" not "also," but the meaning is perfectly plain. That being so, the surety who stands bail must be taken to know the date on which the accused has undertaken to appear, and if the accused does not appear, the surety bond is liable to be forfeited.

The case in which the question arises was fixed for trial at the Sessions Court on 1st November 1917. But the accused did not appear on that date and the case in which other persons were also implicated had to be proceeded with in the absence of the accused for whom the petitioner had stood bail. The petitioner however produced the accused on 6th November, but his undertaking was that the accused should appear on the first, and as he failed to do that, the bond was rightly forfeited. We have been asked to reduce further the amount forfeited: but, the Sessions Judge taking into consideration that the case had to be tried over again and evidence of the witnesses recorded, some of whom had to come from distant parts, thought that the petitioner should forfeit at least half the amount of the bail. We are not prepared to say that he has not exercised his discretion properly. The petition must be dismissed.

S.N./R.K. *Petition dismissed.*

A. I. R. 1919 Madras 946

SESHAGIRI AIYAR AND PHILLIPS, JJ.

Sujir Raghunathaiya — Defendant—Appellant.

v.

Sobina Saldanha—Plaintiff—Respondent.

Second Appeal No. 489 of 1918, Decided on 6th December 1918.

(a) Mortgage—Moveables — Contract debarring redemption — Mortgage can be redeemed—Principles embodied in Transfer of Property Act are applicable — Transfer of Property Act (1882), S. 60.

In India though there is no express law with reference to moveables, the principles embodied in the Transfer of Property Act are generally applicable to them. [P 947 C 1]

A mortgage of moveables can, notwithstanding terms debarring redemption, be redeemed if the transaction was in its inception a mortgage: 13 *M. I. A.* 560, *Expl.* [P 947 C 1]

(b) Deed—Construction.

In construing documents Courts should be guided in the first instance by the language of the document and by the facts of the particular case. [P 946 C 2]

B. Sitarama Row and *Ramanath Sujir* —for Appellant.

K. Y. Adiga—for Respondent.

Judgment.—Although a large number of decisions were quoted before us, we think that on a question of construction we should be guided in the first instance by the language of the instrument and by the facts of the particular case. There are circumstances in this case which justify the view taken by the Courts below. In the first place, the conveyance is not an absolute one. The document begins and ends by saying that it is a conditional sale; secondly, there is a provision for payment of interest and the loan is spoken of as principal. Thirdly, the mortgagor is asked to pay the premia. Further there is no provision for reconveyance even and lastly there is a provision for obtaining a receipt on payment of the loan. All these circumstances indicate that there is the relationship of creditor and debtor and also that of accountability between the parties. We think the Courts below held rightly that the Ex. A was a mortgage.

Mr. Sitarama Rao then raised an interesting question on which there is not much authority in India. He argued that the Judicial Committee enunciated in *Patttabhiramier* v. *Vencatarow Naicken* (1) a general principle applicable to all Indian mortgages, whether they be of realty or of personalty, that the contract between the parties should be given effect to and that the rule "once a mortgage" ought not to be extended to India. But in *Thambusawmy Moodelly* v. *Hossain Rowthen* (2) this judgment was modified to the extent of holding that if parties had contracted, with reference to

(1) [1869-70] 13 M. I. A. 560=15 W. R. 35 (P.C.).

(2) [1876-78] 1 Mad. 1=2 I. A. 241 (P.C.).

the Madras course of decisions, *Pattabhiramier* v. *Vencatrow Naicken* (1) would not govern those transactions. The Board further intimated that the legislature should settle the law. The legislature did enact the Transfer of Property Act in 1882, but the provisions were limited to immovable property. The learned vakil argued that as no express law was passed relating to the pledge of moveables, *Pattabhiramier* v. *Vencatrow Naicken* (1) should govern the transaction. It must be remembered that the above case related to immovable property. There is no ground for .presuming that the Judicial Committee intended to enunciate a rule applicable to moveable properties also by that judgment. Again, the rule in England seems quite settled that in the case of a pledge of moveables the right of redemption would subsist notwithstanding any contract to the contrary. This was forcibly illustrated in the case of the mortgage of policies in *Salt* v. *Marquess of Northampton* (3). There it was held that notwithstanding a construction that after the death of the mortgagor his legal representatives should have no right of redemption, the clause was held to be inoperative. In India, although there is no express law with reference to moveables, the principles embodied in the Transfer of Property Act have generally been applied to them: vide *Mahamaya Debi* v. *Haridas Haldar* (4). Therefore if we are to invoke the aid of justice, equity and good conscience in dealing with such cases, whether we apply the English law or accept the analogy of the Indian law relating to immovables, the result is that, notwithstanding terms debarring redemption, the mortgage can be redeemed if the transaction in its inception was a mortgage. We think it is undesirable to place moveables on a different footing from immovables on a matter like this. For all these reasons we confirm the decree of the District Judge and dismiss the second appeal with costs.

S.N./R.K. *Appeal dismissed.*

(3) [1892] A. C. 1=61 L. J. Ch. 49.
(4) A. I. R. 1915 Cal. 161=42 Cal. 455=27 I. C. 400.

A. I. R. 1919 Madras 947

SPENCER AND KRISHNAN, JJ.

Chavadi Ramasamia Pillai —Petitioner—Appellant.

v.

E. Venkateswara Aiyar and *others*—Respondents.

Civil Misc. Appeals Nos. 197, etc., of 1917, Decided on 23rd July 1918, against orders of Dist. Judge, Tinnevelly, D. - 22nd January 1917 in Original Petns. Nos. 628, 626, 630 and 633 of 1916.

(a) Provincial Insolvency Act (1907), Ss. 22, 26 (2) and 46 (4)—Appeal—Date of order and last day should be excluded.

In computing the period limited for appeals under the Act, the principles of Ss. 9 and 10, General Clauses Act should be applied, i. e., the date on which the act appleaed against is done and the last day, if dies non, should be excluded. [P 947 C 2]

(b) Provincial Insolvency Act (1897), Ss. 22 and 26 (2)—Applications under S. 26 (2) are not governed by S. 22.

Applications under S. 26 (2) are not governed by the rule of limitation contained in S. 22 of the Act. [P 948 C 1]

T. M. Ramaswami Aiyar—for Appellant.

C. V. Ananthakrishna Aiyar, K. R. Gurusami Aiyar, A. Subbarama Aiyar and *K. S. Sankara Aiyar*—for Respondents.

Judgment.—It is argued that these appeals are barred by limitation on the ground that, as the general provisions of the Limitation Act have been held not to apply to appeals under S. 46, Provl. Insol. Act, the date upon which the order appealed against was made and the Sunday upon which the ninety days allowed by S. 46, expired, cannot be excluded. S. 46, Cl. (4) merely declares that ninety days shall be the period of limitation for appeals to the High Court without specifying the method of computing that period. S. 9, General Clauses Act, does not directly apply to this section in which the words "from" and "to" do not occur. Nevertheless we think it was intended that the computation should be done as it is usually done in appeals under other Acts, seeing that no other method is prescribed, that is, that ninety days should be reckoned from the date of the order appealed against. We must therefore apply the general principle contained in S. 9 under which the day on which the act appealed against is done is to be excluded.

Further under S. 10, General Clauses Act, 22nd April which was a dies non,

must be excluded, and it is unnecessary to resort to S. 4, Lim. Act, for this purpose. It was also argued that the application to the District Court itself was barred by limitation under the twenty-one days' rule in S. 22, Provl. Insol. Act. But we observe that the application to the District Court was not an appeal against any order passed by the Official Receiver but was one to the Court to take action under S. 26, Cl. (2). On the merits we are of opinion that there was sufficient cause for the petitioner's vakil failing to attend on the date of hearing, if the facts stated in his affidavit which have not been controverted are true. The petitioner could not be expected to proceed with his application, which involved certain complicated matters of law and fact, unaided, and he might have been reasonably given some time to engage a fresh vakil. We think that when the facts became known on the petitioner's application to the District Court to restore his petition to file, the District Judge should have allowed his application on such terms as to costs, etc., as he thought proper. We set aside the Judge's order of 22nd January dismissing the appellant's petition and direct the Judge to take it again on his file and dispose of it according to law. The appellant will bear his own costs and the respondents' costs in the District Court up to date. Costs in this Court will abide and follow the result.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 948 (1)

SADASIVA AIYAR AND NAPIER, JJ.

Doraisami Moopan—Appellant.

v.

Subbalakshmi Palayee Ammal and *others*—Respondents.

Appeal No. 26 of 1915, Decided on 17th December 1917, against the Appellate order of Dist. Judge, Tanjore, in Appeal Suit No. 156 of 1911.

Execution—Decree binding—Executing Court cannot go behind decree.

A Court cannot, in execution of a decree, enquire into the existence of a prior alleged agreement between the parties that no decree should be passed in the suit: 37 *I. C.* 836 *Dist.* [P 948 C 2]

Judgment.—The agreement in question was not to further prosecute the suit, that is, not to obtain a decree in the suit. The decision in *Chidambaram Chettiar* v. *Krishna Vathiyar* (1) does not apply, as the agreement before decree in that case was to the effect that a decree was to be passed but the decree so obtained was not to be executed. The question, whether there was an agreement which prevented a decree itself being passed in the suit, cannot be gone into in execution. The former decree, however as against the respondents 4 to 7 (defendants 5 to 8) has been set aside by the decree in a fresh suit. On this ground this appeal is dismissed against them. As regards respondent 3 (defendant 4) the appeal is adjourned till the disposal of the Second Appeal No. 101 of 1917.

S.N./R.K. *Order accordingly.*

(1) [1917] 40 Mad. 233=37 I. C. 836.

A. I. R. 1919 Madras 948 (2)

PHILLIPS AND KUMARASWAMI SASTRI, JJ.

A. Thiagaraja Aiyar—Defendant—Appellant.

v.

G. Ramaswami Aiyar and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1648 of 1917, Decided on 14th August 1918, against the decree of Dist. Judge, Tanjore, in Appeal Suit No. 495 of 1916.

(a) Transfer of Property Act (1882), S. 83—Mortgage suit—Deposit made after institution of suit is invalid.

A deposit under S. 83 is invalid if made after the institution of a suit by the mortgagee. No exception to the rule is made in favour of allowing a mortgagor to deposit the money before he receives notice of the suit but after its institution. [P 948 C 2; P 949 C 1]

(b) Transfer of Property Act (1882), S. 83—Suit instituted—Mortgage money includes costs of suit.

Obiter—Where a suit on a mortgage has been instituted, the mortgage amount will include the costs of the suit and even if a deposit could be made after suit, it must include the plaintiff's costs. [P 949 C 1]

Ramachandra Aiyar for *S. Viswanatha Aiyar* and *P. N. Nageswara Aiyar*—for Appellant.

A. V. Viswanatha Sastri—for Respondents.

Judgment.—In *Bayya Sao* v. *Narsinga Mahapatro* (1) it was held that a deposit under S. 83, T. P. Act, was invalid if made in one Court

(1) [1911] 35 Mad. 209=10 I. C. 393.

after the institution of a suit by the mortgagee in another Court, and the Judges who decided that case were of opinion that the same principle would apply in the case of such a deposit in the Court where the suit had been instituted and that the deposit should be made under O. 26, Civil P. C. We respectfully agree with the reasoning in that case and can see no reason for making any exception in favour of allowing a mortgagor to deposit the money before he receives notice of the suit but after its institution. When once a suit has been instituted, the amount due on the mortgage cannot be ascertained until the decree is passed providing for interest, costs, etc., for we think that costs must also be included in the amount remaining due on the mortgage within the meaning S. 83, T. P. Act, and we are supported in this view by the decision of this Court in *Kamalamma* v. *Komandur Narasimha Charlu* (2), which interpreted similar words in the repealed S. 90, to include costs. This is an additional argument in favour of holding that a deposit under S. 83 T. P. Act is invalid if made after institution of a suit by the mortgagee. Even if such a deposit could be made the amount deposited did not include costs and consequently there was no deposit of the amount due on the mortgage, which would be effectual to stop the running of interest. The effect of the deposit on the running of interest has been the only point argued in this second appeal which must be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(2) [1907] 30 Mad. 464.

A. I. R. 1919 Madras 949

SPENCER AND KRISHNAN, JJ.

Mandavilli Rama Row—Petitioner—Appellant.

v.

Sivanarayana and *others*—Counter-Petitioners—Respondents.

Appeal No. 54 of 1917, Decided on 26th July 1918, against order of Sub-Judge, Cocanada, in Execution Appeal No. 805 of 1916 in Original Suit No. 43 of 1914.

Civil P. C. (1908), Ss. 47 and 151—Execution of decrees—Dispute between auction-purchasers under different decrees—Application by purchaser of fractional share to restrain purchaser of whole property from taking possession is not one under S 47—Inherent powers under S. 151 cannot be exercised—Remedy is to bring suit for partition—Practice—Revision.

The purchaser of a fractional share of property in execution of a decree applied to restrain the purchaser of the entire property under another decree from taking possession of the whole property under Ss. 47 and 151. The Court granted the prayer. On appeal:

Held: (1) that as the parties were auction-purchasers under different decrees, the petition did not lie under S. 47; (2) that the Court had no inherent jurisdiction to pass the order under S. 151; (3) that the petitioner's remedy was to bring a suit for partition and delivery of the fractional share purchased by him: 29 *Mad.* 294 and 29 *I. C.* 976, *Foll.* (4) that no appeal lay against the order as S. 47 did not apply.

[P 949 C 2]

The High Court however in the interests of justice converted the appeal into a petition for revision and set aside the order. [P 950 C 1]

T. Ramachandra Rao and *M. Purushothama Naidu*—for Appellant.

B. Narasimha Rao and *C. Sambasiva Rao*—for Respondents.

Judgment.—Petitioners in the lower Court were auction-purchasers of an undefined one-third share in items 2 to 5 in question here. The counter-petitioners purchased the whole of these properties. Petitioners asked that the counter-petitioners should be restrained from taking possession of the whole of the properties and should be allowed to take joint possession of only a two-thirds share on the ground that one-third had already been sold to them. The application was made under Ss. 47 and 151, Civil P. C. Such an application clearly does not lie under S. 47, as the petitioners and counter-petitioners are not parties to the same suit or representatives of such parties. They are auction-purchasers in Court auction under two different decrees.

We do not think S. 151 applies either. It is not shown that the Court had any inherent power in this matter. Petitioners' remedy was to bring a suit for partition and delivery of their one-third share: see *Yelumalai Chetty* v. *Srinivasa Chetty* (1) and *Hassan Ammal Bibi* v. *Ismail Moideen Rowthar* (2). There is no allegation that petitioners have already obtained joint possession of their share. If they had, they can remain in possession till an attempt is made to remove them. There is no legal provision under which the lower Court's order could be justified at this stage. On our view that S. 47, Civil P. C. does

(1) [1906] 29 Mad. 294.
(2) [1915] 29 I. C. 976.

not apply, no appeal lies to this Court, but we have decided to treat the appeal petition as one for revision under S. 115, as we think this is a fit case for interference under that section. The order of the lower Court must be set aside and the petition dismissed with costs in the lower Court. Each party will bear his own costs here.

S.N./R.K. *Order set aside.*

A. I. R. 1919 Madras 950

AYLING AND COUTTS-TROTTER, JJ.

Vanamatti Satteraju—Plaintiff—Appellant.

v.

Bollapragada Pallamraju and *others*—Defendants—Respondents.

Second Appeal No. 934 of 1917, Decided on 26th March 1918, from decree of Sub-Judge, Cocanada, in Appeal Suit No. 92 of 1916.

Contract Act (1872), S. 239—Vessel used to earn freight — Co-owners of vessel are partners.

Co-owners of a vessel are not, as such, partners, but only tenants-in-common, but if the vessel is put to use to earn freight, the co-owners become partners in the employment. [P 950 C 2]

A. Krishnaswami Aiyar—for Appellant.

P. Narayanamurthi — for Respondents.

Judgment.—In this case the plaintiff sued for a decree for the dissolution of his partnership with the defendants and the learned Sub-Judge dismissed the plaintiff's suit on a point taken for the first time in his Court, namely, that the suit was not maintainable as, assuming the facts alleged in the plaint to be true, there was, in law, no partnership.

These facts were contained in paras. 3, 4 and 5. Para. 3 says that the plaintiff and defendant 1 entered into an arrangement in or about December 1907 to construct at their joint expense a boat and another smaller boat attached to it, the plaintiff making certain advances towards it, among certain other stipulations which need not be gone into in detail, and agreeing that the licenses, when the boat was completed, should be taken in the name of defendant 1, that the boats should be plied for hire, that defendant 1 should keep the accounts and that net profits and losses derived from the user of the boats should be shared equally between the plaintiff and the defendants. Para. 4 sets out the amount advanced by the plaintiff towards the capital and para. 5 states that defendant 1 had been letting the boat for hire and managing the whole business and had earned large sums of money by way of profit from her use, for which he had not accounted to the plaintiff.

Now, the learned Subordinate Judge, having perused a section in Lord Lindley on Partnership on this extremely difficult subject, apparently has come to the conclusion that people who own a ship in common in no circumstances are partners. The law of England no doubt is that a mere part ownership of a ship does not constitute the relation of a partner. That is clearly stated in all the books and in all the cases. And there is no doubt that S. 239, Contract Act, has tended to import into the law of this country some of the very fine distinctions derived from the law of England, where special reasons of public policy led to the making of these close distinctions between mere co-ownership and co-partnership in regard to the vessels. Although it is quite true that the co-ownership in a vessel does not constitute the relation of partners but merely that of tenants in common, yet when the ship begins to be put to use, to earn freight, a very different state of things exists. Abbott on Merchant Shipping, Part 1, Ch. 3, p. 132 Edn. 14, says this :

"Firstly, co-owners are, as such, tenants-in-common of their ship: and, secondly, if they employ their ship in earning freight, or otherwise as a money making machine, they become joint adventurers or partners in the employment,"

and for that proposition *Green* v. *Briggs* (1) is cited. That is a very long judgment of Wigram, V.C., and he cites *Holderness* v. *Shackels* (2) and says this :

"The Court distinguished between the ship itself and her earnings; and held in that case that although part owners were tenants-in-common of the ship, they were jointly interested in the use and employment of the ship, and that the law as to earnings must follow the law in partnership cases."

And in *Hill, Ex parte* (3) the Vice-Chancellor said :

"There is no lien on the ship because that was not joint property, but the earnings of the ship would have been joint property and liable to the joint creditors, not from any doctrine peculiar to the earnings of a ship, but on the general principles applicable to the joint property of every partnership. If, in this case, the Thames

(1) [1848] 17 L. J. Ch. 323=6 Hare 395.
(2) [1828] 8 B. & C. 612=3 Man. & Ry. 25.
(3) [1815] 1 Mad. 61=56 E. R. 24.

had been employed on a whaling voyage, and the money now at the Bank represented the cargo, no dispute could have arisen. Then is freight, qua earnings, distinguishable from other earnings of a ship, for the purpose under consideration? In the absence of authority establishing such distinction, or a clear principle requiring me to adopt it, I will not admit it."

In *Young, Ex parte* (4), one of the cases relied on by the respondents' vakil, in which Lord Elden's mind was distinctly called to the distinction between the ship and her earnings, he said:

"I have no doubt that freight is liable to the joint demand. As to the ship, it stands upon the nice distinction of a tenancy-in-common."

And I notice that Lord Lindley points out there are two cases under the English law of employment of a ship, one is where she is employed by some only of the total co-owners, which, in English law, can be done against the will of the rest. For reasons of public policy it has been held that the majority of the co-owners of the ship who wish to employ her may force the hands of others. Therefore one sees that, if a ship is employed under these conditions, it may very well be right that the law should guard the unwilling co-owners from being made co-adventurers in an employment which they did not approve of. With regard to the second case what Lord Lindley says at p. 37 is this:

"Where a ship is employed by all the part-owners, or by some of them, but not against the will of the others, they all share her gross earnings, and contribute to the expenses incurred in obtaining them and in such a case there is little, if any, difference between the account which is taken between the part owners and that which would be taken if they were actually partners."

And similarly Abbott lays it down quite plainly at p. 133 that:

"each part-owner, who does not before the commencement of an adventure effectually withdraw authority from his co-owners to sail the ship on his behalf, is liable as a partner for the whole of the expenses of that adventure."

We therefore hold that, so far as the earnings of the ship go as regards the freight that she earns, on the allegations in the plaint there exists a partnership between the plaintiff and the defendants, and the plaintiff, if he can prove these allegations, will be entitled to a dissolution of partnership and taking of accounts as regards freight. But he is not a partner but only a co-owner in respect of the actual hull of the ship and he will not be entitled, in any event, to have his prayer granted as regards the sale of the boat or boats used by the partnership. The preliminary objection on which the learned Subordinate Judge dismissed the case was due to a misapprehension and it must be remanded to him for disposal upon the merits. The appellant will have the costs in this Court. The costs in the Courts below will be costs in the cause.

S.N./R.K. *Appeal allowed.*

(4) [1813] 2 V. & B. 242=35 E. R. 311.

A. I. R. 1919 Madras 951

AYLING AND KRISHNAN, JJ.

Veeraraghava Aiyangar—Appellant.

v.

Souri Aiyangar—Respondent.

Letters Patent Appeal No. 25 of 1918 Decided on 13th August 1918, against judgment of Bakewell, J., D/- 26th February 1918, in Civil Revision Petition No. 250 of 1917.

Evidence Act (1872), S. 73—Scope.

Section 73 is not limited, in its scope, to documents which are signed or contain some intrinsic statement of the identity of the writer. As under English law, all that is necessary to render proof by comparison admissible is a dispute as to the writing: 15 *I. C.* 649, *Foll.*; 7 *I. C.* 359, *not Foll.* [P 951 C 2]

M. K. Rangachariar—for Appellant.

T. Narasimha Aiyangar—for Respondent.

Judgment.—This case turns solely on the meaning to be given to the word "purports" in S. 73, Evidence Act. Different views have been taken by Jenkins, C. J., in *Barindra Kumar* v. *Emperor* (1), and by Chandavarkar and Batchelor, JJ., in *Emperor* v. *Ganpat Balkrishna* (2). We are inclined to agree with the latter. We do not discern any object in limiting the scope of the section to documents which are signed or contain some intrinsic statement of the identity of the writer: and apparently in English law all that is necessary to render proof by comparison admissible is a dispute as to the writing (vide Stephen's Digest on the Law of Evidence, Art. 52, Taylor's law of Evidence, Edn. 10, p. 1340, and Phipson, Edn. 5, pp. 93 and 94). In the second portion of the section under construction the word used is "alleged," and as from the context it is clear that no contradiction between the two words could have been intended, the impression left on the mind is that the two

(1) [1910] 37 Cal. 467=7 I. C. 359.
(2) [1912] 15 I. C. 649.

must have been used to express the same idea. In our opinion, the Subordinate Judge was entitled, in the circumstances, to compare the handwriting of Exs. B and D and that being so, there was no ground for interfering with his decree. We must, therefore set aside the order of the learned Judge and restore the decree of the Small Cause Court. Appellant will get his costs throughout.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 952

ABDUR RAHIM AND OLDFIELD, JJ.

Muthiah Chettiar and *others*—Plaintiffs—Appellants.

v.

Kuttayan Chetty — Defendent — Respondent.

Second Appeal No. 919 of 1916, Decided on 1st October 1917, against decree of Dist. Judge., Madura, in Appeal Snit No. 40 of 1915.

(a) Limitation Act (1908), Ss. 19, 20 — Nattukottai Chetties — Custom of — Name written at top of letters is sufficient "signature."

It is the custom and practice among Nattukottai Chetties not to sign their names at the foot of their letters but to begin them by saying that the letters are from such and such a firm. The name so written at the top is a sufficient 'signature' within the meaning of S. 19, Limitation Act : 1 *All.* 683 and 6 *Cal.* 340, *Foll.*

[P 952 C 2]

(b) Limitation Act (1908), S. 19, Expl. 2— Letter written to debtor's dictation, containing name of firm is sufficient.

A letter written to the debtor's dictation which contains the name of his firm satisfies the requirements of S. 19, Expl. 2 : 6 *Cal.* 340. *Foll.*

[P 952 C 2]

(c) Limitation Act (1908), S. 20—Part payment must be shown to be payment towards specified debt—It must appear in payee's handwriting.

A part payment, that is relied on as saving limitation under S. 20, must be shown to be a payment towards a specified debt, and this must appear in the payee's handwriting. It is not enough that the amount paid by the debtor is placed to his credit generally : 9 *Mad.* 271, *Foll.* 6 *Mad.* 281, *not Foll.* [P 953 C 1]

C. V. Ananthakrishna Aiyar — for Appellants.

C. S. Venkatachariar—for Respondent.

Judgment.—The plaintiffs-appellants instituted the suit to recover a certain sum of money alleged to be due on a hundi, dated 7th March 1903, and the question in the second appeal relates to limitation. The suit was instituted on 13th November 1909, and therefore it is conceded by Mr. Ananthakrishna Aiyar for the appellant that unless he succeeded in establishing acknowledgment or part payment within the meaning of the law under Exs. B and C—B being dated 29th September 1905, and C 19th July 1907—the suit will be barred. As regards B, which purports to be a letter written by the defendant, the first question that arises is whether there was any signature to it of defendant 1 within the meaning of S. 19, Limitation Act. The parties are Nattukkottai Chetties and defendant 1 wrote to the plaintiffs giving the name of his firm at the top of letter, but no signature was put at the foot of it. We have been referred to a number of cases and it seems to us that the decisions reported as *Mathura Das* v. *Babu Lal* (1) and *Mohesh Lal* v. *Busunt Kumaree* (2) bear out the contention of the appellant that, according to the custom and practice of Nattukottai Chetties who do not sign their letters at the foot, but begin by saying that the letter is from such and such a firm, the name so written at the top is a sufficient signature within the meaning of S. 19, Limitation Act. Our attention has also been drawn to a decision reported as *Chidambaram Chetti* v. *Ramaswami Chettiar* (3). In that case it appears that the name of the family deity was put at the bottom of the letter and Sankaran Nair and Spencer, JJ., taking that along with the name given at the top of the letter, held that that was sufficient signature within the meaning of the Act. We are inclined to hold that the law laid down in *Mathura Das* v. *Babu Lal* (1) and *Mohesh Lal* v. *Busunt Kumaree* (2) is correct and the ruling in *Chidambaram Chetti* v. *Ramaswami Chettiar* (3) cannot be said in any way to be opposed to it. Then, with reference to Ex. B, another question also arises, namely, supposing it was not written by defendant 1 but was written to his dictation, whether that would be sufficient to satisfy the requirements of S. 19. This has been answered in the affirmative in *Mohesh Lal* v. *Busunt Kumaree* (2), and we think that the language of the section itself is clear on the point. Expl. 2, S. 19 says :

"for the purposes of this section, 'signed means signed either' personally or by an agent duly authorised in this behalf."

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(1) [1875-78] 1 All. 683.
(2) [1881] 6 Cal. 340.
(3) A. I. R. 1915 Mad. 506=26 I. C. 911.

So if defendant 1 dictated the name of his firm as authenticating the terms of Expl. 2. We may take it, therefore that so far as Ex. B is concerned the contention of the appellant is made out. But that is not sufficient for his purposes, because Ex. B was written more than three years before the institution of the suit. Coming to Ex. C it only shows that the payment of Rs. 250 was made by means of a hundi and that amount has been credited. But the document, as we read it, does not contain any acknowledgment of the defendant's liability for the rest of the amount. Then Ex. C is sought to be used as evidence of part payment within the meaning of S. 20. It being conceded that the payment was made towards the principal, the proviso to S. 20, Cl. 1, requires that in the case of part payment of the principal of a debt, the fact of payment must appear in the handwriting of the person making the same. On this point, there is a decision of this High Court, reported as *Mackanzie* v. *Tiruvengadathan* (4), of Muthusami Aiyar and Brandt, JJ., conferring the judgment of Parker, J., to the effect that the writing must show that the payment was made towards the debt in question and this seems to us to be the interpretation warranted by the language of the proviso, which speaks of the payment referring apparently to part payment of the principal of the debt : that is to say, there must appear in the payee's writing an endorsement that the payment was in the nature of and intended to be part payment of the principal. There is, however, an earlier decision of this Court, reported as *Jada Ankamma* v. *Nadimpalle Rama Sastrulu* (5). which does not appear to have been noticed in *Mackanzie* v. *Thiruvengadathan* (4), and which is to the contrary effect. It is a decision of Innes and Kernan, JJ., and undoubtedly commands our respect, but we find that the case was not at all argued at the Bar and therefore it cannot be said to have the same authority as the case in *Mackanzie* v. *Tiruvengadathan* (4). So far as we have been told, the ruling in *Mackanzie* v. *Truvengadathan* (4) has not been dissented from in any later decisions and as we have stated, it is in accordance with the language of the section.

(4) [1886] 9 Mad. 271.
(5) [1883] 6 Mad. 281.

Mr. Ananthakrishna Aiyar then attempted to make out that as a matter of fact, in the hundi itself there was a statement that the payment was made towards the debt. The hundi, it appears, had been paid by the person on whom it was drawn. It may be also taken for granted that there was a subsequent settlement of account between that person and the defendant, the drawer of the hundi. But before secondary evidence was given, it was the duty of the plaintiff to make out the conditions under which alone secondary evidence could be admitted by the law. The evidence regarding the contents of the hundi was objected to by the Pleader of the defendant and the plaintiff does not appear to have given any evidence to show that he had called upon either the defendant or the drawee of the hundi to produce the hundi. Besides we may say that none of the Courts below placed any reliance upon this evidence regarding the contents of the hundi and having regard to the fact that the P. W. 2, was giving evidence at least seven years after he last saw the hundi, it would be extremely unsafe to say that he remembered all that he professes to remember. At any rate, the plaintiffs failed to lay a proper foundation for the production of secondary evidence, the reception of which was objected to by the defendant's Pleader. On these grounds, we are of opinion that the suit was barred and the second appeal must be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 953

SPENCER, J.

Gurvanna Gowd and *others*—Accused —Petitioners.

v.

Govindappa — Counter-Petitioner — Opposite Party.

Criminal Revn. No. 170 of 1917 and Criminal Revn. Petn. No. 139 of 1917, Decided on 17th August 1917, from order of Sub-divl. Magistrate, Bellary, in Misc. Civil Suit No. 9 of 1915.

Criminal P. C. (1898), S. 146—Attachment continues till adjudication by civil Court—Magistrate cannot decide question by further inquiry and terminate attachment.

An order for attachment passed under S. 146 (1), must be kept in force *till* the adjudication of the rights of the parties *by* a competent civil Court.

A Magistrate has no jurisdiction to cancel the attachment as a result of further inquiry and adjudication by him as to the right to possession: 26 *Mad.* 410, *Foll.* [P 954 C 1]

Order.—As stated in para. 6 of the Deputy Magistrate's Order of 8th September 1915, the question for consideration in these proceedings under Chap. 12 was who was in possession of the Takrar land on 1st July 1915. No doubt the Divisional Officer's Court, which determined that Patta should be registered in the name of Venkamma, was a competent Court to decide the question of registry, and it appears from the records that it was this question of registry which was the principal cause of the dispute as to possession. Nevertheless, the Divisional Officer's Court was not a competent Court for deciding a question as to the person entitled to possession of the land in dispute. This question can only be finally decided in the civil Court and the Magistrate having passed the order of attachment, not as an interim order under S. 145 (4), Prov. 2, Criminal P. C., but as an order under S. 146 (1) made at the conclusion of his inquiry after hearing the parties and taking evidence, was bound to continue the attachment until a competent civil Court adjudicated on the rights of the parties. Vide *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (1).

I must set aside his order of 26th February 1917, as made without jurisdiction and restore the order of attachment and the appointment of a Receiver made on 8th September 1915. Each party will bear his or their own costs in this Court.

S.N./R.K. *Order set aside.*

(1) [1903] 26 Mad. 410.

A. I. R. 1919 Madras 954

SPENCER, J.

MantripragadaMattapalli Narasimha Rao In re—Accused—Petitioner.

Criminal Revn. No. 531 of 1917 and Criminal Revn. Petn. No. 416 of 1917, Decided on 3rd December 1917, from judgment of Joint Magistrate, Bezwada, in Criminal Appeal No. 92 of 1916.

(a) Penal Code (1860), Ss. 44, 323, 341 and 385—Accused suspecting smuggling of liquor by complainant stopped him on way detained liquor jar and threatened to report unless some amount was paid — Accused charged under Ss. 323, 341 and 385—S. 385 did not apply as no personal injury was threatened—S. 341 did not apply as there was no restraint to person—S. 323 being non-cognizable trial under it with other charges under police challan was improper as prejudice was caused.

Accused, who was the proprietor of a certain estate, stopped complainant, a cooly, whom he suspected of smuggling Arrack from the Nizam's Dominions into British Territory, on the way, took and kept his liquor jar for the night and threatened to report the matter to the police unless he paid something. He was charged with wrongful restraint, threat of injury to commit extortion and causing simple hurt in the course of the attempted extortion and was sentenced to a single fine of Rs. 100 for the three offences:

Held: (1) that the conviction under S. 385 was bad, as complainant was not put in fear of any injury within the meaning of S. 44, I. P. C. and the accused only threatened to do what he was bound by law to do; (2) that the conviction under S. 341 was bad, as there was no physical restraint of complainant's person; (3) that the charge of voluntarily causing hurt, which was non-cognisable and for which there was no complaint to a Magistrate, should not have been tried on the police charge sheet with the other charges and that this irregularity prejudiced the accused, as the evidence of hurt was not considered except as combined with the evidence on the other police charges. [P 954 C 2; P 955 C 1]

(b) Penal Code (45 of 1860), S. 385—Term "Injury" implies injury to person's mind, body, reputation or property.

For the purpose of S. 385 it is necessary that the accused should have put some person in fear of injury in order to extort some property from him. "Injury" includes only such harm as may be caused illegally to a person's mind, body, reputation or property. [P 955 C 1]

B. Narasimha Rao—for Petitioner.

A. Narasimha Ayyar—for the Public Prosecutor.

Order.—The offences of which the accused has been found guilty are wrongful restraint, hurt, and putting a person in fear of injury in order to commit extortion. A single sentence of fine has been imposed for the three offences combined. The convictions for the first and the last of these offences, viz., those under Ss. 341 and 385, I. P. C., will not stand because it has not been found that any physical restraint was put on the person of P. W 1. If he remained for the night in Lingagiri because the accused, a proprietor of that place, told him to stay, there was no offence within S. 341. Again the threat that the accused is alleged to have used towards the cooly, who was discovered transporting Arrack from the Nizam's Dominions into British Territory, was to the effect that he would report him to British Police. For the purpose of S. 385 it is necessary that the accused should have put some person in fear of injury in order to extort some property from him. The definition

of "injury" in S. 44, I. P. C., shows that it embraces only such harm to body, mind, reputation or property as may be caused illegally. There would have been nothing illegal in a landed proprietor asking the police to investigate a sus. pected case of smuggling liquor. It would, on the contrary, be his duty to give information. The offence of hurt is a non-cognizable one. It consisted here in the accused giving the cooly a stroke on his hands with his walking stick when he persisted in asking permission to be allowed to go on his way. There was apparently no complaint by P. W. 1 to the Magistrate, and, in all probability, the charge of hurt would never have come into Court if the police had not taken up the other charges. I think the accused has been prejudiced by being tried for this offence along with the other cognizable offences, as the evidence has not been considered separately.

I set aside the conviction and direct the fine to be refunded.

S.N./R.K. *Conviction quashed.*

A. I. R. 1919 Madras 955

WALLIS, C. J. AND OLDFIELD, J.

Gantasala Kuppiah Chetty—Defendant—Appellant.

v.

N. Gunavathiamma and *others*—Plaintiffs—Respondents.

Original Side Appeal No. 62 of 1916, Decided on 19th July 1917, from judgment of Coutts-Trotter, J., D/- 15th September 1916.

Madras High Court Fee's Rules, R. 40—What is special ground for awarding fees on high scale stated—Reprehensible or fraudulent conduct is not such ground.

The 'special grounds' which would justify an award of fees to a party on the higher scale under R. 40 are limited to cases where the special grounds are such as to affect the costs of the litigation The reprehensible or fraudulent conduct of a party is not such a 'special ground' as would justify such an award: *Assets Development Company Ltd.* v. *Close*, (1900) 2 *Ch.* 717, *Cons.*

[P 955 C 2]

Venkatasubba Rau and *Radhakrishnayya*—for Appellant.

M. A. Tirunarayanacharri & P. Kandasami—for Respondents.

Wallis, C. J.—(After discussing the facts) * * * * There only remains one other question. The learned Judge, in view of the conduct of defendant 1 of which he takes a very unfavourable view, granted plaintiffs' costs on the higher scale R. 40, High Court-fees Rules provides

"on special grounds the Court may . . . . . order that the fees set forth in the column headed higher scale, shall be allowed."

This rule is adopted from O. 65, R. 9, of the Rules of the Supreme Court, which sets forth that fees on the higher scale mny be allowed

"if on special grounds arising out of the nature and importance, or the difficulty or urgency of the case the Court of a Judge shall . . . . . so order."

Some difficulty was experienced by the Courts in England in interpreting the words which I have read as to what was meant by "nature and importance or the difficulty or urgency of the case." Standing by themselves it might have seemed at first sight that they were wide enough to authorize the Court to grant costs on the higher scale where it thought that the conduct of one of the parties to the suit had been particularly reprehensible, or to cover a case in which an unfounded charge of fraud had been made. That was the case in *Assets Development Co. Ltd.* v. *Close* (1), where not only was an unfounded charge of fraud made, but also the facts required a great deal of investigation and a lengthy trial. It was, however held by Buckley, J., in accordance with the previous decisions that these facts were not enough to justify a grant of costs on the higher scale. The learned Judge says:

"I think the meaning of the rule is that it is to apply where the nature and importance or difficulty or urgency of the case necessitates the expenditure of more money,"

that it is to say, that the special grounds must affect the costs of the litigation. I do not think that the omission of the words, to which I have called attention in our reproduction of the rule affords any ground for disregarding the restricted construction which was put upon the rule by English Courts, and I think that we should do well to follow the example of the English Courts in limiting the rule as to the power of the Court to award costs on the higher scale on special grounds to cases in which the special grounds are such as to affect the costs of the litigation, and I do not think that that is so in this case. We must therefore vary the order of the learned Judge to that extent by reducing the costs to

(1) [1900] 2 Ch. 717=69 L. J. Ch. 715.

costs on the ordinary scale while otherwise dismissing the appeal with costs.

Oldfield, J.—I entirely agree.

S. N./R.K. *Order varied.*

A. I. R. 1919 Madras 956

WALLIS, C. J. AND OLDFIELD, J.

Kanniammal—Plaintiff—Appellant.

v.

Sanka Krishnamurthy — Defendant—Respondent.

Original Side Appeal No. 35 of 1915, Decided on 20th April 1917, from Judgment of Bakewell, J., D/- 15th February 1915.

(a) **Specific Relief Act (1877), S. 42, proviso—Scope of proviso does not extend to cases when plaintiff is not entitled to further relief unless he does something further which he is not bound to do.**

The meaning of the proviso to S. 42, Specific Relief Act is that a mere declaration should not be granted where, as things stand at the time when the suit is brought, the plaintiff is entitled to further relief which he omits to claim either because he does not want to pay the stamp duty or for any other reason. The proviso does not extend to cases where the plaintiff is not entitled to the further relief unless he does something further which he is not bound to do and which he may not be in a position to do. [P 956 C 2]

(b) **Specific Relief Act (1877), S. 42, proviso—Suit for declaration that mortgage decree is not binding on plaintiff—Omission of prayer for redemption—Suit should not be dismissed.**

A suit for a declaration that a mortgage-decree passed against the plaintiff is not binding on him should not be dismissed merely for the omission of a prayer for redemption of the mortgage as a consequential relief. [P 956 C 2]

(c) **Specific Relief Act (1877), S. 42, proviso—"Further relief"—Meaning of.**

Per *Oldfield, J.*—The further relief contemplated by the proviso means further relief arising from the cause of action on which the plaintiff's suit for declaration is based. [P 957 C 1]

A. Ramchandra Iyar—for Appellant.

V. V. Srinivasa Iyengar — for Respondent.

Wallis, C. J.—This is an appeal from the judgment of Bakewell, J., dismissing a suit brought by the minor plaintiff for a declaration that the mortgage decree passed against her father-in-law, brother-in-law and herself, as representives of her deceased husband, is not bin ding on her on the ground that she was sued and the decree obtained against her as a major. The plaintiff also asked for an injunction restraining the defendant from executing the decree against her interest in the mortgaged property. The learned Judge has dismissed the suit on the ground that the plaintiff is debarred from bringing this suit for a declaratory decree by the proviso to S. 42, Specific Relief Act that

"No Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so,"

The learned Judge observes that the plaintiff is now entitled to redeem the mortgaged property and holds, therefore that she is not entitled to the declaration prayed for, as she has not sued for redemption. With great respect, we are unable to agree with this conclusion. There is on the records of the Court, a decree binding the interest of the plaintiff and if that decree is not binding upon her we think that she is entitled to a declaration to that effect and to cancellation of so much of the decree. With reference to the language of the proviso to S. 42, Specific Relief Act that no such suit is to be brought

"where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so,"

we think that the meaning of the proviso is that as things stand at the time when the suit is brought the plaintiff should be entitled to further relief, which she omits to claim, either because she does not want to pay the stamp duty or for any other reason, and that the proviso does not extend to cases where the plaintiff is not entitled to the further relief, unless she does something further which she is not bound to do and which she may not be in a position to do as in this instance, to find the mortgage money. She has by the Limitation Act, a very long time to find the mortgage money and in our opinion, she cannot be required to do so at once on pain of losing her right to a declaration that a decree which is on the record of the Court is not binding upon her and for cancellation of so much of the decree on the records of the Court as purports wrongly to bind her. We have not been referred to any authority which deals directly with this part of the case and we think it would be an undue extension of the proviso to hold that the plaintiff was to be debarred from bringing a suit for declaration on the ground that she is not in a position to find the mortgage money and consequently to ask for redemption. The appeal must be allowed and the suit remanded. Costs will abide.

Oldfield, J.—The proviso to S. 42, Specific Relief Act is to the effect that no declaration should be made,

"Where the plaintiff, being able to seek further relief than a mere declaration of title omits to do so."

It seems to me that the further relief contemplated means further relief arising from the cause of action on which the plaintiff's suit for declaration is based. Here the cause of action was the existence of a decree alleged to have been illegitimately obtained, by which the plaintiff was required to redeem a mortgage within a specified time. The cause of action for a redemption suit will be independent of the existence of that decree; it will simply be the fact that the property has been mortgaged. In these circumstances I do not think that the proviso is applicable to the present case. I agree with my Lord the Chief Justice.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 957

OLDFIELD AND SADASIVA AIYAR, JJ.

V. R. M. Ramasami Naidu—Defendant—Appellant.

v.

T. M. Muthusamia Pillai—Plaintiff—Respondent.

Second Appeal No. 422 of 1917, Decided on 13th March 1918 against decree of Dist. Judge, Tinnevelly in Appeal Suit No. 405 of 1916.

(a) Provincial Insolvency Act (1907), S. 16—Defendants 2 to 4 and *R* being partners—*R* adjudicated insolvent—Whole debt due to partnership sold by Receiver instead of only *R*'s one fourth share—Defendant 1, bona fide purchasing—Plaintiff who held personal decree against defendants 2 to 4, attaching their share—Before attachment defendants 2 to 4, adjudicated and Receiver appointed—Receiver suing for recovering shares of defendants 2 to 4 as money had and received by defendant 1—Suit held unsustainable attachment by plaintiff being void.

Defendants 2 to 4 and one *R* were partners *R* was adjudicated an insolvent. The outstandings due to the partnership were sold in public auction by the Official Receiver instead of *R's* share alone, which was a fourth and were purchased by defendant 1. Defendant 1 believing bona fide that he had purchased the whole debt due to the partnership collected the debt. Plaintiff who held a decree against defendants 2 to 4, attached the latter's shares in the debt. Before the attachment defendants 2 and 3 were adjudicated insolvents. The plaintiff who was appointed Receiver in the suit in which the shares of defendants 2 to 4 were attached brought the present suit for recovery of three-fourths of the amount recovered by the defendant 1, from the partnership debtor as money had and received by the defendant 1 for the use of defendants 2 to 4.

Held: (1) that there being no privity between the plaintiff and defendant 1 or between defendants 2 to 4 and defendant 1, the action was unsustainable: *Litt* v. *Martindale* (1856) 18 *C. B.* 314; *Littlewood* v. *Williams* (1815) 6 *Taunt* 277; *Rogers* v. *Kelly* (1800) 2 *Camp* 123; *Chambers* v. *Miller* (1862) 32 *L. J. C. P.* 30; *Aiken* v. *Short* (1856) 1 *H. & N.* 210; 9 *B. L. R.* 348; 10 *Mad.* 69; 1 *I. C.* 408; 2 *Cal.* 393; *Neate* v. *Harding* (1851) 6 *Ex.* 349 and *Holt* v. *Ely* (1853) 1 *El. & Bl.* 795; *Dist.*

(2) that the attachment effected by the plaintiff was void and of no effect as the shares of defendants 2 to 4 had by their adjudication become vested in Official Receiver: 34 *I. C.* 602, *Expl.* [P 958 C 1]

(b) Insolvency—Receiver—Insolvent's properties become divisible among creditors from date of adjudication which relates back to date of petition.

Per *Oldfield, J.*—Whether there is or is not a distinct order vesting an insolvent's properties in the Official Receiver they become divisible among the creditors from the date of the adjudication in insolvency, which relates back to the petition. [P 958 C 2]

(c) Principal and Agent—Power of attorney only to collect debts—Agent cannot sell them.

Per *Oldfield, J.*—An agent authorized by a power of attorney only to collect debts has no authority to realize their value or any part of it by selling them. [P 959 C 1]

(d) Insolvency—Decree sought against firm—It is permissible to sue only solvent members—Partnership.

Per *Oldfield, J.*—It may be permissible in India as in England to sue only the solvent members of a firm when a decree is sought against the firm. [P 959 C 1]

(e) Contract—Right to enforce—Action for money had and received can be regarded as based on implied contract, but such promise cannot be deduced from *aequum et bonum*.

Per *Oldfield, J.*—The action for money had and received is still to be regarded, as it was originally as based on an implied or fictional promise. The authorities however negative the possibility of such a promise being deduced from *aequum et bonum*, as it may appeal to the sympathy of the Court in the particular case or from circumstances in which the defendant having no privity with the plaintiff when the money was received need not be supposed to have given and had no duty to give any promise. [P 960 C 2]

(f) Contract—Right to enforce—Although privity of contract is not necessary for action for money had and received, still there must be some privity of legally recognizable nature.

Per *Sadasiva Aiyar, J.*—While privity of contract between the parties is not necessary to sustain an action for money had and received, there must be what might be called some privity of a legally recognizable nature, such as some knowledge of particular facts in the man who received the money and some mistake or ignorance of fact on the part of the man who paid the money or some relation of trust or confidence between the person who received the money and the person claiming the money or a portion

thereof on which the Court could fasten as creating the relation of principal and agent (though by fiction) between the plaintiff and the defendant. [P 964 C 1]

(g) Co-sharers—Person ignorantly purchasing from co-sharer whole claim of all co-sharers, is not in position of confidence.

Per *Sadasiva Aiyar, J.*—A co-sharer may by a stretch of language, be treated as standing in a position of confidence towards his co-sharers, but a person who ignorantly purchases from a co-sharer the whole of the claim of all the co-sharers cannot be said to be in such a position. [P 964 C 2]

M. D. Deradoss—for Appellant.

A. Krishnaswami Aiyar—for Respondent.

Oldfield, J.—The main facts of this case can be stated shortly. Plaintiff obtained a decree against defendants 2, 3 and 4, and after attaching money, alleged to belong to them and to be in defendant 1's possession was appointed receiver in his own execution and in that capacity is now attempting to recover from defendant 1, the other defendants being impleaded as persons interested. The defence of defendant 1, the appellant before us is that (1) the money is a sum due to defendants 2, 3 and 4, and one Rajappa Mudali, the right to collect which he acquired in a legal manner (2) if his own title is bad some at least of the money has vested in persons other than plaintiff those who are administering defendants 2 and 3's estates in insolvency. The lower Appellate Court's judgment is mainly occupied with the second of these contentions. The facts relied on are that defendant 2 on 13th March 1911 and defendant 3 on 7th October 1911 became insolvents the one in Tinnevelly and the other in Madura and their assets therefore vested for the benefit of all their creditors before plaintiff attached this portion of them on 15th July 1914. The District Munsif's finding that this was so in the case of defendant 2 has not been attacked. He and the lower appellate Court found otherwise in the case of defendant 3, because he was adjudicated insolvent by the Official Receiver, Madura and no distinct vesting order such as *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (1) requires having been passed the debtor's estate is still available to satisfy individual claims. But this is unsustainable.

The authority cited may entail that the estate did not in the absence of a distinct order vest in the Official Receiver. The fact which the lower Courts overlooked remains that in any case it vested under S. 16 (1), Prov. Insol. Act, in the Court and became divisible among the creditors from the date of the petition and that under S. 16 (2) after the date of the adjudication which related back to that of the petition no creditor had any remedy against it. The cases of defendants 2 and 3, are therefore similar. Plaintiff can execute his decree only by proving in their insolvencies and on this ground at least his claim to what is alleged to be in part their money in defendant 1's hands must fail. The lower appellate Court has next held against defendant 1's right to that money on the special ground that he obtained it in proceedings which could not bind them or defendant 4. It consists in a debt which he has collected in virtue of his purchase at a sale held by the Official Receiver, Tinnevelly, in the administration of the estate of Rajappa Mudali above referred to and of an assignment to him, Ex. 1 by defendant 2. That sale is represented by defendant 1 as being of the debts due to a firm composed of Rajappa and defendants' 2, 3 and 4. But, as Ex. B, the auction list, shows, what was sold was only

"the right to arrears due to Rajappa Mudali, insolvent petitioner, as due under the day book and ledger of R. M. shop,"

R. M. N. being the firm above referred to. Ex. K, the sale-deed by the official receiver to defendant 1, is no doubt for

"the debts due to the joint shop conducted under the style of R. M. by Rajappa Mudali."

But the insolvency was, it is not disputed, that of Rajappa, not the firm; and it is sufficiently clear that only his share, not defendants' 2, 3 and 4, purported to be or could have been sold. How the Official Receiver could sell one partner's share of the debts due to the firm, instead of following the normal course and selling his share in its assets, as it might be ascertained, is not clear; but this irregularity appears to have gone unnoticed until the hearing in this Court and on the view I take would not affect the conclusion. The sale in these circumstances giving no title to any portion of the debts except Rajappa's, defendant 1, has relied also on Ex. 1, the assignment of 2nd and 3rd defendants' shares, which he obtained shortly after. It is, I agree with the lower Court, ineffectual as regards defen

(1) [1916] 34 I. C. 602.

dant 3's share because Ex. A, his power of attorney in defendant 2's favour, authorized the latter only to collect debts due to the shop, not to realize their value or any part of it by selling them. The result so far is that defendant 1's right to the debts has been established only in respect of defendant 2's and Rajappa's shares, but that, as already found, plaintiff cannot be heard to deny it in respect of the former's. The question is next of the general objection, which has been made to his claim to the share of defendant 4. That objection would, it may be observed, be available against his claim to the other shares also.

Before referring to this objection, I observe that plaintiff's decree, which has been shown us during the hearing, was obtained against defendants 2, 3 and 4, Rajappa not being a party. It may be permissible in India, as it is in England, [*Hawkins* v. *Ramsbottom* (2)] to sue only the solvent members of a firm, when a decree is sought against it. But there is nothing in the decree, except the use of the Vilasam R. M. N. before each defendant's name, and that is insufficient, to indicate that relief was sought or given against the firm's assets, not the defendants individually, and on such a decree plaintiff's proper course was after exhausting their separate property to proceed against their shares in those assets after they had been ascertained in proper dissolution proceedings, if necessary at his instance in defendants' insolvencies or otherwise. Again, however this point has not been taken at any stage and, I, therefore turn to the general argument already referred to.

It may for the present purpose be considered only as regards defendant 4, and it is that the suit will not lie, because plaintiff cannot recover from defendant 1 money which he received owing to a mistake from the debtors of defendant 4, plaintiff's debtor. Certainly defendant 1 had no right to receive the money. But there is no finding that in doing so, he acted otherwise than honestly and in bona fide mistake as to his right. When or how he became aware of the invalidity of his title, as based on his purchase at the Official Receiver's sale or his assignment (in the case of defendant 3), if he did become aware before collecting the money, has not been ascertained; but, the plaint containing no suggestion of fraud or collusion between him and the Official Receiver or any person concerned, no presumption can be made against him. And then, as plaintiff's position can be no better than that of his debtors, the question simplified is, whether defendant 4 or either of the others could recover from defendant 1 what he has received mistakenly as due to them.

This question in terms of English law is, whether in the circumstances an action would lie against defendant 1 for money had and received for their use; that is, for the use of plaintiff. The scope of this form of action and the considerations which led to its extension are discussed fully in *Sinclair* v. *Brougham* (3), although it is possible that the former has never been defined exhaustively. Plaintiff's argument has accordingly been that it comprehends all claims arising, in the words of Blackstone's definition (Comm. 3, 162), *ex aequo et bono* and "the justice of the case."

Defendant 1 contends, and I shall hold, that one test of its applicability to such facts, as those before us, is afforded by the existence of privity between the plaintiff and defendant, a test which those facts do not satisfy. For it is not suggested that plaintiff or defendants 2, 3 and 4 had any knowledge of or connexion with the payment to defendant 1. No doubt there are, as is to be expected in the circumstances referred to in *Sinclair* v. *Brougham* (3), decisions, in which this test was not applied clearly. But, so far as they cannot be distinguished, they must be regarded as discredited by the mass of cases, in which the general rule was enunciated. To refer to cases, in which the question arose, as it arises here, in connexion with the recovery of payments mistakenly made to the defendant, not by the plaintiff directly, but by a third person alleged to be liable to the plaintiff and in which there was no direct or obvious fiduciary relation between the parties, reliance has been placed first on *Litt* v. *Martindale* (4) and it is certainly in plaintiff's favour. But, although the objection taken by the defendant was that money had and received would not lie, the judgments (which are laconic) indicate that the action was treated as

(2) [1815] 6 Taunt 179.

(3) [1914] A. C. 398.
(4) [1856] 18 C. B. 314.

founded on fraud, of which there is no question in the case before us. In *Littlewood* v. *Williams* (5) the point of privity was not dealt with distinctly, but would appear to have been decided in the plaintiff's favour on the ground of their previous relation with the defendants and their servant and his, from whom he received the money, the conclusion being that it was the plaintiff's money in his hands. These English cases, therefore the strongest on plaintiff's side, in no way detract from the insistence on the necessity for evidence of privity in others, to which I turn. In *Rogers* v. *Kelly* (6) the defendant received money due on plaintiff's bill from his bankers owing to a clerk confusing a bill which had been provided for with one which had not been; and the action was dismissed on the ground that whatever plaintiff's position as against his bankers or theirs against defendant, there was no privity between the parties before the Court. And so also in *Chambers* v. *Miller* (7) and *Aiken* v. *Short* (8) in which it was regarded as material that the mistake owing to which the defendant received the money was one, with which he had nothing to do, since it was between the person who paid him, and the plaintiff. In these cases defendant was no doubt entitled to the money, though not from that person. But that was not so in *Rogers* v. *Ingham* (9) a suit between two persons claiming to be legatees of whom the defendant had been paid by the executor's mistake; and, though the action for money had and received was not in question, the principle now under discussion was applied, James, L. J., observing that relief against mistake had never been given in the case of a simple money demand between the parties, there being no fiduciary relation between them and no equity to supervene by reason of the conduct of either.

So also in *Mackersy* v. *Ramsays* (10), where it was held that, because privity existed between plaintiff and defendant, his banker who had undertaken to collect the amount of his bill and had agreed to credit him with the amount received, the latter was liable to him and that, because privity did not exist between him and the banker's agents, whose insolvency caused loss of the money, those agents were not. And in *Prince* v. *Oriental Bank Corporation* (11), in which *Mackersy* v. *Ramsays* (10) was approved, the absenceof privity again afforded a ground of decision. It is to be observed that the language in *Sinclair* v. *Brougham* (3), on which plaintiff's claim to a liberal view of the action for money had and received mainly rests, was used rather of its early development than of its scope as settled at the present time by authority. It is no doubt still to be regarded, as it was originally, as based on an implied or fictional promise (see the judgments of Lords Haldane and Dunedin). But *Sinclar* v. *Brougham* (3) is completely in accordance with the great body of other authority in negativing the possibility of such a promise being deduced, as plaintiff here would deduce it from the *aequum et bonum*, as it may appeal to the sympathy of the Court in the particular case, or from circumstances, in which the defendant having no privity with the plaintiff, when the money was received, need not be supposed to have given and had no duty to give any promise. Here defendant 1 was clearly under no such duty. For he collected the debts due to defendant 4 and others without reference to them and was not enabled to do so by reason of any fiduciary relation with them or in consequence of any fact independent of the willingness of their debtors to pay him.

The conditions, on which a plaintiff can sue for money received to his use, have been discussed in India more often with reference to the applicability of Art. 62, Sch. 1, Lim. Act, than to the existence of a right of action; and when the latter has been in question, the issue of privity has seldom arisen or been raised. The cases, therefore, are of little assistance. Plaintiff, however, relies on *Syud Lootf Ali Khan* v. *Musammat Afzuloonissa Begum* (12) and *Tellis* v. *Saldanha* (13), the latter being explained in *Vaidyanath Aiyar* v. *Aiyasamy Aiyar* (14). But in all these the parties were in the relation of joint tenants or co-owners and the principle of S. 90, Trusts Act, was applicable, the defendants

(5) [1815] 6 Taunt. 277.
(6) [1809] 2 Camp. 123.
(7) [1862] 32 L. J. C. P. 30.
(8) [1856] 1 H. & N. 210.
(9) [1876] 3 Ch. D. 351.
(10) [1843] 9 Clark & Finnelly 818.
(11) [1878] 3 A. C. 325.
(12) [1871] 9 B. L. R. 348.
(13) [1887] 10 Mad. 69.
(14) [1909] 32 Mad. 191=1 I. C. 408.

having in each case received the money sued for as representing the plaintiffs and themselves; and a fiduciary relation was, therefore, in question. *Sankunni Menon* v. *Govindan Menon* (15) was no doubt decided with reference to Blackstone's definition of the action and a very general statement that the defendant's obligation arose *ex aequo et bono*. But the suit was to recover money, for which no doubt defendant a member of a tarwad and plaintiff had given a pro-note, apparently by way of acknowledgment, to the karnavan; and, when the money was returned from the Government deposit, for which defendant originally received it, his receipt of it was aparently regarded as part of the transaction, into which he had entered with the karnavan's concurrence for the tarwad's benefit. The decision, therefore, might, it would seem, have been based on a ground narrower than the one adopted and consistent with the conelusion already reached on English authority.

In it reference was made to *Mahomed Wahib* v. *Mahomed Ameer* (16), a case, in which the fiduciary relation between the parties, co-sharers, was clear and in which therefore, nothing turned on the reference it contains to *Litt* v. *Martindale* (4), already cited, as an action for money had and received. This reference in fact merely reproduced that made in another case relied on by plaintiff, *Raghumoni Audhikary* v. *Nilmoni Singh Deo* (17), in which *Litt* v. *Martindale* (4), *Neate* v. *Harding* (18), and *Holt* v. *Ely* (19) were referred to. But the claim in the two last mentioned cases was for money taken wrongfully from the plaintiff, directly in the one and from his agent in the other; and the question of privity was, therefore, not raised in them. It has been pointed out that it was not discussed in the first mentioned; and in *Raghumoni Audhikary* v. *Nilmoni Singh Deo* (17), the claim being for money obtained fraudulently by the defendant from the Collector, who received it as plaintiff's deposit and apparently was holding it for him, it would probably have been useless to raise it. On the other hand, in *Ramaswami Aiyar* v. *Kanthayyan* (20), also a case of withdrawal of money from a collectorate but not one in which it was held as a deposit or withdrawn by fraud although the relevancy of the reference to *Kendal* v. *Wood* (21) is not clear, the suit was held unsustainable, on the ground that the payment by the Collector and the receipt by defendants were bona fide and without notice of plaintiff's preferential right and *Harihar Missir* v. *Syed Mohammad* (22) was a case, in which evidence of privity was insisted on and the suit was held to be governed by Art. 62 only because that evidenc was sufficient. There is accordingly no reason for holding that the principle accepted in England has been rejected in this country. We must therefore decide that plaintiff's suit does not lie for any of the money claimed.

This conclusicn renders it unnecessary to deal with the argument of Mr. A. Krishnaswamy Aiyar for plaintiff relating to defendant 4's share of the amount received by defendant 1 and based on Lindley on Partnership, Edn. 6, p. 692, or with the memorandum of objections. The result is that the appeal is allowed and the suit dismissed, plaintiff to pay defendant 1's costs throughout. The other defendants have not been made parties to the appeal. The memorandum of objections is dismissed with costs.

Sadasiva Aiyar, J.—The material facts may be shortly stated thus:—The Official Receiver of the Tinnevelly District sold by public auction the debts due to a partnership of four persons who carried on business in Tuticorin. The principal partner, Rajappa Mudali, was adjudicated an insolvent with effect from 5th December 1908. The partnership business itself had been closed in February 1908 (see Ex. 1). I think it may be taken that the partnership had become dissolved between February 1908 when the business was closed in December 1908 when Rajappa was declared insolvent, except, of course, that the rights and obligation of the partners continued in all things necessary for winding up the business of the partnership. (S. 263, Contract Act.) When Rajappa Mudali was adjudicated an insolvent, he was entitled only to $\frac{1}{4}$th share in the assets of the

(15) A. I. R. 1914 Mad. 572=14 I. C. 254 = 37 Mad. 381.
(16) [1905] 32 Cal. 527
(17) [1876] 2 Cal 393
(18) [1851] 6 Ex. 349
(19) [1853] 1 El. & Bl. 795
(20) [1899] 9 M. L. J. 57
(21) [1871] 6 Ex. 243.
(22) [1917]1 P. L. J. 374=37 I. C. 30

partnership, which assets principally consisted of the outstandings due to the partnership by its debtors. The Official Receiver seems to have put up for auction sale the whole of the outstandings due to the partnership and defendant 1 became the purchaser thereof in October 1910 (see Ex. K) for Rs. 250. I think it is clear that defendant 1 (the appellant before us) never intended to purchase only Rajappa Mudali's ¼th share in the outstandings and it follows that he never considered himself as a co-sharer with the other three partners of Rajappa Mudali, (namely, the defendants 2, 3 and 4) of the right to recover those outstandings. He never recognized defendant 4 as having been a partner at all, and defendant 4 himself always repudiated that he was a partner, though the finding of the lower Courts (which is binding on us in second appeal) is that he was a partner.

Defendant 2 in November 1910 (within three weeks of defendant 1's purchase) admitted in Ex. 1 that the whole of the outstandings belonged to defendant 1 by his purchase at the Receiver's sale, and on receipt of a consideration released all his (defendant 2's) right in, or connexion with, the outstandings in favour of defendant 1. Thus defendant 1 became legally entitled at least to half share in those outstandings, whether his claim to the whole of the outstandings was well founded or not.

The plaintiff got a decree for money against defendants 2 to 4 in a Small Cause Suit of 1910. Defendant 1 persuaded a debtor of the firm to agree to pay about Rs. 1,650 to him in compromise of a suit brought by him against that debtor and afterwards received Rs. 450 more then three years before this suit and again Rs. 1,200 in 1912 within three years before this suit from that debtor. The plaintiff, in execution of his Small Cause decree against defendants 2 to 4, attached ¾ths of this amount of Rs. 1,650 in July 1914, though meanwhile defendant 2 had relinquished his rights to defendant 1 in November 1910 and had even been declared insolvent in the Madura District Court with effect from March 1911. Defendant 3 also had been adjudicated insolvent in the same Court with effect from October 1911. Thus it is clear that the plaintiff's attachment in 1914 (assuming that defendants 2 and 3 continued to have each 1/4th share in the outstandings of the firm notwithstanding the Tinnevelly Receiver's auction sale of the whole to defendant 1 in October 1910) was wholly ineffectual so far as defendants 2 and 3's shares were concerned, as the said shares had become vested in defendant 1 and the Official Receiver respectively or in the Official Receiver of Madura alone before the attachment of July 1914.

The plaintiff brought the present suit in April 1915 for recovery of 3/4ths of Rs. 1,650 (Rs. 1,237-8-0) recovered by defendant 1 in 1911-12 from the partnership-debtor. (The plaintiff had been appointed receiver in the suit in which the shares of defendants 2 to 4 were attached in 1914.) The suit was brought on the allegation that 3/4ths share of the money so recovered by defendant 1 was money had and received by defendant 1 for the use of defendants 2 to 4. The lower Courts have given a decree in favour of the plaintiff for half of Rs. 1,200 (that is, Rs. 600) which defendant 1 collected from the partnership-debtor in 1912 within three years of the suit, treating that Rs. 600 as the half share of defendants 3 and 4 received by defendant 1 for the use of defendants 3 and 4. I shall at once dispose of one of the points that arise in the case by stating that the plaintiff's attachment of defendant 3's alleged 1/4th share in the Rs. 1,200 is legally ineffective as that share, assuming it to have existed in 1911, had become vested in the official receiver of Madura who was not a party to the plaintiff's execution proceedings of 1914. The second appeal has therefore to be allowed in any event to the extent of half the amount decreed in plaintiff's (respondent's) favour by the lower Courts.

The only question therefore remaining is whether defendant 1 received Rs. 300, being the 1/4th share (of the Rs. 1 200) due to defendant 4, for the use of defendant 4 and whether defendant 1 is therefore liable to pay over that Rs. 300 with interest from 23rd April 1915 to the plaintiff. The question of law involved must be admitted to be one of very great difficulty. Suppose *A* and *B* are joint creditors of *C*, who owes them Rs. 100. *D*, a stranger, purchases the whole debt from *A*, believing that *A* was entitled to transfer the whole debt of Rs. 100 to *D*. *D* then is paid by *C*, the debtor, the whole

of the Rs. 100. Can *B*, the co-creditor, treat Rs. 50 of the Rs. 100 as having been received by *D* for *B's* use and sue to recover it from *D*? (It will be seen that I have tried in the above illustration to eliminate as far as possible unnecessary incidents appearing in the facts of the present case but not bearing on the question of law.) Now it is clear that if *A* himself received the whole of the Rs. 100 from the debtor *C*, *B*, his co-creditor, could treat Rs. 50 as money had and received by *A* for *B* and sue *A* for it. The question is whether when *D* got the transfer of the debt from *A*, believing that *D* got the title to it free from any claim to any portion of it on the part of anybody else, and when *D* recovered the whole of the money from the debtor *C* on that footing, *D* could be treated as having received half of it on behalf of *B*. In *Sinclair* v. *Brougham* (3) (House of Lords), Lord Chancellor Haldane, Lord Dunedin and Lord Sumner have considered the nature of the action for money had and received. The Lord Chancellor says (see pp. 415 to 417 of 1914 *A. C.*) :

"Broadly speaking, so far as proceedings in personam are concerned, the common law of England recognizes only actions of two classes, those founded on contract and those founded on tort. When it speaks of actions arising *quasi ex contractu*, it refers merely to a class of actions in theory based on a contract which is imputed to the defendant by a fiction of law . . . . The action (for money had and received) was in principle one which rested on a promise to pay, either actual or imputed by law . . . . Lord Mansfield explained . . . . 'If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action founded on the equity of the plaintiff's case, as it were upon a contract' . . . . The form of the common *indebitatus asumpsit count* . . . . was a form of a claim which had been very gradually evolved. The researches of recent writers appear to me to have placed its origin in its true light. The basis of actions of this kind was originally tort, a writ having been framed in consimili casu under the provisions of Ch. 24 of the Statute of Westminster (13 Edw. 1)

By degrees, out of this action on the case and as one of its forms, a new form which was seen to diverge wholly form tort, the action of assumpsit arose . . . . . Holt, C. J., is reported to have said: 'That the notion of promises in law was a metaphysical notion for the law makes no promise, but where there is a promise of the party.' Yet the observation of Holt, C. J., notwithstanding, a little later on this 'metaphysical notion' became firmly established. For it was just the fiction of attributing a promise in a multitude of cases where in reality there was none, which finally gave the action its comprehensive range and made it available even where no fact importing or implying privity of contract could be proved. The history of the action of the assumpsit has been described by a writer to whom lawyers and historians alike owe much, the late Professor Ames of Harvard University, in language which shows how easily the fiction of a promise grew into part of the law. Speaking of the action of assumpsit generally he says: 'In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded debt, became concurrent with account, with case upon a bailment, a warranty, and bills of exchange, and competed with equity in the case of the essentially equitable quasi contracts growing out of the principle of unjust enrichment."

Lord Dunedin says at pp. 431 to 433 (*of* 1914 *A. C.*):

"The familiar case is the paying of money by *A* to *B* under the mistaken impression in fact that a debt was due, when in truth there was no debt due. It was to fit cases of this sort that the common law evolved the action for money had and received. I think one cannot help feeling that this action was truly the putting of an equitable doctrine under a legal form. I am using the word equitable in a non-technical sense, for I am not suggesting for a moment that the action was borrowed from technical equity. My noble and learned friend Lord Sumner in his opinion, which I have had the advantage of seeing, has conclusively shown that it was not. But being a legal form, it does not admit in spite of Lord Mansfield's dictum that such an action was very beneficial and to be encouraged, of being stretched beyond its capacity . . . . . My Lords, I confess that for a person not bred to the common law to express an opinion as to the true meaning aud extent of common law actions is to handle *periculosae plenum onus aleae*."

Lord Sumner, says at pp. 453 to 456 (*of* 1914 *A. C.*):

"The action for money had and received cannot now be extended beyond the principles illustrated in the decided cases, and although it is hard to reduce to one common formula the conditions under which the law will imply a promise to repay money received to the plaintiff's use, I think it is clear that no authority extends them far enough to help the appellants now."

Then the noble Lord referred to the argument invoking Lord Mansfield's authority that:

"Whenever it is ex aequo et bono for *A* to repay money which he has received from *B* and would be against conscience for *A* to keep it, then *B* has an equity to have A decreed to repay it,"

and proceeded:

"My Lords, I cannot but think that Lord Mansfield's language has been completely misunderstood . . . . Even the decision in *Moses* v. *Macferlan* (23), which has since been dis-

(23) [1760] 2 Burr. 1005.

sented from, for some time unsettled the law [see Smith's Leading Cases, Notes to *Marriot* v. *Hampton* (24)], and this last mentioned case is one which illustrates the proposition that money is not thus recovereble in all cases where it is unconscientious for the defendant to retain it, for no one could doubt that Hampton's retention of the money in that case was very like sharp practice .... With whatever complacency the Court of King's Bench might regard the views expressed in *Moses* v. *Macferlan* (23), protests were very early made against it in the Common Pleas [*Johnson* v. *Johnson* (25)], and in *Miller* v. *Atlee* (26) Pollock, C. B., bluntly declared the notion that the action for money had and received was an equitable action to be 'exploded' and Parke, B., sitting by him, did not say him nay. This episode is reported only in 13 Jurist, but it smaks of truth.... There is now no ground for suggesting as a recognizable 'equity' the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer."

I have quoted thus at a length, which may be called wearisome, to show how dangerous it would be for an Indian Judge like myself to deal in my own language with the nature, scope and extent of the action for money had and received or to classify accurately and exhaustively the circumstances which would entitle a person to bring an action for money had and received against another, especially when Latin phrases like aequo et bono have to be freely used by Judges and counsel to explain themselves fully. Lord Sumner at p. 458 (*of* 1914 *A. C.*) says: "Of equitable principles I hesitate to speak confidently." Lord Dunedin has in a passage which I have already quoted expressed himself even still more diffidently as "a person not bred to the common law" about his ability to express an opinion as to the true meaning and extent of common law actions. In *Sankunni Menon* v. *Govindan Menon* (15) Benson, J., and myself did quote Blackstone to indicate the wide nature of the common law action for money had and received in the olden days. But the scope of that action ought not to be extended beyond what would be covered by the principles governing the numerous decisions which have laid down what kinds of actions do come within it and what kinds of actions do not. In the case in *Sankunni Menon* v. *Govindan Menon* (15) the defendant who received the money knew from the beginning that the money belonged to his tarwad and not to himself and the person who paid it did not know it. While privity of contract between the parties is, of course, not necessary to sustain such an action, I think there must be what might be called some privity of a legally recognizable nature, such as some knowledge of particular facts in the man who received the money, and some mistake or ignorance of fact on the part of the man who paid the money, or some relation of trust and confidence between the person who received the money and the person claiming the money or a portion thereof, on which the Court could fasten as creating the relation of principal and agent (though by fiction) between the plaintiff and the defendant. I shall try to illustrate what I mean by a simple example: *B* owes money to *A*. *A* dies. There is a dispute between *C* & *D*, each claiming to be the sole heir of *A*. *B* pays the money to *C*. Can *D* sustain an action for money had and received against *C* even if he establishes against *C* that he is the rightful heir and not *C*? I am clearly of opinion that he could not do so, his only remedy being against the debtor *B*. In the present case, it is not shown that when the partnership-debtor paid money to defendant 1, defendant 1 knew that he had not a right to the whole of the money paid to him and it is also not shown that he was ever in a position of trust or confidence towards defendant 4 and it is also not shown that the debtor had any fraudulent motive in paying the whole money to defendant 1. A co-sharer may by a stretch of language, be treated as standing in a position of confidence towards his co-sharers, but a person who ignorantly purchases from a cosharer the whole of the claim of all the cosharers cannot be said to be in such a position. I therefore agree that the plaintiff has no cause of action against defendant 1 and I concur in the order proposed by my learned brother.

S.N./R.K. *Appeal allowed.*

(24) [1797] 7 T. R. 269.
(25) [1802] 3 Bos. & Pul. 162.
(26) [1849] 3 Ex. 799.

A. I. R. 1919 Madras 964

ABDUR RAHIM AND KUMARASWAMI SASTRI, JJ.

Kanakasundaram Pillai—Petitioner.

v.

Somasundaram Pillai — Opposite Party.

Civil Revn. Petn. No. 2 of 1917, Decided on 18th July 1917.

Civil P. C. (1908), O. 9, R. 13—Mortgage Decree—Final decree passed ex parte—Application to set it aside is maintainable.

A final decree passed ex parte in a mortgage suit is a "decree" within the meaning of O. 9, R. 13, and an application to set it aside is therefore maintainable under the rule.

[P 965 C 2]

T. R. Venkatarama Sastri and *S. Visvanatha Aiyar*—for Petitioner.

S. Muthiah Mudaliar for *G. S. Ramachandra Aiyar*—for Respondents.

Judgment.—The petitioner obtained a preliminary mortgage decree for the sale of certain property and an application was then made for the passing of the final decree. At the hearing of this application the respondent did not appear and the final decree was passed in his absence. Subsequently he made an application under O. 9, R. 13, Civil P.C. to set aside the final decree, which he alleged was passed ex parte. The District Munsif acceded to that application and the petitioner now has applied to us in revision to set aside the order firstly on the ground that it is not a case to which O. 9, R. 13, applies.

The point raised seems to be one of first impression and its decision depends on the interpretation of O. 9, R. 13. It says:

"In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside."

Now there is nothing in the language of that rule which compels us to limit the word "decree" to the preliminary decree in a case where the law contemplates preliminary and final decrees. It cannot be denied that a final decree is as much a decree within the meaning of the law as a preliminary decree. The Code provides certain procedure to be followed in the proceedings for a final decree; an application has to be made by the preliminary decree-holder and notice has to be given to the judgment-debtor to show cause why such a decree should not be passed. We do not see any good ground, nor has any been suggested to us why a final decree like this should not be treated as a "decree" within the meaning of O. 9, R. 13, if it has been passed ex parte within the meaning of the law. In such cases, the proceedings commencing from the preliminary decree must be treated as separate proceedings and if those proceedings are terminated by a decree which has been passed ex parte we do not see, so far as the language of the rule or of any other provisions of the Code that have been brought to our notice are concerned, why the procedure set down for setting aside ex parte decrees should not apply. Our attention has been drawn to the fact that R. 13, contemplates cases in which the summons has not been duly served, and the contention is that in proceedings for final decree in a mortgage suit what is served is not a summons but a notice. We do not think that there is really any substantial distinction to be based on a ground like this, and we are of opinion that the ends of justice require that we should not unduly narrow the scope of R. 13, O. 9. It is of importance that the proceedings for a final decree should be had with due regard to the procedure laid down for the purpose and that if a final decree is passed ex parte in the absence of the defendant, he should be given an opportunity of having that decree set aside by a proper application if he was prevented from appearing for sufficient cause.

The next contention raised is that the application was made after the time limited had expired, but that is not a question of jurisdiction in which we can interfere with the order in revision. The petition therefore fails and is dismissed with costs.

S.N./R.K. *Petition dismissed.*

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* A. I. R. 1919 Madras 965
Full Bench

WALLIS, C. J., OLDFIELD, SADASIVA AIYAR, SPENCER AND BAKEWELL, JJ.

Vasireddi Venkata Lakshmi Narasamma—Plaintiff—Appellent.

v,

Secretary of State—Respondent.

Second Appeal No. 1824 of 1916, Decided on 17th April 1918, from decree of Temporary Sub-Judge, Guntur, in Appeal Suit No 187 of 1915.

*** Grant — Construction — Grant of land bounded by non-navigable river—Onus of showing that grant did not include bed of river is on grantor.**

Where a grant is made of land which is bounded on one side by a non-navigable river, the onus of showing that the grant did not cover the bed of the river *ad medium filum aquae* is on the grantor. The presumption may be strong or weak according to the circumstances of the particular case, and the amount of evidence required to rebut it will vary accordingly.

[P 968 C 1]

T. V. Venkatarama Aiyar and *R. Rajagopala Aiyar*—for Appellant.

V. Ramesam—for the Crown.

Order of Reference.

Seshagiri Aiyar and Napier, JJ.—This is a suit by the trustee of a temple for a declaration that the lands belong to him and that the Secretary of State is not entitled to put up the grass thereon to auction or to interfere in any manner with the right of the plaintiff. The plaint, as originally instituted, contained the statement that the inam granted to the temple comprised lands on both sides of the Tungabhadra river and that consequently the entire bed of the river belonged to the temple. It has been found by the Subordinate Judge, and we see no reason for not accepting that finding, that the boundary of the inam village is the river itself and that no lands on the other side of the river were granted to the temple. On this finding it has been argued before us that the plaint temple is entitled to half the bed of the river. The learned Government Pleader took exception to this change of case on the part of the plaintiff; but we think that in the circumstances of the case the plaintiff should not be refused relief because he put his case too high.

The point for consideration therefore is where a grant is made fixing one of the boundarise of the lands granted as a river, whether the grantee is entitled to half the bed of that river. The decisions of the English Courts seem to be uniform in this respect. *Lord* v. *Commissioners for the City of Sydney* (1) and *Maclaren* v. *Attoyney-General for Quebec* (2) and other cases referred to in these two decisions have accepted the principle that where the lands are bounded by a river, the grantee is entitled to lands *ad medium filum aquae*. In *City of London Land Tax Commissioners* v. *Central London Ry.* (3) the House of Lords applied this principle to the case of highways. All the learned Lords who took part in the decision affirm that it is an established principle of law that the

" ownership of frontages on either side of the street extended *ad medium filum viae*, just as, had the division or boundary between two subjects been a stream, the ownership of the riparian proprietors would have extended *ad mediam filum fiaminis*."

In *Whitmores (Edenbridge) Lim.* v. *Stanford* (4) this rule was extended to artificial channels. In this country, *Balbir Singh* v. *Secy. of State* (5) accepts the principle of the English decisions. *Powell* v. *Powell* (6) is to the same effect. In *Secy. of State* v. *Kadirikutti* (7), the learned Judges say that the rule that riparian proprietors are entitled to the bed of the river *ad medium flum* is not applicable to navigable rivers. That is an indication that if it is a non-navigable river, the principle of English Law would be applied in this country. In *Sundaram Ayyar* v. *Municipal Council of Madura* (8), Justice Bashyam Aiyangar extended the doctrine to highways. The matter was recently discussed by three Judges of thia Court in *Secy. of State* v. *Janakiramayya* (9). Oldfield, J. seems to doubt whether the principle referred to is applicable to India. Sadasiva Aiyar, J. on the other hand apparently sees no objection to the applicability of that doctrine to India. Bakewell, J. expressed no opinion on that question. The learned Government Pleader referred us to two cases decided by the Judicial Committee as throwing some doubt upon the applicability of a similar principle to Indian conditions. In *Sri Balusu Ramalakshmamma* v. *Collector of the Godvari District* (10), the decision turned upon the fact that the ownership of the bed of the river was not the question raised for decision in the Courts below. In rejecting the contention which was put forward for the first time before the Board, Lord Hobhouse made use of these observations:

" The result is that their Lordships having grave doubts whether the presumption applicable to little English rivers applies to great rivers such as the Godavari, would require to know much more about the river in question and the mode in which it has been dealt with before deciding as to the presumption or its rebuttal."

In a more recent case reported as *Raja Srinath Roy* v. *Dinabandhu Sen* (11), in which the question related to the right of fishery possessed by a riparian proprietor, Lord Sumner in delivering the judgment of the Judicial Committee

(1) [1858-59] 12 Moore P. C. 473=7 W.R. 267.
(2) [1914] A. C. 258=83 L. J. P. C. 201.
(3) [1913] A. C. 364=82 L. J. Ch. 274.
(4) [1909] 1 Ch. 427=78 L. J. Ch. 144.
(5) [1900] 22 All. 96.
(6) [1916] 36 I. C. 567.
(7) [1890] 13 Mad. 369.
(8) [1902] 25 Mad. 635.
(9) [1915] 30 I. C. 609.
(10) [1899] 22 Mad. 464=26 I. A. 107 (P. C.).
(11) A. I. R. 1914 P.C. 48=42 Cal. 489 (P.C

says at p. 531 (of *I. L. R. 42 Cal.*) after reviewing at considerable length the English and American law on the subject:

"In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day, regard must be had to the physical, social and historical conditions to which that rule is to be adapted."

Having regard to the observations of the Judicial Committee and to the difference in opinion between two learned Judges of this Court, we do not think it desirable that we should finally dispose of this matter. The question is of very great importance to the Government as well as to private proprietors, and we think it desirable that the opinion of the Full Bench should be invited on the subject. We therefore propose the following questions for the opinion of the Full Bench: Whether when Government makes a grant in India of a village which is described as bounded by a non-navigable river, the right of the grantee extends to half the bed of the river, and whether the onus of proving that the grant dld not cover the bed of the river is on the grantee or on the grantor. This last question has become necessary having regard to the observations of Lord Hobhouse in *Sri Balusa Ramalakshmamma* v. *Collector of the Godavari District* (10), wherein he says the question of presumption or its rebuttal in a country like India would depend upon considerations different from those which obtain in England.

Opinion.—In Ben. Regn. 11 of 1825, the legislature, acting, as recited in the preamble, on reports from the law officers as to the provisions of the Mahomedan and Hindu laws and on a consideration of the decisions of the Sudder Adalut, proceeded in S. 4 to make a distinction as to the ownership of churs in navigable and non-navigable rivers, which in the opinion of Sir M. R. Westropp, C. J., in *Baban Mayacha* v. *Nagu Shravucha* (12) raised an inference, though not conclusive that the beds of non-navigable rivers are generally private property. The observation of the Judicial Committee in *John Doe* v. *East India Company* (13), appears to proceed upon the same view. The law was laid down in the same way in *Rajah Neelanand Singh* v. *Rajah Teknarain Singh* (14), and by the Calcutta High Court in *Hunooman Doss* v. *Shamchurn Bhutta* (15) and *Bhageeruttee Dabea* v. *Greesh Chunder Chowdhry* (16), where the Court held that:

"by the common law of this country the right to the soil of the bed river when flowing within the estates of different proprietors, belongs to the riparian owners, *ad medium filum aquae*."

In this Presidency the decisions of the Sudder Court in *Sree Rajah Oopalapaty Jogee Jaganadheruze* v. *Sub-Collector of Rajahmundry* (17), and of the High Court in *Subbaya* v. *Yarlagadda* (18) were to the same effect. It is only in the case of navigable rivers that the presumption has been laid down the other way by the Judicial Committee in *Eckowri Singh* v. *Heeraloll Seal* (19): *Felix Lopez* v. *Mudhun Mohun Thakoor* (20) and *Nogender Chunder Ghose* v. *Mahamed Esoff* (21), while in *Forbes* v. *Meer Mahomed Hossein* (22), it appears to be assumed that in the case of non-navigable rivers the ownership of the bed is in the riparian owners. The decision of the Judicial Committee in *Kali Kissen Tagore* v. *Jodoo Lal Mullick* (23) and *Khagendra Narain Chowdhry* v. *Matangini Debi* (24), appears to proceed on the same basis. In *Sri Balusu Ramalakshmamma* v. *Collector of the Godavari District* (10), where the appellant before them sought to base her title to the lanka in question on the presumption arising from the fact that she was the owner of both banks of the river, their Lordships observed that such a claim was not made by the pleadings or by the issues, and was one about which much evidence might and probably would have been given if it had been raised; and they accordingly declined to discuss the question because it was not relevant to the case made by the plaintiff, and merely observed that, having grave doubts whether the presumption applicable to little English rivers applies to great rivers such as the Godavari, they would require to know much more about the rivers in question before deciding as to the presumption or its rebuttal. This reservation in a case in which the question in their Lordships' opinion did

(12) [1877-78] 2 Bom. 19.
(13) [1854-57] 6 M. I. A. 267 (P.C.).
(14) [1862] Cal. S. D. A. R. 160.
(15) 1 Hay 426.
(16) 2 Hay 541.
(17) [1858] S. D. A. 180.
(18) [1862-63] 1 M. H. C. R. 255.
(19) [1869] 2 B. L. R. 4=12 M. I. A. 136 (P.C.).
(20) [1870] 5 B. L. R. 521 (P.C.).
(21) [1873] 10 B. L. R. 406=18 W. R. 113.
(22) [1874] 12 B. L. R 210=20 W. R. 44.
(23) [1880] 5 C. L. R. 97=6 I. A. 190 (P.C.).
(24) [1890] 17. Cal. 814=17 I. A. 62 (P.C.).

not arise and in which the authorities above referred to were apprrently not cited, cannot be taken as a ruling that the presumption is generally inapplicable in the case of non-navigable rivers in this part of India. Certain dicta as to the ownership of river-beds were also cited from recent cases in this Court, but they are far from uniform and in none of these cases was the present question considered in the light of the authorities. We therefore consider it unnecessary to refer to them. The result of the authorities in our opinion is that, as regards a grant of land in India described as bounded by a non-navigable river, the onus of showing that the grant did not cover the bed *ad medium filum aquae* is on the grantor. The presumption may be strong or weak according to the circumstances of the particular case, and the amount of evidence required to rebut it will vary accordingly. We do not think it desirable to attempt to lay down any more definite rule. Reference has been made to the Madras Land Encroachment Act, Act 3 of 1905, but that Act cannot affect the pre-existing rights, if any of the grantee in this case.

S.N./R.K. *Reference answered.*

A. I. R. 1919 Madras 968

PHILLIPS AND NAPIER, JJ.

P. Varadarajulu Naidu In re— Accused-Petitioner.

Criminal Revn. No. 596 of 1918 and (Criminal Revn. Petn. No. 482 of 1918) Decided on 15th October 1918.

(a) Criminal P. C. (1898), S. 196—Actual words of complaint need not be sanctioned.

Under S. 196 it is not necessary that the actual words of the complaint should be sanctioned. 1 *I. C.* 22 & 36, *Foll.* [P 968 C 2]

(b) Criminal P. C. (1898), S. 196—Sanction by Government—Specific authority held sufficient.

The Government authorized the District Magistrate by telegram to prosecute the accused under S. 124, I. P. C. after consultation with the Public Prosecutor and directed the District Magistrate to submit the complaint prepared 'for issue of supplemental sanction:

Held: (1) that the last clause of the telegram should be read apart from the rest of the order and that it was not intended to refer back to the first portion of the telegram or to limit the authority given; (2) that the telegram contained sufficient sanction under S. 196, 7 *I. C.* 359; *Diss from*; 16 *Mad.* 468; *Dist.* [P 968 C 2]

(c) Criminal P. C. (1898), S. 196—S. 196 is disenabling and must be construed strictly.

Per *Napier, J.*—Senction 196, Criminal P. C., is not an enabling section. It is a disenabling section and must be read simply as requiring the specific authority of Government for institution of the proceeding and nothing more. [P 969 C 2]

K. Srinivasa Aiyangar and *A. Krishnaswami Aiyar*,—for Petitioner.

E. R. Osborne—for the Crown.

Phillips, J.—The only point argued before us, among the many objections taken in the revision petition, is that the complaint was filed without the authority of Government. A telegram was sent by Government to the District Magistrate (Ex.-A) and it expressly authorized the Public Prosecutor to file a complaint against Varadarajulu Naidu under S. 124-A, I. P. C., It further authorises him, to act immediately if the District Magistrate thinks it advisable after consulting him. and this consultation does not refer, as suggested by Mr. Srinivasa Ayyangar, to the actual filing of the complaint. The last sentence of the telegram enjoins the District Magistrate to submit the complaint prepared "for issue of supplemental sanction." It is contended that these words modify the previous portion of the order and render the authority invalid. I however agree with the Sub-divisional Magistrate that this last sentence must be read apart from the rest of the order, and does not intend to refer back to the first-portion of the telegram or to limit the authority given. The words "issue of" strengthen me in this view for if Government intended that no action should be taken until the complaint had been sanctioned, those unnecessary words would not have been inserted in the telegram. *Subramania Siva, In re*; *Chidambaram* Pillai, *In re* (1) is authority for the proposition that actual words of the complaint need not be authorized by Government. I have therefore no doubt but that the authority given by Government in Ex.-A was a perfectly valid authority. In view of the above, it is unnecessary to deal with the two cases cited, i. e., *Barindra Kumar Ghose* v. *Emperor* (2) and *Queen Empress* v. *Samavier* (3), the former of which decided a point which does not arise here and the latter a question under S. 197, Criminal P. C., the language of which is entirely different from S. 196. I would therefore dismiss this petition.

Napier, J.—I agree. I only wish to add a few more words on what I conceive to be the scope of S. 196, Criminal P. C. Mr. K. Srinivasa Ayyangar invited our

(1) [1909] 32 Mad. 3.=1 I. C. 22 & 36,
(2) [1910] 37 Cal. 467=7 I. C. 359.
(3) [1893] 16 Mad. 468.

attention to the language used by the learned Judges in a case reported as *Barindra Kumar Ghose* v. *Emperor* (2). It appears to me that they treated S. 196 as an enabling section. With the greatest deference I entirely differ. S. 196 is not an enabling section. It is a disenabling section. The enabling section is S. 190. S. 190 provides that a Magistrate may take cognizance of any offence (a) upon receiving a complaint of facts which constitute such offence; (b) upon a Police report of such facts; and (c) upon information received otherwise or from his own knowledge. Then there are Ss. 195, 196 and 197 which limit the power of a Magistrate to take cognisance in this general manner. What the Code does is to provide that any person who has knowledge of an offence being committed can set the Criminal Court in motion; but that with regard to matters dealt with in S. 196, the Criminal Court shall not be set in motion without a complaint. This provision eliminates Cl. 2 and 3 of S. 190 and further provides that the complaint shall be either by order of or under authority from the Governor-General in Council or the Local Government. Therefore in my opinion, the questions whether this section should be read in the interest of the accused or to what extent discretion is allowed or to what extent Government is to be guided by questions of policy, have, with deference to the learned Judges, no bearing on the question at all. All that it requires is that whereas ordinarily anybody can give information of an offence and the proceedings then go on in the name of the Crown against the accused person, in this particular case only the Government can set the Court in motion.

And it is, I think, in view of the generality of the language in this section that this Court and the High Court of Bombay have given a wide interpretation to the section. This Court in the case reported as *Subramania Siva*, In re; *Chidambaram Pillai*, In re (1) expressly approved of the language used in *Queen-Empress* v. *Bal Gangadhar Tilak* (4), and that language seems to me to indicate the true manner in which the construction of this section should be approached. It is as follows:

"Now, as to the question of jurisdiction, we are all of opinion without doubt that this prosecution was instituted under the authority of Government, and that, to use the word of the present Code (Act 10 of 1882), this complaint was made 'by order of or under the authority of Government.' There is no special mode laid down in the Code whereby the order of sanction of Government is to be conveyed to the officer who puts the law in motion. In this case the prosecution was conducted by the Government solicitor, it was instituted by the Oriental Translator to Government and he produced the written order of Government to institute the complaint. Now, though the complaint must undoubtedly contain the article complained of to give information to the accused of the charge against him, there is nothing in the Code to show that the written order to make the complaint, if written order is required, must specify the exact article in respect of which the complaint is to be made."

That appears to have been the view taken in *Subramania Siva*, In re; *Chidambaram Pillai*, In re (1) because in that case we find the language of the order is:

"The Madras Government authorises the institution of criminal proceedings against Chidambaram Pillai, Subramania Siva and Padmanabha Iyengar under Ss. 124-A, 153 A and 505, I. P. C., in respect of speeches delivered by them at Tuticorin and Tinnevelly in the months of February and March 1908."

So, the only thing definite in the order is the persons, the sections, and the dates within which the speeches were made. These two cases seem to me clearly to indicate that this section must not be construed with the strictness of an enabling section, but as being a disenabling section must be read simply as requiring the specific authority of Government for institution of the proceedings and nothing more.

S.N./R.K. *Petition dismissed.*

(4) [1898] 22 Bom. 112.

A. I. R. 1919 Madras 969

SADASIVA AIYAR AND SPENCER, JJ.

Ramasami Reddi—Appellant.

v.

Sokappa Reddi & another—Respdts.

Appeal No. 95 of 1916 Decided on 17th April 1918.

Civil P. C. (1908), O. 34, R. 5—Mortgage Suit—Decree passed under T. P. Act.—Application for final decree under Civil P. C. is not maintainable — Decree-holder's remedy is to apply for order absolute—Matter is governed by Art. 182 and not by Art. 181—T. P. Act (1882), S. 90—Limitation Act (1908), Arts. 181 and 182.

A preliminary decree for sale was passed in a mortgage suit under the provisions of the Transfer of Property Act. The new Civil Procedure Code, Act 5 of 1908, having come into force before the expiry of the time fixed in the preliminary decree for payment of the mortgage amount the mortgagee applied for a final decree under O. 34, R. 5, Civil P. C.

Held, (1) that a final and executable decree was passed in the case under the Transfer of Property Act, notwithstanding that the direction in the decree for the sale of the property was made conditional on default of payment of the amount found due to the plaintiff by a certain date. [P 970 C 1]

(2) that the decree-holder's remedy was to apply for an order absolute

(3) that the matter was governed by Art. 182 and not by Art. 181, Limitation Act. 41 *I. C.* 268, *Diss. from.* [P 970 C 2]

Per *Sadasiva Aiyar*, *J.*—The repeal of the provisions of the Transfer of Property Act regarding mortgage decrees could not, having regard to S. 6, Cl. (c) from General Clauses Act, deprive the holder of a mortgage decree passed under it of his remedy by way of getting an order absolute in respect of his right under the decree so as to make it executable in the strict sense. [P 970 C 2]

K. V. Sesha Aiyangar—for Appellant.

C. V. Seshagiri Sastri and *K. V. Krishnaswamy Aiyar*—for Respondents.

Facts.—On 16th July 1908 the Court passed a mortgage decree in favour of plaintiff, which directed that the decree amount should be paid within six months Before the time expired, the new Code of Civil Procedure, Act V of 1908, came into force. In May 1911 the decree-holder applied for an order for sale under O. 34, R. 5, Civil P. C. A second application was made in 1914 praying for a final decree. The Court having returned it for presentation on the execution side it was so presented. It was contended that the application was barred under Art. 181. This was overruled and the application was allowed. On appeal this decision was upheld. A second appeal to the High Court was dismissed by Justices Spencer and Srinivasa Aiyangar. The appellant applied for a review of the order having regard to a decision of another Divisional Bench in the case reported as *Nimmala Mahankali* v. *Kallakuri Subba Rao* (1).

Spencer, J—On further consideration I am not satisfied that the decision, dated 20th.March 1917, of Srinivasa Aiya ngar, J,. and myself in Appeal against Appellate Order No. 95 of 1916 was wrong. It is argued on the strength of the subsequent decision by another Bench in *Nimmala Mahankali* v. *Kallakuri Subba Rao* (1) that the fact that in this case the date for payment was the date after the Code of 1908 came into force is enough to distinguish this case from the cases in *Balaji Rao* v. *Harirama Chetty* (2), *Singaravelu Pillai* v. *Santhana Krishna Mudaliar* (3), *Mahammad Husain* v. *Abdul Kareem* (4) and *Natesa Udayan* v. *Annasami Udayan* (5) which we followed. I think that a final and executable decree was passed in this case under the Transfer of Property Act, notwithstanding that the direction in the decree for sale of property was made conditional on default cf payment of the amount found due to the plaintiff by a certain date. With due respect to the learned Judges who decided *Nimmala Mahankali* v. *Kallakuri Subba Rao* (1), I am of opinion that the introduction of the new Code did not give rise to any new right under Art. 181, Limitation Act to have a fresh final decree passed in consequence of the provisions of the Transfer of Property Act, under which these proceedings commenced, being superseded (see S. 6, General Clauses Act). In other words, if Art. 182 governed the proceedings on 16th July 1908 when the decree was passed, the introduction of the new Civil Procedure Code on 1st January 1909 did not have the effect of making it incumbent on the decree-holder to apply under Art. 181 for a final decree nnder O. 34, R. 5. The second appeal must be again dismissed with costs.

Sadasiva Aiyar, J.—I fully concur in the opinion just now pronounced by my learned brother. The question whether Art. 181 (old Art. 170) or Art. 182 (old Art. 179) of the Limitation Act is applicable to an application for an order absolute under the Transfer of Property Act procedure is of little importance as, whether the former or the latter article applied to the initial application, a subsequent application, whether for an order absolute or for execution in the strict sense, will be governed by the provisions of Cl. 5, Art. 182, which gives 3 years' period from the fresh starting point created by the initial application, which is an application for execution or, at least, an application to take a step-in-aid of execution. See however *Abdul Majid* v. *Jawahir Lal* (6) which shows that Art. 182 (old Art. 179) is the Article really applicable even to the initial application. I am further of opinion that having regard to the General Clauses Act, S. 6, Cl. (c), the repeal of the provisions

(1) [1917] 41 I. C. 268.
(2) [1916] 32 I. C. 39
(3) [1915] 3 I. C. 9.
(4) [1915] 39 Mad. 544=29 I. C. 237.
(5) [1916] 34 I. C. 756.
(6) A. I. R. 1914 P. C. 66=36 All. 350 (P. C.).

of the Transfer of Property Act could not deprive the holder of a mortgage decree passed under it of his "remedy" by way of getting an order absolute "in respect of" his right under the decree so as to make it executable in the strict sense. I therefore dissent respectfully from the obiter dicta in *Nimala Mahankali* v. *Kallakuri Subba Rao* (1) on which the petitioner relies and agree that the second appeal should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 971 (1)

AYLING AND PHILLIPS, JJ.

C. Subramania Iyer and *others*—Plaintiffs—Appellants.

v.

Muthu Vaithilinga Mudaliar and *others*—Defendants—Respondents.

Second Appeal No. 564 of 1916, Decided on 28th November 1917.

Civil P. C. (1908), O. 22, Rr. 3 and 5—Question of rightful legal representative must be decided by Court—Decision by Appellate Court even is equally final.

When a questton arises as to who are the representatives of a deceased party to a suit or proceeding, it is obligatory on the Court to decide it. [P 971 C 1]

An order passed by an Appellate Court deciding tbe question is as final as a similar order passed by the Court of first instance and its propriety cannot be questioned in an appeal on the merits from the final decree. [P 971 C 1,2]

T R. Venkatarama Sastri—for Appellant.

A. Sambamurthi Iyer, *K. Bhashyam Iyengar* and *N. Kunjithapadham Iyer*—for Respondents.

Judgment.—In the First Court, on the death of the original plaintiff, the question arose whether Subramania Iyer (referred to as plaintiff 2) alone should be recognized as his legal representative or whether certain other persons (referred to as plaintiffs 3 to 12) should also be recognized along with him as legal representatives of the original plaintiff.

This is a question which under O. 22, R. 5, Civil P. C. it was obligatory on the Court to decide; but it is clear from the order recorded and the Munsif's remarks in his finding dated 15th October 1915 that he did not determine the question, but simply added all the claimants (plaintiffs 2 to 12) as legal representatives without inquiry or hearing plaintiff 2's objections and proceeded with the case.

When the case came up on appeal, the ower Appellate Court called for a finding as to who were the proper persons to be added as legal representatives of the original plaintiff, and passed an order adding plaintiff 2 alone.

In our opinion, this order has the effect of removing plaintiffs 3 to 12 from the suit (except as regards their liability for costs) just as would have been the result of a similar order passed by the Original Court at the proper stage. An order under O. 22, R. 5, is not appealable and we do not think it is open to plaintiffs 3 to 12 to question it by way of appeal against the decree passed by the lower Appellate Court in favour of plaintiff 2 against the defendant, which decree is not sought to be altered so far as defendant is concerned. The present appeal does not lie and is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 971 (2)

ABDUR RAHIM AND NAPIER, JJ.

A. F. Cuffly—Accused—Petitioner.

v.

Muhamadali Mahomed Ibrahim Sahib—Counter-Petitioner—Opposite Party.

Criminal Revn. No. 705 of 1917, and Referred Case No. 108 of 1917, Decided on 18th January 1918.

Railways Act (9 of 1890), S. 120—Term 'person' includes railway official—S. 120 applies to railway officials also—Guard removing Gosha ladies from 1st class compartment rightly occupied is guilty of offence under S. 120.

The word 'person' in S. 120 includes railway officials. The section applies to acts mentioned therein, even if they are committed by railway servants. Where a Railway guard removed two gosha ladies from a first class compartment in which they were entitled to travel and forced them to occupy another compartment:

Held: that he was guilty of an offence under S. 120. [P 972 C 1,2]

Satyamurthi Ayyar—for Petitioner.

C. Narasimha Chariar—for Public prosecutor.

Order.—The Magistrate in this case found that the accused, who was a railway guard, made two Mahomedan gosha ladies who were travelling in a first class compartment in which there were two European ladies get out of that compartment and get into a coupe compartment at Arkonam. He also found that the ladies did not consent to changing their compartment. It would appear that the two European passengers or at least one of them objected to the gosha ladies travelling in the same compart-

ment and that was the reason why the guard interfered and made the gosha ladies go into another compartment against their will. This he had no right to do, as the gosha ladies had agreed to pay the excess fare which was chargeable for the difference between the second class ticket which they possessed and the first class fare. The station master and the guard himself had given them this accommodation in consideration of the excess fare which they had promised to pay and which was actually paid at Arkonam. The action of the guard was not justified by the law and it necessarily interfered with the comfort of these gosha ladies who were entitled, upon the facts found, to travel in the compartment in which they were.

The learned Sessions Judge has gone elaborately into the evidence and has come to the conclusion that the prosecution had exaggerated the facts. But he was not entitled to reconsider the case on the evidence and to come to a different finding from that arrived at by the Magistrate. There was no appeal to him and he was acting in exercise of the powers of revision. He also holds that the action of the accused did not amount to an offence under S.120, Railways Act, on the ground that the section does not apply to a railway guard or other railway employees. But the section itself is in general terms. It says:

"If a person in any railway carriage or upon any part of a railway .... wilfully and without lawful excuse interferes with the comfort of any passenger or extinguishes any lamp, he shall be punished. etc.

It also covers the case of any such person being in a state of intoxication or committing any nuisance or act of indecency or using obscene or abusive language. There is no apparent reason why, if a railway employee or railway guard commits any of these acts, he should be exempted from the punishment provided by the section. The word used in S. 120 is 'person,' and there is nothing in the section to indicate that a railway guard or other railway officials are intended to be excluded from the purview of the section. It is perfectly true that there are special classes of offences dealt with in the Act which may be committed by railway servants. But that does not at all lead to the inference that the other offences dealt with in the Act may not be committed by railway servants, where the offence is defined in general terms. It may also be pointed out that there are a number of sections which deal with offences by passengers travelling in a railway train. But in all these sections, the word "passenger" is specifically used. Contrary to that, the word used in S.120 is "person," and not "passenger." We think that S. 120 applies to an act mentioned in that section, if committed by a railway servant. The conviction of the accused was therefore, justified and there is no reason to interfere with the sentence. This is the answer which will be returned to the Sessions Judge's reference.

S.N./R.K. *Reference answered:*

** A. I. R. 1919 Madras 972
Full Bench

WALLIS, C. J. ABDUR RAHIM, COUTTS-TROTTER, SESHAGIRI AIYAR AND SRINIVASA AIYANGAR, JJ.

Mulla Vittil Seeti Kutti and *others*—Defendants—Appellants.

v.

K. M. K. Kunhi Pathumma and *others*—Plaintiff and Defendants—Respdts.

Second Appeal No. 2558 of 1912, Decided on 23rd April 1917.

**** (a) Limitation Act (1908), Art. 134—Possession not taken by transferee—Art. 134 does not apply—Art. 134 applies where possession is obtained subsequently to transfer.**

By the Full Bench — (*Wallis, C. J., and Coutts Trotter, J.*, dissenting) — Art. 134, does not apply to a transfer from a trustee or mortgagee where possession is not taken by the transferee : *Attorney-General* v. *Flint* (1844), 4 *Hare* 147 ; *Petre* v. *Prtee*, (1853) 1 *Drewry* 371) *Foll.*

The article, however, applies to cases where possession is obtained subsequently to the transfer; and where possession is taken sometime after the date of the transaction purporting to transfer the right to take possession, time runs against the person suing for possession from the date when possession is actually taken by the transferee.

Per *Wallis, C. J.*, and *Coutts Trotter, J.*— Art. 134, Limitation Act applies to a transfer from a trustee or mortgagee under which possession is not taken by the transferee.

Where possession is taken subsequently to the transfer, time runs from the date of the transfer itself and not from the date when possession was taken by the transferee : 23 *Bom.* 614, and 29 *All.* 471, *Diss. From.* [P 977 C 1]

(b) Limitation Act (1908)—Case covered by Article—It is not premissible to depart from article itself.

Per *Wallis, C. J.* — Where a case is covered by the language of an Article of the Limitation Act, it is not permissible to depart from the Article itself or from the starting point pre-

scribed therein on grounds of real or fancied hardship. [P 979 C 2]

(c) Limitation Act (1908), Art. 134—Intention of legislature is not to make provision in favour of cestui que trust or mortgagor and give him further period—Intention is clearly restrictive.

Per *Wallis C. J.*—It cannot be held that the intention of the Indian legislature in enacting Art. 134 was to make a provision in favour of the cestui que trust or mortgagor and give him a further period than he would otherwise have had. On the contrary, the intention was clearly restrictive. The Indian legistature must have been perfectly well aware that in the case of sales and mortgages alike, possession is rarely given on the date of the transfer ; and if it had intended the date of taking possession under the sale or mortgage to be the starting point, nothing would have been easier than to say so. It has not done so and it is not open to the judiciary to effect this by taking out of the article nearly all the cases which would otherwise fall within it: 26 *Mad.* 780 *Dist.*

[P 978 C 2]

Taking the starting point to be the date of the instrument of transfer, there is no rule of construction under which time can be considered not to run until the transferee gets into possession ; *Burrell* v. *Earl of Egremont*, (1844) 7 *Beav.* 205 ; 35 *Cal.* 209 ; *In re Metropolis and Counties Permanent Investment Building Society* (1911), 1 *Ch.* 698 ; *Expl* and *Dist.* [P 979 C 1]

(d) Limitation Act (1908), Art. 134 — Applicability of.

Per *Abdur Rahim, J.*—Art, 134 is meant to apply not merely to purchases but also to other transfers made by a trsutee or mortgagee [P 989 C 2]

(e) Limitation Act(1908), Cols. 1 and 3 — should be read together.

Per *Abdur Rahim, J*—It is a well known rule for construing the Indian Statutes of limitation that Cols. 1 and 3 should be read together. Col. 1, Art. 134, defines the scope of the article as applying to suits for the recovery of possession of immovable property which has been transferred by a trustee or mortgagee. The date from which time is to be calculated is given "as the date of the transfer." From the very moment of the transfer, the transferee should be capable of being sued for recovery of possession. and this implies that the transfer must be a transfer with possession. The result would be that, unless the transferee had been in possession for 12 years, the suit against him would not be barred under Art. 134. If the transferee, did not obtain possession in pursuance of the transfer the article would not apply at all. [P 980 C 1]

Per *Seshagiri Aiyar, J.*—Cols. (1) and (3) of the Schedules of the Limitation Act should be read together and the words appearing in one of the columns should be given the same meaning as in the other column. [P 981 C 2]

(f) Limitation Act (1908), Art. 134 — Applicability of—Art 134 only applies to transfers made in excess of transferor's powers.

Per *Abdur Rahim, J* —Article 134 does not apply to cases where a trustee or a mortgagee makes a transfer in pursuance of the powers vested in him in such cases, the transferee becomes merely an assignee of the trust or mortgage and cannot claim any higher position. The article applies only to transfer made in excess of the transferer's powers. [P 980 C 2]

(g) Limitation Act (1908), Art. 134 — "Transfer" cannot be construed as meaning transfer with possession.

Per *Coutts Trotter, J.*—The word transfer' in Art. 134 cannot be construed as meaning "transfer with possession", as that would amount to a bodily interpolation into the Statute of words that are not there. [P 980 C 2]

(h) Limitation Act (1908), Art. 134 — Art. 134 is in nature of execption to Art. 148 —Its object is to afford protection to person in possession.

Per *Sheshgiri Aiyar, J.*—Article 134 is in the nature of an exception to Art. 148 and its object is to afford protection to person in possession. The protection is of the same kind as that contained by implication in S. 28 of the Act, by which a prescriptive right (limited or unlimited as the case may be is secured as against the person who has the legal ownership in him. The article should, therefore be construed liberally in favour of the legal owner and strictly against the transferee. [P 981 C 2]

(i) Limitation Act (1908), Art. 134 — "Transfer" does not mean mere paper conveyance, but transfer of possession.

The word "teansfer" in Cols. 1 and 3, Art. 134 does not simply mean a paper conveyance but the transfer of possession. In this view time does not begin to run until the transferee has taken possession of the property. A transferee from a mortgagee prescribes only from the date when he takes possession of the property transferred to him. [P 982 C 1]

(j) Limitation Act (1908), Art. 134—Where Cols. 1 and 3 of article not applicable residuary article must be applied.

Wherever both Cols. 1 and 3 of an Article are not applicable to a case the residuary article must be applied, its function being to provide for cases which could not be covered by the exact words used in both the columns of an article. Even if "transfer does not mean "transfer with possession," if at the date of the transfer the transferee had not taken possession, Art. 134 would have no application and Art. 144 would apply as against the person who claims to have acquired a limited prescriptive right to be redeemed. [P 983 C 1]

(k) Limitation Act (1908) — Construction—Article should uot be construed, if language admits of it, in such way as to bar action before cause of action arises—Undue stress should not be laid on Col. 1.

Per *Srinivasa Aiyangar, J.* — No period of limitation can beg in to run till there is a cause of action and an article of the Limitation Act should not be construed, if the language admits of it, in such a way as to bar the action before the cause of action arises. In construing an article of the Limitation Act undue stress should not be laid on Col. 1 which describes the nature of the suits so as to make all suits of that class to be governed by that article,, although the starting point fixed in

Col. 2, cannot be applied at all or cannot be applied without working injustice. [P 984 C 2]

(l) **Limitation Act (1908), Art. 134 — Art. 134 does not apply unless transferee had possession on date of transfer—Possession need not be physical.**

Article 134 cannot apply unless the transferee had possession on the date of the transfer. The possession need not be physical or actual possession. The article is intended to protect a person in possession for over 12 years and the article assumes that the plaintiff is in a position to sue for recovery of possession from the transferee on to date of the transfer. [P 988 C 1]

(m) **Limitation Act (1908), Art. 134 — "Transfer"—Meaning of, explained.**

The word 'transfer" in the article means transfer of title and not transfer of possession. [P 987 C 2]

K. P. M. Menon—for Appellants.

A. Sundaram—for Respondents.

Order of Reference

Tyabji, J.—The facts and questions involved in this appeal may be very shortly stated. When I refer to the parties I include their predecessors in title. All the mortgages mentioned below are usufructuary,

In 1862 the plaintiff mortgaged items 2 and 3 for Rs. 1,000 to defendants 1—4. (Ex. A); defendants 1—4 took possession, In 1882 defendants 1—4 purported to mortgage item 2 for Rs. 125 in favour of one Haji (Ex. 15), who was subsequently redeemed by defendants 5 and 8. In 1893 defendants 1—4 purported to mortgage item 3 to defendant 13 for Rs. 75 (Ex 26).

In 1894 defendants 1—4 purported to mortgage items 2 and 3 to defendants 5 and 8 for Rs. 9,000 (Ex. 18) possession of item 2 was taken by defendants 5 and 8 in 1900 (Ex. 20); possession of item 3 has been taken after the suit was instituted. Defendants 1—4 on each of the occasions when they purported to mortgage the properties, purported to mortgage them as if they were full owners, and not merely as mortgagees.

The plaintiff has sued to redeem his original mortgage of 1862, (Ex. A) and the contention of defendants 5 and 8 is that as their transfer from the mortgagees was more than 12 years prior to the suit the original mortgagor is barred from suing for possession without redeeming them ; Art. 134, Limitation Act. Both the lower Courts have beld on the authority of *Ram Chandra Vithal Rajadhiksh* v. *Sheikh Mohidin* (1) that the title of defendants 5 and 8 could become indefeasible only 12 years after possession and as defendants 5 and 8 have not had possession for the said period prior to suit, the claim has not become perfected by adverse poseession. It is argued before us that *Ramachandra Vithal Rajadhiksh* v. *Sheikh Mohidin* (1) was wrongly decided and that on the wording of the article no question as to possession arises. The Article provides that:

A suit to recover possession of immovable property, (1) conveyed or bequeathed in trust or (2) mortgaged: and afterwards transferred from the trustee or mortgagee for valuable consideration; shall be barred after 12 years from the date of the transfer. The difficulties in reading the article as contended for by the appellants are two fold. In the first place, in accordance with it, a suit for possession may be barred though the defendants may not have taken possession and consequently there may have never accrued a cause of action against him for obtaining possession. That is not a mere academic difficulty. In regard to item 3 of property the difficulty arises in this very appeal; for it is contended that in regard to that property the present suit could not lie against defendants 5 and 8 as they were not in possession at the date of the suit; they have taken possession since the suit was instituted and if now a fresh suit were instituted against them, the defence would be that the suit is barred under Art. 134 as the suit would be 12 years after the transfer.

Thus according to the appellants' contention, a mortgagee can transfer not merely his own rights but the rights of the mortgagor, and can pass a better title than he himself possesses by the simple device of deferring possession to the transferee for 12 years and the mortgagor can do nothing to prevent this being done. Secondly, if the article is read as the appellants contend then, though the transfer by the mortgagee may be only of a limited interest and of an interest which does not carry with it the right of possession, still the real owner of the property would be unable to obtain possession after 12 years of the transfer: so that not only is the mortgagee (a personlnot entitled to full ownership) enabled to transfer full ownership, but the full ownership is acquired by the transferee whether it is purported to be transferred or not. That the article

(1) [1899] 23 Bom. 614.

should not be read literally on this second point was decided in *Radhanath Doss* v. *Gisborne & Co.* (2). The difficulty on the other hand in reading the article as read in *Ramchandra Vithal Rajadhiksh* v. *Sheikh Mohidin* (1) is that the words in Col. 3 of the article are "from the date of the transfer" and not "from the date of possession." It seems to me that *Ramchandra Vithal Rajadhiksh* v. *Sheikh Mohidin* (1) can be supported on the basis (1) that the law of limitation implies that the suit in question could have been instituted during the period allowed or, as expressed in *Peria Aiya Ambalam* v. *Shunmugasundaram* (3):

"limitation cannot run against him when there is no remedy open to him to recover possession of his property"

and (2) that the transfer referred to in Col. 1 of the article must by necessary implication be a transfer which gives the right to possession and which is not complete unless possession is actually transferred. I do not express any opinion on the question whether the article can be so restricted beyond referring to the remarks of Lord Cairns in *Radhanath Doss* v. *Gisborne and Co.* (2), approved in *Juggernath Sahoo* v. *Syud Shah Mahomed Hossein* (4), to the effect that the article must be stringently read.

Ramchandra Vithal Rajadhiksh v. *Sheikh Mohidin* (1) gave effect to a previous decision of the Bombay High Court in which Farran, C. J., delivered the judgment of himself and Fulton, J., and said that until the defendants held possession under their mortgage for the full period of 12 years, the plaintiff could have disregarded it and recovered possession and that it was only after the defendants had held possession for 12 years that Art. 134 coupled with S. 28, Lim. Act, gave legal validity to their mortgage, barring the plaintiff from recovering possession without redeeming them. It has been argued before us that the reference to possession was merely obiter. But it seems to me to be more likely that Judge of so much experience as Sir Charles Farran had in mind the second of the two difficulties which I have mentioned; unless the transfer by the mortgagee was one which entitled the transferee to possession, it is difficult to give any effect to the Article; and if that concession has to be made the step taken in *Ramchandra Vithal Rajadhiksh* v. *Sheikh Mohidin* (1) seems justifiable.

There are, however some other cases both of this and the other High Courts which make it desirable in my opinion that the matter should be settled by a Full Bench of this Court. The point that was referred in *Manavikraman Ettan Tamburan* v. *Ammu* (5) to the Full Bench was whether a person who had taken a sub-mortgage could be said to have "purchased" within the terms of the Article of the Act of 1877: it was no doubt assumed that if he could be styled a purchaser the article applied. On the point referred the article has been amended and made quite clear. On the other hand in the analogous case, where a usufructuary mortgagee is ousted by a trespasser, a Full Bench of this Court held on general principles, and not on any express words in any article, that limitation does not run against the mortgagor until there has been an assertion of adverse title to the knowledge of the mortgagor. *Peria Aiya Ambalam* v. *Shunmugasundaram* (3). The same principles were again enunciated in elaborate judgment of the Full Bench in *Viyapuri* v. *Sonamma Boi Ammani* (6). The question in the last case was whether the possession of a trespasser who has dispossessed a simple mortgagor is adverse to the simple mortgagee. These decisions of the Full Bench are based on general principles which are applicable to the present case, unless it is held that the language of the article precludes any other construction but that which is put forward by the appellant. I would therefore refer the following questions to the Full Bench:

(1) Does Art. 134, Lim. Act apply to a transfer from the trustee or mortgagee under which possession is not taken by the transferee? (2) Where possession is taken under the transfer but at some time after the date of the transaction purporting to transfer the right to take possession, does time begin to run from the date when possession is taken or from the date of the transaction? (3) Where the mortgage is usufructuary and the mortgagor has no right to obtain possession

(2) [1870-72] 14 M. I. A. 1=15 W, R, 24 (P.C.)
(3) A. I. R. 1914 Mad. 334=22 I. C. 615=38 Mad. 903.
(4) [1974-75] 2 I. A. 48=23 W. R. 99. (P.C.)
(5) [1901] 24 Mad. 471.
(6) [1915] 39 Mad. 811=31 I. C. 412.

from the mortgagee at the time of the transfer, does time run against the mortgagor under Art. 134, (a) from the time of the transfer, or (b) from the time when the mortgagor's right to sue for possession accrues under the original mortgage, or (c) from the time when the transferee enters into possession, or (d) from the time when the transferee enters into possession and asserts an adverse title to the knowledge of the mortgagee.

Some other questions were argued before us with which I shall now deal. (1) With reference to the right of the appellant under Exs. 15 and 20 and in regard to item 3 the opinion of the Full Bench must be awaited. (2) The contention that the lower Courts erred in giving a decree for purapad for more than three or six years prior to suit, is opposed to *Parasurama Pattar* v. *Venkatachalam Pattar* (7), where it was laid down that purapad is one of those payments which the mortgagee has to make under the mortgage and that the mortgagor need not sue for it until he sues for redemption, at which time the mortgagee is bound to give credit to the mortgagor for all payments that the mortgagee was bound to make. I would follow that decision; and the only other point then is (3) Whether the appellants should have been made liable for purapad only from 1894, the date of the assignment of the mortgage to them. But the appellants by the assignment could not get higher rights than the original mortgagee, their assignor who as I have already held, was bound to give credit to the mortgagors for the payments due from himself. This contention, therefore cannot be accepted.

The question whether the appellant has under Art. 134 acquired an indefeasible right as mortgagee of item 2 for Rs. 125 (Ex. 15) may in some of its aspects depend upon the decision of the Full Bench. This point will therefore be dealt with when the case comes back for final decision.

Ayling, J.—I agree to the reference proposed; and also in the conclusions arrived at by my learned brother on the other points argued before us.

Opinions

Wallis, C. J.—Our rules only provide for a reference to a Full Bench where both the learned Judges constituting the Bench agree that the question of law to be referred is involved in the determination of the case. There are weighty and obvious reasons for this limitation, and it is therefore desirable that we should confine ourselves to the questions which actually arise in the present case. The suit is to redeem a mortgage of the year 1862 and is within time as against the mortgagees, having been brought within sixty years from the date of the mortgage Art. 148. The question is whether it is also within time as against transferees from the mortgagees, or is barred under Art. 134, as having been brought more than twelve years from the date of the transfer. The plaintiff's mortgagees acting as full owners executed several usufructuary mortgages of items 2 and 3, under which they have been out of possession of these items since 1886 and 1894 respectively. The most recent mortgages of both these items were more than 12 years before suits, but the present mortgagees did not get possession under these mortgages from the prior mortgagees as regards item 2 until 1900 and as regards item 3 until after the institution of the present suit.

As regards both items the suit is covered by the language of Art. 134 taken in its natural sense, but it is said that as the plaintiff had no occasion to sue the present transferees by way of mortgage from the original mortgagees *until they* took possession as regards item 2 in 1900 and as regards item 3 after the institution of this suit, the article does not apply. With regard to the last case it must be remembered that possession was not with the mortgagees but with prior transferees from them, so that for over thirty years the mortgagors, if they wished to recover possession of the suit properties, would have had to sue transferees from the mortgagees. This result, it is said, may be arrived at in three ways: (1) by reading the date of transfer in the third part of the article as meaning transfer with possession; (2) by holding that the article only applies to cases where possession is given on the date of the transfer and (3) by holding that time did not run under the article until the transferees from the mortgagees took possession. In my opinion none of these solutions is admissible. Art. 134, as is well known, is founded on S. 25, Real Property Limitation Act,

(7) A. I. R. 1914 Mad. 661=21 I. C. 70.

1834, which, after providing generally in S. 24, that suits in equity shall be barred in the same way as actions at law, went on to provide in S. 25, that when land is vested in a trustee the right of the cestui que trust to bring an action for the recovery of the land shall be deemed to have first accrued when the land shall have been conveyed to a purchaser for valuable consideration and shall be deemed to have accrued only as against such purchaser and any person claiming through him.

This was an exception in favour of the cestui que trust, as it prevented time running against him until there had been a conveyance by the trustees to a purchaser for valuable consideration. Now, as to the first suggestion it has never been doubted, so far as I know, that when the section applies, time begins to run from the date of the conveyance, and not from the date when possession is taken under the conveyance. The very object of the Statute was to get rid of the question as to when possession became adverse, which was the starting point under the Act of James I as construed by the Courts, and to fix a definite period at which the right to re-enter or bring the action for recovery should be deemed to have accrued. To come now to the Indian enactments, there is in my opinion, equally little ground for holding that "the date of the purchase" in the corresponding S. 16 (5), Limitation Act of 1859 and in Art. 134 of the Acts of 1871 and 1877 and "the date of transfer" in Art. 134 of the present Act mean transfer with possession. S, 16 (5) of the Act of 1859 was obviously taken from S. 25 of the English Act, but was made applicable to purchases from mortgages as well as from the trustees, and there is nothing in the section to justify us in reading purchase, or now transfer, as purchase or transfer with possession. The word "purchase" was probably substituted for "conveyance" to cover oral sales, but there is no reason to suppose that it was intended to depart in other respects from the starting point provided in S. 25, English Act. To adopt this construction in my opinion is simply to alter the statutory starting point and to go back to the date of adverse possession, which was the old law modified by the Act of 1834. I feel no less difficulty in holding that the present Article applies only where possession is taken on the date of the transfer, as this is inserting words which are not there and would practically exclude nearly all the cases which would otherwise come within the article, as possession is rarely taken by the transferee on the date of the transfer. Even supposing S. 25, English Act of 1834, to be susceptible of such a construction, I do not think that would affect the present question.

Mr. Lewin points out that a strict construction of S. 25 would bar reversionery heirs whose right to sue might not arise until long after the date of the conveyance, and he founds an argument on the fact that S. 25 is in form a proviso on S. 24, which imposes the same limitation upon suits in equity as upon actions at law, and a proviso the general effect of which is to extend rather than to limit the right of suit. As observed in Darby and Bosanquet, Edn. 2, p. 417, its effect is to prevent time running in favour of a trustee against a cestui que trust upon an express trust or those claiming through him until a conveyance for value has been made by such trustee or some one claiming through him and that the right of the cestui que trust is to be deemed to accrue at the date of such conveyance. "Now it is obvious," the learned authors remark,

"*that unles this is construed as only a proviso on S.* 24 (the italics are mine) it might instead of extending the time wherein the cestui que trust might bring his remedy actually take it away before his right accrued."

Accordingly they agree with Mr. Lewin that the section may be read as applicable only to cases where it extends, and not to cases where it restricts the right of the suit which the mortgages might otherwise have. It cannot I think be said that this construction has ever been adopted in any decided case and Mr. Godefroi, in his work on Trusts, Edn. 4, p. 600, refers to it as probable but doubtful. On the other hand it would appear that in the cases to which the article has been held applicable, the date of the conveyance has always been taken as the starting point. In *Attorney-General* v. *Flint* (8) one of the trustees of a charitable land who was also the owner of adjoining lands, incorporated a building standing on the charity land with a building standing on his own land and afterwards sold the whole building in 1817. A conveyance pursuant to the sale

(8) [1844] 4 Hare 147=67 E. R. 597.

was executed by his executors some years later, and it was held that the suit was not barred as it was brought within 20 years from the date of the conveyance. In *Petre* v. *Petre* (9) it was held that there was no express trust to bring the case within S. 25, but that even if there were, the suit was barred as having been brought more than 20 years after the date of a deed by the trustee conveying the property to the trustees of his marriage settlement. In a somewhat similar Irish case, *Smith* v. *Smith* (10), the trustee was held to have conveyed the property to the trustees of his marriage under a settlement which was not forthcoming at the date of the suit and to have enjoyed it during his lifetime, and it was held that a suit against his son who took under the settlement after his death was barred by S. 25. The decision was reversed on the ground that the terms of the settlement were not proved, *Smith* v. *Smith* (11), but it would appear from the observations of Darby and Bosanquet, p. 444, that the appellate Court agreed with the lower Court that the suit would have been barred under S. 25 if the settlement had been proved. *Smith* v. *Smith* (11) only decides that there is no dispossession until some one else takes possession. In *St. Mary Magdalen Oxford* v. *Attorney-General* (12) there is nothing in their Lordships' judgments to recognize the contention raised for the respondent, and assuming however that this is the correct construction of S. 25 of the English Act, S. 16 (5) of the Indian Act of 1859, was not appended as a proviso to any previous section, but was wholly self-contained, and in the language of their Lordships in *Soni Ram* v. *Kanhaiya Lal* (13) as regards other Articles of the English and Indian Statutes, I think that S. 16 (5) of the Act of 1859, was essentially different in its language and intention from S. 25 of 3 and 4 Will, 4, c. 27, and the same observation applies to Art. 134 of the present Act.

With reference to purchases from mortgagees S. 16 (5) of the Act of 1859 expressly provided that the period of limitation should be the same as in the case of suits against the mortgagee himself under S. 1 (15), but this provision, which would have met the present case, was not reproduced in Art. 134, Act 9 of 1871, which shows clearly the intention of the legislature to further restrict the time in the case of purchases from mortgagees. Art. 134, Act 15 of 1877, omitted the words in "good faith" from the first part of the article, while the present Act of 1908 substituted the words transfer or purchase throughout the article with consequential variations. In these circumstances it cannot, I think, be held that the intention of the Indian Legislature in this article was to make a provision in favour of the cestui que trust or mortgagor and give him a further period than he would otherwise have had. On the contrary, the intention was clearly restrictive, and it seems to me therefore that even if the construction of S. 25 of the English Act suggested by Lewin and Darby and Bosanquet be accepted, that affords no warrant for introducing such a construction here. The Indian legislature must have been perfectly well aware that in the case of sales and mortgages alike possession is rarely given on the date of the transfer; and if it had intended the date of taking possession under the sale or mortgage to be the starting point, nothing would have been easier than to say so. It has not done so, and it is not open to us to effect this by taking out of the article nearly all the cases which would otherwise fall within it. The decision of the Privy Council in *Batul Begam* v. *Mansur Ali Khan* (14) is no authority for such a course.

That was a suit for pre-emption as to which under Art. 10, the starting points are either taking physical possession or the registration of the instrument of sale. There had been no such registration and the suit property which consisted of certain shares in an estate did not admit of physical possession being taken except by means of a partition suit which had not been brought. Neither of the starting points prescribed under Art. 10 was to be found in the case, and in these circumstances their Lordships applied the residuary article. Here however we have the date of the instrument of transfer which is, as I read it, the prescribed starting point under Art. 134. All that

(9) [1853] 1 Drewry 371=61 E. R. 493.
(10) [1876] Ir. R. 10 Eq. 373.
(11) [1876] 1 L. R. Ir. 206.
(12) [1857] 6 H. L. C. 189=26 L. J. Ch. 620.
(13) [1913] 35 All. 227=19 I. C. 291=40 I. A. 74 (P. C.).
(14) [1902] 24 All. 17=28 I. A. 248 (P. C.).

was decided in *Rungiah Gounden & Co.* v. *Nanjappa Row* (15) was that a decree directing the sale of mortgaged property in default of payment of the mortgaged debt on or before the date fixed in the decree was not a decree directing payment of the amount to be made at a certain date within the meaning of Art. 179, Col. 3, para 6, (which I should have thought it obviously was not) and that consequently the application did not come within the article and must be governed by Art. 178. This, in my opinion, is no authority for giving the go-by to the starting point prescribed by Art. 134 for this particular class of suits by refusing to apply the article to the bulk of the suits falling under it and treating them as governed by some other article. I may add that I do not think any argument can be founded on the fact that the articles are printed in three columns.

Taking this to be the article to be applicable and the starting point to be the date of the instrument of transfer, we have next to consider whether there is any rule of construction under which time can be considered not to run until the transferee from the mortgagee gets into possession. In *Soni Ram* v. *Kanhaiya Lal* (13) their Lordships laid down that under the Indian Act, once time begins to run it could not be suspended except under the provisions of the Act, and explained the decision in *Burrell* v. *Earl of Egremont* (16) as proceeding on the construction of the peculiar language of S. 40 of the English Statute, and I do not think their Lordships intended to depart from that principle in their recent decision: see *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (17) affirming the decision in *Lakhan Chunder Sen* v. *Madhusudan Sen* (18) for the reasons given by the learned Judges of that Court, That decision can be supported on the ground that the case was covered by S. 14 liberally construed, and I do not think it is authority for the proposition that under our Limitation Act we are at liberty to allow periods of suspension not provided for in the Act. That would be wholly opposed to the line of reasoning in *Soni Ram* v. *Kanhaiya Lal* (13) as well as to recognized principles of statutory construction. It is, I think, equally inadmissible nnder the statute to say, not that the running of time shall be suspended, but that it shall not begin to run from the time limited in the article except under some express provision of the statute: see also the judgment of Neville, J., in *Metropolis and Counties Permanent Investment Building Society, In re* (19). For this reason I am unable with great respect to follow the decision in *Ramachandra Vithal Rajadhiksh* v. *Sheikh Mohidin* (1) and the obiter dicta in *Husaini Khanam* v. *Husain Khan* (20).

Briefly my answer is ihat, when, as here, the case is covered by the language of the article, it is not permissible to depart from the article itself or from the starting point prescribed therein on grounds of real or fancied hardship. Darby and Bosanquet have a final chapter on the construction of Statutes of Limitation, but they do not refer to any such propositions such as are now suggested. In my opinion, they are destitute of authority and all the limitations which have been placed in modern times on the operation of the statutes of limitation have been based on a construction of the language of the particular sections, and not on any such general principles. I may add that I see no great hardship in the present case. The mortgagees in this case had parted with poseession to transferees more than thirty years before suit and had never re-taken it, and the mortgagors might at any time have ascertained the extent of the encumbrances they had created by reference to the registration office of the District. My answer is that in this case the mortgagors are barred.

Abdur Rahim, J.—The questions referred to the Full Bench relate to the construction of Art. 134, Lim. Act, which has been the subject of much discussion. It is in these words:

"To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration; twelve years (from) the date of transfer."

The article embodies certain alterations of the similar provisions of the previous Limitation Acts. In the first place, it is meant to apply not merely to pur-

(15) [1903] 26 Mad. 780.
(16) [1844] 7 Beav. 205=13 L. J. Ch. 309.
(17) A. I. R. 1916 P. C. 96=43 Cal. 660=33 I. C. 452 (P. C.).
(18) [1908] 35 Cal. 209.
(19) [1911] 1 Ch. 698=80 L. J. Ch. 387.
(20) [1907] 29 All. 471.

chases but also to other transfers made by a trustee or a mortgagee. This alteration was due, apparently, to the doubts that arose as to whether the word "purchaser" covered the case of transferees like lessees and mortgagees: see *Manavikraman Etten Tamburan* v. *Ammu* (5) and the dissentient judgment of Davies, J., and *Ram Kanai Ghose* v. *Raja Sri Sri Sri Hari Narayan Singh Deo Bahadur* (21).

The main question raised by the reference depends, in my opinion, on what kinds of transfer are referred to in the "Article" or, in other words' whether the word "transfer" means merely the execution of an instrument of transfer, such as a deed of sale, lease or mortgage, or the passing of property or of an interest in property along with possession. It is a well known rule for construing the Indian Statute of Limitation that we must read the first and the third columns together. The first column of Art. 134 defines the scope of the Article as applying to suits for the recovery of possession of immovable property which has been "transferred" by a trustee or a mortgagee; the date from which time is to be calculated is given as "the date of the transfer." Now, from the very moment of the transfer the transferee should be capable of being sued for recovery of possession and this implies that the transfer must be a transfer with possession. The result would be that unless the transferee has been in possession for 12 years, the suit against him would not be barred under Art. 134. If the transferee did not obtain possession in pursuance of the transfer, Art. 134, in my opinion, would not apply at all. Reading the article therefore in that light, I agree in the decision of *Ramchandra Vithal Rajadhiksh* v. *Sheikh Mohidin* (1) and *Husaini Khanam* v. *Husain Khan* (20), although some parts of the reasoning in those cases might be open to criticism. This is also the view suggested in *Muthu* v. *Kambalinga* (22) which it may be mentioned, was overruled on another point by the Full Bench in *Ahamed Kutti* v. *Raman Nambudri* (23), and in all the cases which have been brought to our notice bearing on the interpretation of Art. 134, the purchaser or other transferee who was held to be protected by this article had been in possession for 12 years. That also seems to be the effect of the English rulings as stated in Lewin on Trusts at p. 1125:

"No possession by a purchaser for valuable consideration short of the statutory period will be a bar."

I should therefore answer the first question in the negative. As regards the second question, I would answer it by saying that time will run from the date when the transfer is completed by the transfree being given possession.

The third question assumes the position that the mortgagor was not entitled to obtain possession from the mortgagee at the time of the transfer. It was strongly suggested in the course of the argument that in such a case Art. 134 will not apply and that time will not run at all until the mortgagor's right to obtain possession from the mortgagee has accrued. Art. 134, as has been pointed out in more than one decision, does not apply to cases where a trustee or a mortgagee makes the transfer in pursuance of the power vested in him in such cases the transferee becomes merely an assignee of the trust or mortgage and cannot claim any higher position [see *Vythilingam Pillai* v. *Kuthiravattath Nair* (24) and *Ram Kanai Ghosh* v. *Raja Sri Sri Sri Hari Narayan Singh Deo Bahadur* (21)]; it applies only to transfers made in excess of the transferor's powers. Now a mortgagee in possession is prohibited from doing any act which is destructive or permanently injurious to the property mortgaged: see S. 76, T. P. Act. If he therefore purports, for instance, to sell the property to a third person the mortgagor would be entitled, although the term of the mortgage may not have expired, to protect his own interests by a proper suit. If a transfer is only threatened he can obtain an injunction, and if it has actually been made he can ask for possession to be delivered to the mortgagee. It is not, however necessary to answer the third question.

Coutts-Trotter, J.—With great respect to my brothers Abdur Rahim and Seshagiri Aiyar and the learned Judges who decided *Ramachandra Vithal Rajadhiksh* v. *Sheikh Mohidin* (1) I am unable to construe 'transfer' as meaning 'transfer with possession,' because that

(21) [1905] 2 C. L. J. 546.
(22) [1889] 12 Mad. 316.
(23) [1902] 25 Mad. 99.
(24) [1906] 29 Mad. 501.

is really what it comes to; that seems to me to amount to a bodily importation into the statute of words that are not there. But I am impressed with the argument that Col. 3 of the Schedule is meant to fix the time which the plaintiff's cause of action is to be deemed to accrue. How can a cause of action be deemed to accrue at a time when circumstances precluded it from existing? It is very tempting to hold that the article cannot apply to a plaintiff whose cause of action did not exist at the time when limitation is said to begin to run. Such a general principle would be intelligible and very likely salutary but I do not find it in the statute or in any decision that is binding upon this Court, and I do not see how I can import a general principle into a codifying statute. It is no doubt a startling result to say that a man's cause of action can be barred before it has accrued; but if the plain words of the enactment involve that, we cannot rewrite it. I agree respectfully with my Lord that the words here are too plain to evade; and I question whether judicial attempts to mitigate the hardsnips of the obvious interpretation of statutes do not do more harm than good. If the words of the statute work injustice unless a violent strain is put upon them, the legislature alone can cure the evil. My answer therefore to the first question is yes; to the second, from the date of the transaction.

Seshagiri Aiyar, J.—Although a large number of questions were submitted for the consideration of the Full Bench, the arguments related only to two points: (a) whether the plaintiffs are bound to pay a sum of Rs. 9,000 to defendants 5 and 8 before redeeming the mortgage; (b) whether they are bound to pay them a further sum of Rs 125. The facts which raise these two questions are briefly these: The plaintiffs are the owners of the property. They mortgaged items 2 and 3 for Rs. 1,000 to defendants 1 to 4 in the year 1862. It was a usufructuary mortgage, and defendants 1 to 4 took possession under the mortgage. In the year 1862, these defendants notwithstanding they are only mortgagees dealt with the property as if they were full owners thereof and gave a mortgage of item 2 to one Poker; in 1886 one Haji redeemed Poker. Defendant 5 redeemed Haji and got possession in 1900. From the year 1886 to 1900 Haji held possession under a mortgage for Rs. 125. Consequently, he acquired a right to be redeemed on the payment of that amount. Defendant 5, who has stepped into the shoes of Haji, is entitled to claim that right. Mr. Sundaram who appeared for the plaintiff did not dispute the liability of his client to pay the sum of Rs. 125 before redemption. That disposes of the second question.

The first question is more difficult. It was only in the year 1900 that defendant 5 got possession of the property, although the mortgage for Rs. 9,000 was in the year 1894. The suit for redemption was brought in the year 1909. If limitation commenced to run from 1894, the date of the mortgage, the plaintiff could not maintain the suit in its present form. If, on the other hand, limitation began to run only from 1900 when possession was obtained by defendant 5, the suit is in time. I have come to the conclusion that the suit is in time. In my opinion, Cols. (1) and (3) of the Schedule should be read together and the words appearing in one of the columns should be given the same meaning as in the other column. I also consider that the canon of construction suggested by Benson and Bhashyam Aiyangar, JJ., in *Rungiah Gounden & Co.*, v. *Nanjappa Row* (15), namely:

> "if the various starting points fixed in Col. 3 of any Article from which the period of limitation is to be reckoned do not cover all cases falling within the class of suits or applications described in Col. 1 it will be impossible to hold that the Article in question is exhaustive of the class,"

is the right one. Before examining the language of Art. 134, I may premise by observing that it is in the nature of an exception to Art. 148, which provides for ordinary cases of redemption. It is also clear from its place that its object is to afford protection to the person in possession. Further the protection is of the same kind as that contained by implication in S. 28 of the Act, by which a prescriptive right (limited or unlimited, as the case may be) is secured as against the person who has the legal ownership in him. Consequently one may safely assert that the Article should be construed liberally in favour of the legal owner, as it cuts down the remaining period for enforcing his

rights of redemption, and strictly against the transferee, as he is permitted to acquire a right which in strictness he is not entitled to, and which secures to him an advantage only under special circumstances.

An analysis of Cl. 1 Art. 134, Lim. Act, shows (a) that the suit must be to recover possession; (b) that the properties sought to be recovered must have been first mortgaged and (c) that it should have been transferred by the mortgagee for valuable consideration. I have omitted the words relating to conveyance and trust in this analysis. The question then is, what is the meaning to be attributed to the word "transfer" in the first column? If the suit is to recover possession, it would not prima facie lie against a transferee who has not obtained possession. It follows therefore that it is a pre-requisite of a suit under this Article that the transferee from the mortgagee must have obtained possession. The word "transfer" in this column does not simply mean a paper conveyance but the transfer of possession. If the term "transfer" is used in Col. (1) in that sense, it necessarily follows that the word "transfer" in Col. (3) has the same meaning. The legislature in speaking of the date of the transfer in Col. 3 must have had in mind the transfer with the attributes which that term possesses in Col. (1). In this view time does not begin to run until the transferee has taken possession of the property. If we turn back to S. 28, Lim. Act, the right which is extinguished and which confers upon the opposite party a title by prescription is traceable to loss of possession. That is the policy of the law, and I fail to see why the legislature should be taken to have meant in Art. 134 that anything short of deprivation of possession should bar a person entitled to possession or confer upon the party not taking possession a prescriptive title as if he had been in possession from the date of the paper transfer. The essence of the title lost and of the title acquired both under S. 28, Lim. Act, and under Art. 134 is that one party should have lost possession and the other party should have acquired that possession. I am therefore apart from the authorities, of opinion that under Art. 134 a transferee from a mortgagee prescribes only from the date that he takes possession of the property transferred to him. Reference may be made in this connexion to the observations of Mookerjee, J., in *Promotha Nath Roy* v. *Kishore Lal Saha* 25) and in *Priya Sakai Debi* v. *Bireshwar Samanta* (26). Muthusami Aiyar, J., understood the word "purchase" in Col. 39, Art. 134, before it was amended as relating to possession under the purchase. There is the direct authority of *Ramchandra Vithal Rajadhiksh* v. *Sheikh Mohidin* (1) in favour of the view I have indicated. *Husaini Khanam* v. *Husain Khan* (20) also is to the same effect. Nothing that has been urged in the course of the argument in this case has led me to depart from the position so uniformly maintained.

I do not propose to discuss at length the case-law bearing on 3 and 4 Will. 4, c. 27, from which admittedly Art. 134 has been borrowed. The Indian Article is far wider in its application than the English section. Nonetheless, the principle which was held to underlie 3 and 4 Will. 4, c. 27, has a bearing upon the present case. In *Trustees and Agency Company* v. *Short* (27) Sir Horace Davey (afterwards Davey, L. J.,) contended that:

"Under 3 and 4 Will 4, c. 27, the title of the rightful owner to land is not defeated unless some other person or successive persons has or have been in possession thereof for a continuous period of 20 years."

Lord Macnaghten accepted this contention and held that where a trespasser was in possession for less than twenty years and then relinquished possession the law presumed that the rightful owner was in possession immediately after. In answer to the argument that when once time had begun to run, nothing can stop it, his Lordship stated:

"There is not, in their Lordships' opinion, any analogy between the case supposed and the case of successive disabilities mentioned in the Statute. There the Statute "continues to run" because there is a person in possession in whose favour it is runing."

Parke Baron's observation in *Smith* v. *Lloyd* (28) to the effect

"We are clearly of opinion that the Statute applies, not to want of actual possession by the plaintiff, but to cases where he has bsen out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected,

(25) [1917] 38 I. C. 547.
(26) [1917] 44 Cal. 425=37 I. C. 277.
(27) [1888] 37 W. R. 453=53 J. P. 132.
(28) [1854] 9 Ex. 562=2 C. L. R. 1008.

to bring the case within the Statute, We entirely concur in the judgment of Blackburne, C. J., in *Mc'Donnel* v. *Mc'Kinty* (29) and the principle on which it is founded."

were accepted by the Judicial Committee as good law. The argument of counsel in *Attorney-General* v. *Flint* (8) seems to have proceeded on this assumption, although the question of possession did not directly arise for consideration in that case. If we bear in mind the further principle that there can be no presumption of possession in favour of a wrong-doer, it becomes clear that the rightful owner is not affected by anything short of actual possession taken against him. Compare *Secretary of State* v. *Krishnamoni Gupta*(30). In this view, although defendant 5 obtained mortgage in 1894 for Rs. 9,000, as he did not take possession under it until 1900 and as the suit was brought within twelve years of the taking of possession, the plaintiff is not bound to pay the sum of Rs. 9,000 before redeeming the mortgage.

There is another way of looking at this question, which I do not propose to examine at any considerable length; but having regard to the fact that that point of view has found favour with one of my learned colleagues, I wish to say a word on that question. In this connexion I am assuming that the word "transfer" in Art. 134 does not mean "transfer with possession." In that view, if at the date of the transfer, the transferee had not taken possession, Art. 134 would have no application. If the Article does not apply, then the residuary Art. 144 would apply as against the person who claims to have acquired a limited prescriptive right to be redeemed. Under that Article time beings to run only when the possession of the defendant becomes adverse to the plaintiff.

In my opinion, wherever both Cols. 1 and 3 of an Article are not applicable to a case, we must apply the residuary Articles. The function of the residuary Article is to provide for cases which could not be covered by the exact words used in both the columns of an Article. After all, no Legislature and the ingenuity of no draftsman can provide in terms against all possible contingencies, and that is the reason why residuary Articles are inserted in the Limitation Act. In this view also the suit is in time. Therefore my view is that the claim of defendant 5 that he should be redeemed only on payment of Rs. 9,000 to him is unsustainable. In the light of the above observations, my answer to the first question is "No." The answer to the second question is that time beings to run only after the date of possession. I do not think it necessary to give an answer to the third question, as it does not arise for consideration in this case.

(29) 10 Ir' L. R. 514.
(30) [1902] 29 Cal 518; 29 I. A. 104. (PC)

Srinivasa Aiyangar, J.—Article 134 of the Limitation Act has not been easy to construe, nor is it easy to apply in concrete cases. Soon after the omission in 1877 of the words "in good faith" which qualified the word "purchaser" in the Limitation Act of 1871, a question arose which is not yet settled beyond controversy, whether a transferee with actual knowledge of the limited title of his transferor was entitled to the protection of the Article, especially when such transferor had under no circumstances power to transfer a large interest than he had. There was no apparent reason for treating him differently from his transferor but yet the language of the Article was plain. It may be that the Legislature desired in the case of transferees for value to prevent an inquistion into circumstances attending the transfer or the state of knowledge of the transferee after twelve years from the date of the transfer. Ayling J. and myself had to consider the question in a recent case of *Subbaiya Pandaram* v. *Mahamad Mustapha Maracayar* (31), but that is not the point here.

The questions referred to us are as to the applicability of the Article to suits where the mortgagor had no right to sue for possession on the date of the transfer or where the transferee does not or cannot take possession on the date of the transfer; that is one question; and the other, as to the starting point of limitation to suits to which the Article applies. The suits contemplated by the Article are suits for possession, presumably by a mortgagor, or his representative (we are concerned only with mortgages here) and against the transferee or his representative. Though there was some discussion at the Bar about it, there can be no doubt that the suits governed by the Article are suits against the transferees or their representatives. S. 5 of the Act of 1859 in which the provision was first

(31) [1917] 40 I. C. 50.

enacted is conclusive of this question, for it says "in suit for recovery from the purchaser or any person claiming under him." Further the Article cannot, I think, apply to suits where at the time of the transfer the mortgagor was not entitled to sue for possession; otherwise he may be barred before he has a right of action. The mortgagor, for instance, may not be entitled to redeem till after the expiry of over twelve years from the date of the mortgage and if soon after the date of the mortgage the mortgagee alienates the mortgaged property and places the alienee in possession, the mortgagor would be left wholly without a remedy if Article 134 applied, in so far as the recovery of possession of his land is concerned, a manifestly unjust result. When we remember that mortgages for long terms are quite common in this country and in Malabar the common and the usual mortgage (the kanom) is irredeemable for twelve years, we would not be justified in construing Article 134 in such a way as to indirectly take away the right of redemption of the mortgagor, while that right has been the subject of anxious protection in law; so much so that an impediment to the fair exercise of the right even by a contract of the parties at the time of the transaction, i. e., a clog on the equity of redemption is not recognized. The Indian Legislature in S. 60, T. P. Act, as has been pointed out, has omitted the words, "in the absence of a contract to the contrary," with a view to prevent the mortgagor from contracting himself out of his right of redemption at the time of mortgage.

Whatever doubts there may have been prior to the decision of the Privy Council in *Bakhtawar Begam* v. *Husaini Khanam* (32) as to whether the mortgagor was at liberty to redeem before the time limited for payment, now there can be no question that he cannot do so unless he reserves such a right by the mortgage contract. No doubt it may be said that a mortgagor should not bind himself not to redeem for a long period, but a Limitation Act should not be construed as fettering or affecting a substantive right. It may also be said that he may have an action for damages against the mortgagee on his covenant to place him in possession or redemption, but that would be a poor substitute for his land. As on principle, no period of limitation can being to run till there is a cause of action (Col. 3 of the elaborate Schedules in the Limitation Acts of 1871 and 1877 onwards is based on this principle and the terminus a quo as far as possible is made to coincide with the earliest time at which an action could be brought) we ought not to construe the Article, if the language admits of it, in such a way as to bar the action before the cause of action arose or even to cut short the period so as to give varying periods of time for the same suit, varying according to the time which elapsed between the date of the transfer and the accrual of the cause of action. In construing these Articles of the Lim. Act we should not lay undue stress on Col. 1 of the Article which describes the nature of the suits, and hold that all suits of that class must be governed by that Article, though the starting point fixed in Col. 3 cannot be applied at all or cannot be applied without working injustice.

On this principle in *Rangiah Gounden & Co.* v. *Nanjappa Row* (15) it was held that an application for execution of a mortgage decree, which cannot be executed till after the time fixed for payment (usually six months), is not governed by Art. 179 of the Act of 1877 but by Art. 178 of that Act. It is to be observed that one of the starting points specified in Col. 3 of Art. 179 is the date of the decree and there is no difficulty in counting the period of limitation from that date, and it is as easy to apply Art. 179 to that case as Art. 134 to this. For other illustrations of the same principle I may refer to the decisions of this Court in *Palaniandi Malavarayan* v. *Vadamalai Odayan* (33) and *Manikkam Pillai* v. *Thanikachalam Pillai* (34), where it was held that unless there was a person in existence competent to sue, there can be no limitation. There may no doubt be cases where on ground of public policy or owing to the difficulty in fixing precisely the time when the cause of action arises, a limited period may be fixed beginning from more or less arbitrary starting points for example a

(32) A. I. R. 1914 P. C. 36 = 36 All. 195=23 I. C. 355=41 I. A. 84 (P. C.).

(33) [1915]28 I. C. 956.
(34) [1916] 34 I. C. 945.

suit to recover moveable property from a depositary or pawnee must under Art. 145, Lim. Act be brought within thirty years from the date of the deposit, or pawn, though there may be a contract between the parties fixing a time before which the depositor or pawnor could not recover the property from the bailee. Such contracts are likely to be rare, and it is obviously convenient that questions of title to moveable property which is capable of transfer by mere delivery of possession should be settled as soon as possible.

It is noteworthy that though under Cl. 15, S. 1 of the Act of 1859 the beginning of the period of limitation was the date of the transaction in suits to recover moveable and immovable property alike, irrespective of the time fixed by the contract for such recovery, and though the same provision was re-enacted in 1871, in the Act of 1877 the starting point was altered so as to coincide with the date of the accruer of the cause of action as regards suits to redeem mortgages of immovable property. Again, when the Act of 1908 was passed, in Art. 138 the starting point was altered so as to coincide with the accruer of the cause of action and Cl. 2 was added to S. 15, thus showing the anxiety of the legislature to prevent any injustice by time running against a person who was unable to sue. At the same time it is to be noted that though a change was made in respect of suits for redemption or recovery of possession of immovable property from mortgagees, no corresponding charge was made in Art. 134 which provided for suits to recover possession from transferees. This may be due to the fact that Art. 134 provides for recovery from transferees, not merely of mortgagees, but also of trustees.

As regards recovery of moveable property from buyers, from bailees or trustees for which provision is made in Art. 133 in practically identical terms, there is no difficulty in applying the Article; as the bailor may recover possession from the buyer without reference to the time fixed in the contract of bailment as the bailor can at his option avoid the contract of bailment in the circumstances referred to in Col. 1 of the Article. [S. 153, Contract Act. *Donald* v. *Suckling* (35) per Blackburn, J.] In England 3 and 4 Will. 4 C. 27, S. 28, which was afterwards repealed and re enacted as S. 7, Real Property Limitation Act of 1874, merely reducing the period of limitation from twenty years to twelve, provided.

"that when a mortgagee shall have obtained the possession or receipt of the profits of any land comprised in his mortgage, the mortgagor shall not bring an action or suit to redeem the mortgage but within twelve years next after the time when the mortgagee obtained such possession."

Both before the enactment (when Courts of Equity applied the provisions of the Statutes of limitation, which in terms did not apyly to equity suits, in analogy to actions at law), and after, it appears to have been understood that the provisions of the statute and similar provisions in the earlier statutes did not bar redemptien even after twenty years from the date of the mortgagee taking possession, if the mortgagee as such was entitled to remain in possession till his mortgage was satisfied, i. e., where, as in the case of a Welsh mortgage which closely resembles a usufructuary mortgage as defined in the Transfer of Property Act, there is no question of default or forfeiture or right of foreclosure [see Coote on Mortgages, pp. 32 and 33; *Yates* v. *Hambly* (36), *Fenwick* v. *Reed* (37)]. In *Alderson* v. *White* (38) there was a sale and a covenant to re-sell on payment of the purchase money at or upon 25th March in any year. The suit was to redeem long after twenty years after the purchaser had taken possession. The Lord Chancellor in appeal held that the transaction was not a mortgage and that concluded the case. But referring to the plea of the statute he said:

"I am disposed to think that the statute cannot apply so as to make the mere possession by the mortgage for twenty years . ...a bar to redemption, where the original contract is, in terms, that the mortgagor may redeem at any time during a period extending beyond twenty years."

It appears to me therefore that the stringent provisions of Art. 134, which cut down the long period of sixty years which a mortgagor has after his right to redeem accrued, should not be construed as barring his action even before it arose or as giving him a lesser period than twelve years if the cause of action arose after the date of the transfer but before the expiry of twelve years more especially

(35) [1866] 1 Q. B. 585=7 B. & S. 783.

(36) [1742] 2 Atk 360=26 E. R. 618.
(37) [1816] 1 Mer. 114=35 E. R. 618.
(38) [1858] 2 De G. & J. 97.

as a transferee need not be a transieree in good faith. This question however does not really arise in this case and it is therefore unnecessary to answer the third question in the reference. As regards the first and second questions I think that unless the transferee had possession on the date of the transfer, the Article cannot apply. The possession need not be physical or actual possession. As I have said already, the suit must be one for possession against the transferee. The Article is obviously intended to protect a person in possession for over twelve years and the Article assumes that the plaintiff is in a position to sue for recovery of possession from the transferee on the date of the transfer. If, on the other hand, the Article is so construed as to apply to cases where the transferee has not possession or cannot, or is not entitled to get possession on the date of the transfer, there is no reason to confine it to cases in which the transferee takes possession within twelve years from the date of the transfer, and not to apply it to cases where he takes possession long after twelve years from the date of the transfer.

In the latter case the mortgagor's right to redeem or recover possession would cease, retrospectively as it were the moment the transferee obtains possession even if he gets it by the voluntary surrender of the mortgagee or his representative. To take a case which is of ordinary occurrence in Malabar, *A* is the jenmi and grants a kanom on 1st January 1900 to *B*. This is not redeemable within twelve years, and is often not redeemed for a much longer time. *B* sub-mortgages his mortgage interest on kanom to *C* a year after, i. e., on 1st January 1904, and places *C* in possession and immediately after, say, on 1st February 1904 sells the property to *D* absolutely or gives a melcharth purporting to act as the jenmi. *D* will have to redeem *C* before he obtains possession which he may not be entitled to do till after twelve years from 1st January 1901, i. e., till January 1913 as *C* might claim to hold possession as kanomdar against his mortgagor *B* and his transferee *D*, though not against the jenmi *A*. The amount due to *C* is never an easily ascertainable sum, owing to his right to compensation for improvements which is often not settled till after a prolonged inquiry in Courts. Many years may elapse, even twelve years, before the rights of *D* and *C* inter se are settled and *D* becomes entitled to or gets possession through Court. In the case supposed *A* cannot sue anybody for possession till after 1st January 1912 and would have sixty years to redeem *B* and recover possession from *C*. *D* is not entitled to redeem *C* till January 1913, and may not get or even be entitled to get possession till some time after. Twelve years from the date of the transfer would expire in February 1913, and *A* has practically no time to bring a suit for possession from *D*, the transferee, even under the most favourable circumstances. But *D* may not take possession, for many a melcharth holder is unable or unwilling to pay for redemption immediately he obtains a transfer, more especially as he generally stipulates for twelve years' enjoyment after he obtains possession. The real owner then may be barred the very instant he is able to sue the transferee for possession. In this very case one of the transferees got possession after the institution of the suit for redemption. It must be remembered that there can be oral sales in places where the Transfer of Property Act is not in force and such sales would have been valid in all Provinces before the passing of that Act and when the Limitation Act, 1877 was enacted. The language of Art. 135 in that Act, so far as concerns the present matter was exactly the same as that of the later Act of 1908 It is difficult to see how the mortgagor can in such cases possibly know that his rights are being affected to his prejudice, assuming that there is some sort of a duty to search the registers to find out if his mortgagee has not been fraudulently dealing with the property in violation of the mortgage contract.

It is true that the Law of Limitation may bar a person's right though he may not know that his rights are being infringed, but where he has no reason to believe that his rights are being infringed by the act of those who are bound to protect it, it appears to be unnecessary to restrict or interfere with his right unless the lauguage of the Statute is plain. A mortgagor can no doubt, as soon as the mortgage money becomes payable, sue to redeem the mortgage and implead in that suit the transferees of his mortgagee, but if his mortgagee is in posses-

sion on his own behalf the suit would be governed by Art. 148, and not by Art. 134. If after the institution of such a suit the transferee obtains possession, as has happened in this very case should the suit be dismissed as barred by Art. 134, though it was not barred at its institution? It must be remembered that the doctrine of lis pendens cannot apply, as the transferee obtained possession by virtue of a right created antecedent to the institution of the suit. The fact that in this case the original mortgagee had created mortgages and placed the mortgagees in possession is also immaterial, for they had been redeemed by the last transferee from whom possession is sought: the last transferee does not claim as assignee of the previous mortgagees whom he had redeemed, but as a mortgagee from the original mortgagee.

It was not suggested that suits for recovery of possession in Art. 134 do not include suits to recover possession on payment of whatever may be found due to the mortgagee i. e., suits for redemption, and no such limitation can be placed on the Article. The conclusion, then I arrive at is that unless the mortgagor or his representative can sue for recovery of possession from the tramfree on the date of the transfer, the Article does not apply. This construction gives sufficient protection to those who are entitled to protection, namely persons who take a transfer from mortgagees who rightly or wrongly, they may believe have the power to transfer an absolute title, as a mortgagee by conditional sale atfer condition broken, an English mortgagee after the period fixed for redemption, or a mortgagee with a power of sale after the time for the exercise of the power has arrived; as by lapse of time they may be prevented from proving facts or circumstances which would enable them to keep their purchase. That I believe, is also the reason for the omission of the words "good faith" in the Article, for a person may not be able to prove it after a long lapse of time though the omission undoubtedly may enable a transferee with notice to obtain the protection of the Article. Even transferees from ordinary usufructuary mortgagees may be entitled to protection. as such mortgages, in Provinces, in which the Transfer of Property Act is not in force, may be effected by delivery of possession and a transferee from a person who has long been in possession may not be in a position to find out whether such possessor is an absolute owner or a more mortgagee, just in the same way as it may be difficult to ascertain if a person in possession of moveable paoperty is an absolute owner or bailee. But there is no reason to extend the protection so as to materially affect the substantive rights of owners who are not in a position to protect their interests.

If however the Article is to be applied it is difficult to fix any other date than the date of the transfer, i. e., the transfer of title, as the starting point. That "transfer" in this Article means the transfer" of title and not transfer' of possession is clear, for the word "transfer" was substituted for the word "purchase" to settle the conflict of decisions on the interpretation of the latter word in the Act of1877. In in re *Metropolis* and *Counties Permenent Investment Building Society* (19) Neville, J., held that time for redemption of a common mortgage in England commenced from the date of the mortgagee taking possession as provided by S. 7, Real Property Limitation Act of 1874 and observed that the statement in Fisher's Book that:

> "time will not run in the case of a common mortgage until the day of redemption has arrived; for the mortgagor cannot redeem before that day:"

must be accepted with caution; he apparently dissented from the dictum of Walton J., to the contary in a previous case. It is to be observed that there was no question in that case that S. 7 of the Statute applied to the suits for redemption of common mortgages, in which ordinarily the mortgage money becomes payable in six months: there are also generally provisions in these mortgages for the mortgagor being in possession till default. There can therefore be no hardship in applying the provisions of the section. Hardship or no hardship, if the language of the Statute is quite plain as it is in this case, we are not entitled to take liberties with it under the guise of construing it. I am therefore with all respect unable to agree with the decision in *Husaini Khanam* v. *Husain Khan* (20), *Ramchandra Vithal Rajadhiksh* v. *Sheikh Mohidin* (1), as I read it only decided that Art 134 does not apply except to cases of transferees with possession. My answer then to the questions 1 and 2

is that Art. 134 does not apply at all to the cases mentioned therein.

S.N./R.K. *Order accordingly.*

A. I. R. 1919 Madras 988

ABDUR RAHIM AND SESHAGIRI AIYAR, JJ.

Venkata Reddi and *others*—Defendants—Appellants.

v.

Kuppa Reddi and *another*—Plaintiffs Respondents.

Appeal Suit No. 291 of 1917, Decided on 25th April 1918, against decree of Sub-Judge, Coimbatore, in Original Suit No. 32 of 1916.

(a) Hindu Law—Partition—Idea of extra share to eldest member is obsolete.

The old idea of giving jestabagam or an extra share to the eldest member of a Hindu family has become obsolete and the allotment of such a share at a partition will not be binding on the other shares. [P 989 C 2]

(b) Hindu Law—Partition—Members living together after partition and incurring marriage expenses indiscriminately—Re-union is not proved.

The fact that after partition, the members lived in commensality, incurring marriage expenses indiscriminately will not, under Hindu law, amount to a reunion : 30 *Cal.* 231 (*P.C.*) and 30 *Cal.* 725 (*P.C.*). *Foll.*

Even the throwing in of an extra share by the eldest members into hotchpot will not have the effect of converting separate property into common property. The extra share cannot be given up except by a document duly registered : 32 *I.C.* 955, *Cons.* [P 989 C 1, 2]

A. Krishnaswamy Aiyar—for Appellants.

T. R. Ramachandra Aiyar—for Respondents.

Seshagiri Aiyar, J. — One Kuppa Reddi had four sons. The eldest was Ramasami Reddi the father of defendants 1 to 3. He died in 1914. The last was one Muthu Reddi, who died fifteen years ago, and the plaintiffs are his sons. There were two other sons. In July 1906 there was a partition among the brothsrs evidenced by Ex. U. The family properties were divided into two schedules. Sch. B, was allotted to the second and to third brothers and Sch. A was given to the first and the sons of the fourth brother. These latter were represented by their mother as guardian. The document also says that :

"as No. 1 out of us has been managing the affairs as the head of the family, one share in addition is included."

The present suit is for a half share in the properties which were taken by the first and the fourth brothers. The defendants' case is that the plaintiffs are entitled only to a third share, and that the plaintiff can have no right to the eldest brother's extra share. The Subordinate Judge came to the conclusion that Sch A, properties, which fell to the first and fourth branches, should be shared equally by the two branches. He found that, since the partition, the two branches lived in commensality, kept no accounts and enjoyed the properties as if they were members of an undivided family. This conclusion on facts is not seriously disputed in appeal.

The real question argued before us was whether Ex. U effected a division in status between the first and the fourth branches of the family, and whether since 1906 their properties were enjoyed by the two branches as tenants-in-common or as co-parceners. There can be no question of reunion because, on the date of the partition, the plaintiffs were minors. That is now settled by the decision of the Judicial Committee in *Ram Pershad Singh* v. *Lakhpati Koer* (1) : vide also *Balabux* v. *Rukhmabai* (2). There are some outstanding facts which incline me to hold that the first and the fourth branches of the family became divided inter se. In the first place, if the object was to send away the second and the third branches, there was no necessity for the members of the fourth branch being represented by their mother as guardian. Under the Hindu law although the mother may be the natural guardian as long as the family remains undivided, she has no right of representation in respect of the family property.

Another circumstance is that an extra share was in terms given to the eldest member who was the manager of the family. This, in my opinion, points to the fact that the properties were divided into five shares, that each brother took a share and an extra share was given to the eldest member. The fact that Ex. U does not say that the properties were divided into five shares, does not, in my opinion, negative this view. The shares of the four brothers under the Hindu law are well ascertained and the document speaks of an extra share. It can only mean that an additional fifth share was given to the managing member. This

(1) [1903] 30 Cal. 231=30 I. A. 1 (P.C.).
(2) [1903] 30 Cal. 725=30 I. A. 130 (P.C.).

view of mine is strengthened by the oral evidence given in the case. Three of plaintiff's own witnesses speak to the properties having been divided into five shares and one extra share having been given to the managing member. P. Ws. 3, 10 and 32 give definite evidence on this question. D. W. 1 says that the property was divided into five shares. D. W. 3 who is a paternal uncle of plaintiffs and of defendants says that there was a division into five shares and an extra share was given to the managing member. D. W. 7 also gives similar evidence. It may be said that D. W. 12 is an interested witness. Apart from his evidence, the evidence I have referred to, is so clear and consistent and fits in so well with the probabilities of the case that I am not prepared to reject this evidence as contended for by Mr. Ramachandra Aiyar. I have therefore come to the conclusion that in the partition of 1906, the shares of the brothers were ascertained and that an extra share was given to the senior brother. In that view there can be no doubt that the A schedule properties were held by the two branches as tenants in-common. The decision of the Judicial Committee in *Balkishen Das* v. *Ram Narain Sahu* (3) and *Ram Pershad Singh* v. *Lakhpati Koer* (1) are practically on all fours with the present case.

The next question is whether the joint living, the failure to keep accounts and the fact that marriage expenses were incurred indiscriminately without reference to the shares belonging to the two branches and the fact that acquisitions were made jointly, would constitute what was originally separate property into the co-parcenary property. Mr. Ramchandra Aiyar suggested that it was open to the first branch to throw its extra share into the hotchpot. A transaction of this nature can only be regarded as a gift of a half of the extra share to the fourth branch. Such a transaction must be in writing and registered. It can bear no analogy to renunciations by a member of a joint family in favour of others. Mr. Krishnasami Aiyar quoted the decision in *Thyalambal* v. *Krishna Pattar* (4), where a learned Judge of this Court suggested that, even when members are undivided, in order that the self-acquisitions of any one of them may become joint family property, there must be a document which the law would recognize as a proper conveyance. It is not necessary in this case to go that length. In my opinion, the giving up of the extra share by the senior branch can only be by a duly excuted regietered document and as that has not been done, I must hold that that share has not become the common property of the two branches of the family. Of course the plaintiffs are entitled to an account of the income due to their share from Ramasami Reddi, the managing member and his sons. Whether Art. 44 or Art. 144, Lim. Act applies to the case, it is not necessary to decide at this stage.

The question as to whether more than three years have elapsed since plaintiff 1 attained majority, has not been put in issue. If the suit was brought within three years of his attaining majority, the question as to whether Art. 44 applies, need not be considered. There can be no question that the act of the mother in consenting to give an extra share to the managing member, is not binding on the plaintiffs. The old idea of Jeshtabagam has now become obsolete and consequently the consent of the mother to Ramasami Reddi taking an extra share could not prejudicially affect the plaintiffs. If there is no bar of limitation, the plaintiffs will be entitled to a fourth of the extra share given to the first branch. On the question of accountability, Mr. Krishnasami Aiyar suggested that Art. 62, Lim. Act applied. Here again it is not necessary to express an opinion until the question of the age of plaintiff 1 is settled. The further question as to whether plaintiff 1 can be regarded as competent to give discharge in respect of the rights of his brother who is still a minor, will also have to be dealt with only if plaintiff 1 is found to have been more than 21 years of age on the date of the suit. The decree of the Subordinate Judge must be reversed in so far as it gives to the plaintiffs an equal share with the defendants in A schedule properties. In lieu of that, there will be a declaration that the plaintiffs are entitled to one-third of the properties and to a fourth in the extra share provided that claim is not barred by limitation. There must be a further declaration that the plaintiffs are entitled to an account of the income from the defendants pro-

(3) [1903] 30 Cal. 738=30 I. A. 139 (P. C.).
(4) [1916] 32 I. C. 955.

vided that also is not barred by limitation.

As regards the memorandum of objections Mr. T. R. Ramchandra Aiyar confined his argument to five items disallowed by the Subordinate Judge. As regards item 68 we think the conclusion of the Subordinate Judge cannot be supported. P. W. 19 gives definite evidence that the money which he borrowed, was from Ramaswami Reddi and that, at the request defendant 3, he executed a promissory note for the amount of the consideration to Narayanswami Reddi, the brother-in-law of the defendant. Defendant 3 in the witness-box in a non-committing way says that he did not collect but he does not say that the debt did not exist. We think that the plaintiffs are entitled to their share in item 68. As regards items 23, 65 and 74 we see no reason to differ from tho Subordinate Judge. The original document has not been produced and there is not sufficient evidence to connect the items with moneys belonging to the family. As regards item 35, the evidenoe of P. W. 25 is very definite and clear. Defendant 3 in this deposition says that he collected item 35. There is no reason for not giving the plaintiffs decree for the balance of Rs. 410 in respect of this item. We must modify the decree of the Subordinate Judge in this behalf. As regards items 50 and 69 Mr. Ramchandra Aiyar finally admitted that they are not included in the valuation of this memorandum of objections. We must therefore confirm the judgment of the Subordinate Judge as regards these items. As a result in addition to the declaration already indicated, the decree of the Subordinate Judge must be modified by the giving the plaintiffs their share in items 68 and 35. The costs of all the parties here and in the Court below will be provided for in the final decree.

Abdur Rahim, J.—I agree.

S.N./R.K. *Appeal partly allowed.*

A. I. R. 1919 Madras 990

SADASIVA AIYAR AND SPENCER, JJ.

Sivanupandia Thevar and *others*—Plaintiffs—Appellants.

v.

Zemindar of Urkad—Defendant—Respondent.

Second Appeals Nos. 1074 to 1084 of 1916, Decided on 7th March 1917.

(a) Madras Estates Land Act (1908), S. 40 (3) (a)—Commutation of rent—Principles applicable stated.

In making a determination as to commutation of rent under S. 40, Cl. (3) (a), the Collector should have regard to the average value of the rent actually accrued due to the land-holder during the 10 years preceding the year of the determination of such commuted rent, and not during the 10 years preceding the institution of the suit.

The Collector is at liberty also to take other facts into consideration where the circumstances are peculiar, as where some of the 10 years are extraordinary years. [P 991 C 1]

(b) Madras Estates Land Act (1908), S. 40 (3) (a)—"Year" in S. 40 (3) (a) means year of lease.

The term "year" in S. 40, Cl. (3) does not mean either the calendar year or the fasli year, but the year for which the landlord according to custom or contract is entitled to claim rent, in other words, the year of the lease though in some cases it may happen to be the fasli year also. [P 991 C 2]

(c) Madras Estates Land Act (1908), S. (3) (11) (a)—"Swamibogam" is "rent" in S. 3 (11).

The term "swamibogam" means and implies that it is the landlord's perquisites as owner of the land, and falls within the definition of "rent" in S. 3, Cl. (11). [P 991 C 2]

(d) Words and phrases—Pattam.

The term "pattam" means rent." [P 992 C 1]

(e) Madras Estates Land Act (1908), S. 40—Definite grain pattam fixed between parties—Court cannot allow any deduction at time of commutation from pattam rent to ascertain real grain rent.

Where a definite grain pattam is fixed as the result of a contract between the parties, it is not permissible to Courts to allow any deduction at the time of commutation from the pattam rent, in order to ascertain what may be called the real grain rent which is commuted under S. 40 even where the pattam rent includes cesses not legally recoverable. [P 992 C 1]

(f) Appeal—Forum—Decisions by Revenue Officers refusing commutation to tenants not registered as pattadars—Appeal lies to Collector and not to District Judge.

Appeals from the decisions of Revenue Courts refusing commutation to tenants who have not been registered as pattadars lie to the Collector and not to the District Judge. [P 993 C 1]

(g) Civil P. C (1908), S. 180—High Court should not interfere with discretion exercised by Revenue Courts in cases relating to commutation of rent except on very clear grounds.

Per *Sadasiva Aiyar*, J.—The High Court should not in second appeal interfere with the discretion exercised by Revenue Courts in cases relating to commutation of rent except on very clear grounds, as the question of commutation is intended by the legislature to be governed by the experience of Revenue officer and by equitable considerations, some of a rough and ready character, permitting the use of large discretion and practical sense. [P 993 C 1]

T. R. Venkatarama Sastri and *S. Ramaswami Aiyar*—for Appellants.

V. Ramesam and *S. K. Parthasarathi Aiyangar*—for Respondents.

Sadasiva Aiyar, J.—These eleven second appeals have arisen out of suits brought by the tenants of the Urkad estate to have their rents, which had been mostly paid in grain and partially in cash, consolidated snd commuted to a definite money rent under S. 40, Cl. 1, Madras Estates Land Act. One or more or all of the following six questions arise for desision in these second appeals. Firstly, whether the lower Courts were right in construing S. 40, Cl. 3 (a), Estates Land Act to mean that the Collector in making the determination as to the proper money rent should have regard to the average value of the rent actually accrued due to the land-holder during the ten years preceding the year of the determination of such commuted rent, or whether the true meaning of that section is that the Collector should have regard to the average value of the rent during the ten years preceding the institution of the suit. I am clear that according to the true construction of the language of the section, it means the ten years preceding the year when the Collector determined the amount of the commuted rent by his decision in the suit. I think that it is unreasonable to held that an average rent of ten preceding years was intended (ordinarily) to come into force not immediately after the ten years but with a break or interval occupied by the period during which the suit was pending. Mr. Venkatrama Sastriar mentioned some inconvepiences which would be felt by the Courts (original and appellate) in the trial of such suits, if his interpretation of the section (namely, the ten years preceding the institution of the suit) was not accepted. I do not think that those inconveniences are of such a serious nature as to override what I consider to be the plain meaning of the clause. It has further to be remembered that this avarage of ten years is only to form one of the considerations for the fixing of the commuted rent, that the Court is at liberty to take other facts also into consideration where the circumstances are peculiar (such as where some of the ten years are extraordinary years). I think that in the decision of these cases relating to commutation of rent is second appeal, we ought not to interfere with the discretion of the lower Courts except on very clear grounds, as the whole question of commutation permits of and is intended by the legislature to be governed by the experience of Revenue Officers and by equitable considerations (some of a rough and ready character) permitting of the use of large discretion and practical sense.

Then the second contention of the appellants is, that the year mentioned in the clause means the calendar year beginning with 1st January and not the fasli year as taken by the lower Court. I am unable to find that this contention was raised in the lower Courts, and I do not think that it is raised even in the grounds of the second appeal to this Court. However, I may shortly state that neither the calendar year nor the fasli year as such is intended by this clause, but the year for which the landlord, according to custom or contract, is entitled to claim rent, in other words, the year of the lease. S. 3, Cl. 59, General Clauses Act (10 of 1897) applies only; as stated in the beginning of the section itself, "where there is nothing repugnant in the subject or context." I think it is very clear from the subject and context of S. 40, Madras Estates Land Act that the year mentioned therein means the yearly period for which rent is claimable as between the landlord and tenant, and not the calendar year which would break up the year of the lease into two. In the present suits, the year of the lease happens to be the fasli year.

Then the third question argued related to the point whether the landlord is entitled to claim a small cash swamibogam rent of 7 fanoms per kottah of lands. The word 'swamibogam' itself implies that it is the landlord's perquisites as owner of the land (in other words, profits which he is entitled to get from the tenant who occupies his land) and it clearly comes within the definition of rent found in S. 3, Cl. 2. I do not think it is open to us to indulge in mere speculation and to infer that because the landlord gets half the net grain profits (after making certain deductions) as grain rent, the cash rent or swamibogam cannot also form part of the rent but it is a "case" having nothing to do with rent.

The fourth question that we have to consider is really the most important question in these cases, namely, whether when a fixed grain pattam had been agreed upon between the landlord and the tenant in respect of the lands (in one case seven years before suit and in other cases twenty years before suits), the lower Courts ought to have made a deduction from that pattam rent in order to ascertain what may be called the real grain rent which is commuted under S. 40. This deduction is claimed by the appellants on the ground that the pattam so agreed upon included some cesses and dues declared to be illegal in the case of waram lands. I think that the very word "pattam" clearly means "rent" and even though the pattam might have been fixed after considering the claims of the landlord to certain dues which are not legally recoverable, we must treat the transaction under which the pattam was so fixed as due to an arrangement or compromise between the landlord and the tenant, by which both parties gave up their respective claims to insist upon the actual measurement of the gross produce each year, by which the landlord gave up his claim, whether enforceable or not to recover certain cesses and by which both parties finally agreed that the rent shall be such and such a consolldated quantity of grain thereafter. In such a case, I think it is not only very inconvenient but it is also not permissible to allow either party to go behind that arrangement and re-open it by contending that the rent ought to be higher or lower than the rent then fixed. I think I am fortified in this view by the case of *Jeeatoollah Paramanick* v. *Jugodindro Narain Roy* (1), where Ainslie, J. says at p. 13 :

> " The attempt which is now made to break up the total rent into its elements and take exception to some of them on the ground that they are illegal cannot be permitted. "

The present case is stronger than the one reported as *Jeeatoollah Paramanick* v. *Jugodindro Narain Roy* (1), as the deatils by which the total fixed rent was made up seem to have been specified in the contract in that, case whereas we have had no such details in writing before us. It is complained that the Deputy Collector did not allow such details to be brought up in the evidence of witnesses. So far as I could see, it seems to have been allowed by the Deputy Cellector to be brought out in the evidence of P. W. 11, who prepared a statement showing those cesses so far as the waram lands are concerned. As regards D. W. 1 he said in answer to Court :

> " In fixing the grain rent whether all items such as kaval, kankanam, pichai, kalvaivari, which are set apart either for the landlord or the raiyats or for common expenses when produce is divided, were taken into consideration or not, I do not know. I was not present when the grain rent was fixed. "

He could not therefore have given any evidence as to whether the grain pattam was fixed with reference to thein admissible cesses also or not. I think therefore that no importance could be attached to the Deputy Collector's not having allowed questions to be put to the witness about these details. The next (fifth) contention in those appeals relates to the commutation price fixed by the lower Courts at Rs. 9 per kottah. That price was based on the taluk office reports. The objection to that price is based on the ground that the price of grain prevailing at the zamindar's village granary was the price which ought to be considered. The lower Courts adopted taluk office prices as the plaintiffs did not prove that they were higher than the village prices, the taluk office prices being based on the bazar prices. Having regard to the evidence which shows that about four annas per kottah might be required to transport the grain to the bazar from the village and also considering that it is always understood that the price at the village of the parties is in variably less than the price prevailing in the bazar of the nearest town. I think that a deduction from the bazar prices of at least four annas per kottah ought to be allowed. I would therefore allow such a deduction as regards the price.

Then the last point argued was whether the lower Courts were justified in refusing to commute the rent as regards some of the lands involved in Second Appeals Nos. 1077 and 1083 of 1916, on the ground that the tenants of those lands had not themselves recognized as pattadars by the landlord and hence those lands could not be said to be in their holdings, having regard to the definition " holding " in S. 3, Cl. 3, Madras Estates Land Act (S. 40 allows the raiyat to sue

(1) [1874] 22 W. R. 12.

for commutation only in respect of lands in his "holding) Mr. Ramaswami for the respondent took a preliminary objection to our considering this point. That objection is that when the Revenue Court has refused commutation, an appeal lies to the Collector [see Col. 6 (a), Sch. A, Madras Estates Land Act, against serial No. 4] and that therefore the appeals filed to the District Court on that point and the second appeals filed to this Court against the District Judge's decision on that same point are both incompetent. I think I must accept the validity of this preliminary objection and therefore express no opinion on the soundness of this sixth contention. In the result subject to the modification as regards the price of grain these second appeals must stand dismissed with costs.

Spencer, J.—I agree. On the first point I would add that I think that if the legislature had intended that the years to be taken as a basis for the calculation of rent should be the ten years preceding the institution of the suit, it would have said so in S. 40 as it did in Ss. 31 and 37 and that in the absence of such words the lower Courts were not wrong in considering what was the rent in the years next preceding the determination of the rent. On the other points, I have nothing to add, as I entirely agreed with the view taken by my learned brother.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 993

SADASIVA AIYAR AND SPENCER, JJ.

Chidambaram Pillai and *others*—Defendants—Appellants

v.

Veerappa Chettiar—Respondent.

Second Appeal No. 73 of 1916, Decided on 18th July 1917, against decree of Dist. Judge, Tanjore, in Appeal Suit No. 432 of 1914.

(a) Will — Construction — Power given to executor to manage property till minors attain majority—Promissory note executed by executor, describing himself as executor under will, in renewal of interest due on prior promissory note—Suit on promissory note—Estate of testator held not liable—Mere recital as executor did not constitute him guardian of minors—Executor held to have no power to acknowledge debt even as guardian—Guardian and Ward—Limitation Act (1908), S. 20—Probate and Administration Act (1881), S. 104.

A, by his last will and testament, appointed *V* as his executor to manage his properties till his minor sons and nephew attained majority. *V* executed a promissory note in favour of plaintiff, wherein he described himself as executor under the will of A, in renewal of interest due on a prior promissory note in a suit on the said promissory note wherein it was sought to bind A's estate:

Held: (1) that the estate of A was not liable, 38 *I. C.* 172 and 21 *Mad.* 17, *Foll.*

(2) that the mere recital of the power conferred on *V* to manage the estate did not constitute him guardian of the minors and that the promissory note could not be deemed to have been executed by *V* as such guardian: 7 *W. R.* 73; 13 *M. I. A.* 209 (*P. C.*); 32 *Bom.* 259 and 21 *Cal.* 206, *Dist. A. I. R.* 1914 *Bom.* 300, *Cons.*

(3) that *V*, even as guardian, had no power to acknowledge debts due under the prior promote. [P 996 C 1]

(b) Probate and Administration Act (1881), S. 104—Person expressly executing promissory note as executor binds himself personally

Per *Sadasiva Aiyar, J.*—When a man expressly executes a promissory note as executor, he intends to bind himself personally and the creditor who lends on such a promissory note also intends only to get the benefit of the executor's personal liability under the promissory note. [P 995 C 1]

(c) Will—Construction—Mere direction to executor to manage property till minors attain majority does not constitute him guardian.

A mere direction to an executor appointed under a will to manage the property till the minor beneficiaries attain age will not constitute him guardian of the minors. [P 995 C 1]

(d) Will—Construction—Testator not entitled to dispose of ancestral property by will cannot appoint guardian to manage property for minors succeeding by survivorship.

A testator who cannot dispose of ancestral property by will cannot appoint a guardian to manage that property for minor owners who obtain it by survivorship after his death: *A. I. R.* 1914 *Bom.* 300, *Diss. from.* [P 995 C 1, 2]

(e) Guardian and Ward—Acknowledgment of debt—Guardian cannot acknowledge debt unless for benefit of ward and unless expressly empowered—Limitation Act (1908), S. 20.

A guardian has no right to renew or acknowledge debts, unless it is for the benefit of his ward or unless the document appointing him guardian expressly gives him such power. [P 996 C 1]

(f) Hindu Law—Will—Father can in exceptional cases appoint by will guardian to manage undivided sons' estate during minority.

Per *Spencer, J.*—There may be exceptional cases on which a Hindu father may validly and with propriety appoint by will a guardian to manage his undivided son's estate during his minority when there is no adult co-parcener to do so. [P 997 C 2]

C. Krishnamachariar—for Appellants.

C. V. Ananthakrishna Aiyar — for Respondent.

Sadasiva Aiyar, J.—Defendants 1 to 4 are the appellants. The suit was brought upon two promissory notes, Exs. D and E, executed by one Venkatachallam Pillai on 9th October 1905 for Rs. 1,400, and on 3rd October 1908 for Rs. 725 respectively. This Venkatachallam Pillai was defendant 5 in the case. His legal representatives (defendants 6 to 9 were brought on the record but they were exonerated by the judgment of the Court of first instance. They were not made parties either in the lower appellate Court or in the second appeal to this Court. The liability of the executant, Venkatachallam Pillai, and his heirs need not therefore be directly dealt with in this second appeal. The only question remaining in the suit is therefore whether defendants 1 to 4 are liable on those two promissory notes, Exs. D and E, executed by Venkatachallam Pillai. The second promissory note, Ex. E. was executed mainly for the interest due for three years on the first promissory note, Ex. D. On calculation I find that of the Rs. 725 mentioned in this promissory note Ex. E, nearly Rs. 630 is the amount of interest on Ex. D, and the balance of Rs. 95 seems to have been borrowed for some purpose not disclosed.

Venkatachallam Pillai in executing the main pronote Ex. D describes himself in the body as the son of so and so and as the executor of the deceased Appukuttia Pillai's family under the will executed by the said Appukuttia Pillai. He also signs the promissory note as "Venkatachallam Pillai, executor of Appukuttia Pillai's family," and in Ex. E describes himself similarly in the body of the document and signs merely as "executor Venkatachalam Pillai." In the plaint there is not a word mentioned that this executor of the will of Appukuttia Pillai has got any right of indemnity against the estate of Appukuttia Pillai or the estate of the family or that the plaintiff is entitled to be subrogated to any such right of indemnity of Venkatachalam Pillai. The plaintiff seems to have felt that on a promissory note executed by an executor under a will, the executor and his heirs alone are liable and that the estate of which he is the executor cannot be made directly liable. The law has been, in my opinion, finally settled to the above effect by the recent judgment of my learned brother and Abdur Rahim, J., in *Swaminatha Aiyar* v. *Srinivasa Aiyar* (1), where they refer to the English and Indian cases on this point, including the case in *Srimath Daivasikamani Pandarasannidhi* v. *Noor Mahomed Routhan* (2) to which the late Chief Justice was a party. The plaintiff, thus feeling the weakness of his claim against defendants 1 to 4 (who belong to Appukuttia Pillai undivided family) states in para. 10 of the plaint as follows:

"If for any reason, defendants 1, 2, 3 and 4 should contend that they are not bound to pay any amount defendant 5 is bound to pay that amount."

No doubt the first Court decided that defendant 5 and his heirs are not bound and dismissed the plaintiff's suit as against them, but if the plaintiff, who put himself in the plaint on the safe side wanted to continue to be on the safe side, he ought to have appealed against the judgment of the first Court exonerating defendant 5 and his heirs or should at least have applied to the lower appellate Court to have defendant 5's heirs made party-respondents to the appeal, so that the appellate Court might pass a decree against them if defendants 1 to 4 were exonerated. The lower appellate Court also seems to have felt the difficulty of making defendants 1 to 4 (of whom defendants 2 to 4 are minors) liable on promissory notes executed by a stranger in his capacity as executor of the will of Appukuttia Pillai (the father of defendants 1 to 3 and the paternal uncle of defendant 4). But it gets over the difficulty by treating Venkatachallam Pillai, not as executor appointed by Appukuttia Pillai to look after the estate disposed of by the will of Appukuttia Pillai, but as a guardian appointed by Appukuttia Pillai by his will for his three undivided sons and his undivided nephew. The lower appellate Court then considered that such appointment as guardian by will was valid and that the promissory note Ex D, executed to discharge the debt of Rs. 1,360 due under Appukuttia Pillai's prior promissory note Ex. C, was also valid and binding on the minors. It also considered that, though the claim under Ex D is prima facie barred, the acknowledgment of liability made in Ex. E of 1908 by Venkatachallam Pillai as executor might be treated as an acknowledgment made

(1) [1917] 38 I. C. 172.
(2) [1908] 31 Mad. 47.

by Venkatachallam Pillai as guardian. It further held that such acknowledgment as guardian bound the minors and that hence the claim under Ex. D was also not barred.

I am reasonably clear that there being not a word in either of the promissory notes, Exs. D and E, to indicate that Venkatachellam Pillai executed them as guardian of the defendants, the lower Courts were not entitled to treat such notes as executed by Venkatachallam Pillai, not in his capacity as executor under a will, but as the lawful guardian of the defendants. In fact no reference to the minor defendants appears in either note. When a man expressly executes a promissory note as executor, he intends to bind himself personally and the creditor who lends on such a promissory note also intends only to get the benefit of the executor's personal liability under the promissory note. On this short ground I would set aside the judgments of the lower Courts and dismiss the suit as against defendants 1 to 4 also but under the circumstances without costs.

I would have stopped this judgment with the above paragraph but that several interesting and complicated legal questions were strenuously argued by the respondent's learned vakil, on the basis that these promissory notes were executed by Venkatachallam Pillai as guardian of the defendants. Assuming that he is entitled to raise such contentions, I would deal with them very shortly (premising, however that even in the will Exhibit F, executed by Appukuttia Pillai there is nothing said about Venkatachellam Pillai having been appointed as testamentary guardian of Appukuttia Pillai's sons and nephew and that I am unable to agree with the lower appellate Court that the direction in the will to the executor to manage the property till the minors attain age constituted him as the guardian of the property). That Appukuttia Pillai had no right to dispose of the ancestral property by will is clear Hindu law as now settled, the properties with which he professed to deal by will being undivided family properties which passed by survivorship at his death to his sons and to his nephew. On principle I find it difficult to hold that a man who cannot deal with a particular species of property by will can make arrangements for the management of that property by [redacted] after his death or can appoint guardian to manage that property for minor owners who obtain it by survivorship after his death. It is only as regards self-acquired property which he could dispose of by will in any manner he likes that he could logically claim to possess similar or lesser powers of allowing others to manage it for his minor heirs who take by inheritance or under the will after his death. In *Alagappa Iyengar* v. *Mangathai Ammangar* (3) decided by myself and Moore, J., (who as District Judge decided the present case in the lower appellate Court) it was held following *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar* (4) decided by the present Bench, that:

"as regards properties which survive to the minor son of a Hindu testator as ancestral family property on the death of the father the father has no power to appoint a guardian."

The case in *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar* (4) has been followed also in *Krishna Aiyar* v. *Chakrapani* (5) in this same Court. So far as the case in *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (6) (decided in 1866) is concerned, that was a case decided under the Bengal law and the following sentence on p. 16 affords the key to the decision in that case, which recognised the right of the father to appoint a testamentary guardian:

"It is not denied that as his own acquired property, Heera Lal might dispose of it as he pleased."

It is well known that under the Bengal law the son has no interest by birth in his father's properties. Similarly as regards the decision in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (7) relied on in *Mahobleshwar Krishnapa* v. *Ramchandra Mangesh Kulkarni* (8) that was also a Bengal case. The testator was a zamindar whose sons had no right by birth and the testamentary gift was in favour of his two wives making them trustees for the management of his estate even during his lifetime and giving them a beneficial interest during their lifetime but also only until his minor sons attained majority. The testamentary gift deed did not direct the line of succession. The Privy Council held that such a deed was

(3) [1916] 40 Mad. 672=34 I. C. 766.
(4) [1913] 21 I. C. 848
(5) [1915] 29 I. C. 475.
(6) [1867] 7 W. R. 73.
(7) [1869-70] 13 [illegible] 47 (P. C.).
(8) A. I. R. 1914 Bom. 300=38 Bom. 94=21 I. C. 950.

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valid against reversioner, the minor sons having died during the widow's lifetime. There is nothing said in the decision about the guardianship of these minor sons or about the power of a person to appoint a guardian for the ancestral property of his minor sons who take such property by survivorship and not by succession. I think I ought to follow our own decisions on this point and to respectfully dissent from *Mahableshwar Krishnapa* v. *Ramchandra Mangesh Kulkarni* (8) which relies on *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jah* (6), and *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (7), which cases, however as I have already pointed out have nothing to do with the ancestral property obtained by minor sons by survivorship. The case in *Ramchandra* v. *Krishnarao* (9) is irrelevant in this connexion as it deals only with the power of the Court to appoint a guardian for minors forming a Hindu family group when there is no adult male in that family group. To sum up (a) the promissory notes cannot be treated as executed by the guardian of the defendants (b) the will, Ex. F, does not appoint Venkatachallam Pillai as guardian and (c) Appukuttia Pillai cannot legally appoint a guardian for his minor sons and nephews by will.

Assuming further however that there is a valid appointment of Venkatachallam Pillai as guardian of the defendant's properties a guardian has surely no right to renew or to acknowledge debts unless it is for the benefit of the minors or unless the document appointing him as guardian gives him such power. The will Ex. F, does not give any such power to Venkatachallam Pillai to renew or to acknowledge debts and it makes him "executor" only for managing the properties and to sell them for discharging the debts. See *Alagappa Chettiar* v. *Subramania Pandia Thevan* (10) decided by Wallis, J., (as he then was) and myself, where we have held that a direction or power to discharge a debt does not make the donee of the power an agent authorized to make payment of interest as such so as to keep alive the debt. See *Linsell* v. *Bonsor* (11). The facts found in this case by the lower Courts make it abundantly clear that the renewal under Ex. D was not for the benefit of the minors. The old debt under Ex. C carried interest only at 12 per cent which was enhanced to 15 per cent under Ex. D. Again the document Ex. E provides compound interest on the interest under Ex. D at the same 15 per cent. and adds Rs. 95 further to the old debt. Not a word appears on the record as to the necessity for these renewals and acknowledgments.

In the result viewed in any light the lower Court's decrees against defendants 1 to 4 cannot be sustained.

Spencer, J.— The principal questions for our decision are whether Venkatchallam Pillai who was appointed under Appukuttia Pillai's will to manage his family estate until his minor children attained majority, could give a valid acknowledgment of debts so as to extend the period of limitation for the payment of these debts secured upon two promissory notes and whether the creditor can now recover the amounts out of the estate. In the will Ex. F, Venkatachallam Pillai is described as an executor. The lower Courts have treated him as a guardian of minors. The learned District Judge cites the opinion of Sale, J., in In the matter of *Srish Chunder Singh* (12) to the effect that if executors are given the care and management of the property during an infant's minority they are thereby constituted guardians within the meaning of the Guardians and Wards Act. From the tenor of the will it is evidence that Venkatachallam Pillai's office was not to come to an end as soon as the debts could be paid off the assets collected, and similar dispositions of the testator executed but that he was to continue to look after the family property till the minors came of age. Undoubtedly there was an intention in the mind of the testator to create some kind of trust for the benefit and protection of his children and nephews and to put the management of the estate into the hands of a

"trustworthy person capable of taking pains and having an interest in the improvement of the family property."

as there was no adult male co-parcener available to cultivate lease and if necessary to sell the lands raise loans conduct the suits and pay off the debt. It is argued for the appellant that Appukut-

(9) [1908] 32 Bom 259.
(10) A. I. R. 1914 Mad. 381=23 I. C. 810.
(11) [1835] 2 Bing. (n. s.) 241=132 E. R, 95.
(12) [1894] 21 Cal. 206.

tia Pillai had no power to appoint a guardian of the property of the minors where the property concerned was Hindu joint family property.

In *Gharibullah* v. *Khalak Singh* (13) the Privy Council observed that it was settled law in India that a guardian could not properly be appointed for the undivided share of an infant co-paracener in Mitakshara family. The reason is obvious. A guardian of property in such a case would have no right to divest the manager or the karta of his management of the joint family property and the appointment of guardian would thus in effect be a sinecure. Unless there was separate or self-acquired property to which the minor was entitled, there would be nothing for the guardian to manage. In that sense the appointment would be improper. But beyond saying that such an appointment of guardians by Courts would be improper, the Privy Council have not committed themselves to the opinion that under no circumstances would an appointment of a guardian of minors in a Mitakshara family to be valid. The Bombay High Court has taken the view in *Bindaji* v. *Muthurabai* (14) that a different principle must be applied to a case where all the co-parceners are minors and guardian of the property is appointed for the whole group. Sir Lawrence Jenkins suggested that the order of appointment should reserve liberty to any minor of the joint family to apply on attaining majority to have the guardian removed or his powers restricted. The same High Court took a similar view when the question came up again as to the competency of a guardian of the property of minor co-parceners, whether the guardian's status was based on a muktiarnama of a deceased adult male as in *Mahableshwar Krishnapa* v. *Ramchandra Mangesh Kulkarni* (8), or on an order of Court as in *Ramchandra* v. *Krishnarao* (9). In the more recent case they justified the arrangement on the ground of practical convenience to avoid quarrels in a family consisting only of minors and widows. There the mothers of the nephews acquiesced in the arrangement, and in the case with which we are concerned it does not appear that the mothers of Appukuttia Pillai's sons or nephews took any objection to Venkatachallam Pillai's management at least before the present case came into Court. In the earlier cases the Judges considered that the guardian's appointment only become inoperative when one of the minor co-parceners came of age and they restricted the application of the general principle enunciated in *Virupakshappa* v. *Nilgangara* (15) to that extent.

On the contrary this Court has declared in *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar* (4) and *Alagappa Iyengar* v. *Mangathi Ammangar* (3) and in Second Appeal No. 1660 of 1914, that a Hindu father has no right or power to appoint a guardian for the property of his minor sons, when the property is joint family property of the father and the sons I was a party to the first and the last of these decisions and I have no doubt that they were rightly decided. The first was a case where the Court was asked to remove a person appointed under a will as guardian for the ancestral property of a minor and it was held that the Court had no jurisdiction to interfere. Neither S. 7 (2) nor 39, Guardians and Wards Act could be suitably invoked to give jurisdiction to the Court. The last decision dealt with the application of Art. 44 Lim. Act to the case of an alienation of property by a managing member who happened also to be described as a guardian of the minor member. I am not however prepared to say that *Ramchandra* v. *Krishnarao* (9) and *Mahableshwar Krishnapa* v. *Ramchandra Mangesh Kulkarni* (8) were wrongly decided, or that there may not be exceptional cases in which a Hindu father may validly and with propriety appoint by will a guardian to manage his undivided sons' estate during their minority when there is no adult co-parcener to do so. Trevelyan on Minors, pp. 83, 116. 117, appears to be an autthority for saying that he can. There is no interference with the power of the manager when there is in fact no manager living or when the guardian and the manager are identical. Such a provision would be a natural act on the part of a prudent Hindu father dying without grown up sons or agnates. Although, as pointed out in *Budhilal* v. *Morarji* (16), S. 47, Succession Act has not been made applicable by Hindu Wills Act to the Will

(13) [1903] 25 All. 407=30 I. A. 165 (P. C.).
(14) [1906] 30 Bom. 152.
(15) [1895] 19 Bom. 309 (F. B.).
(16) [1907] 31 Bom. 413.

of a Hindu, this Court has decided in *Albrecht* v. *Bathee Jellamma* (17) that a Hindu father is entitled to appoint by will a guardian of the person of his minor child to the exclusion of its mother and this decision was followed in *Alagappa Iyengar* v. *Mangathi Ammangar* (3).

Be this power of appointment of guardians for the property of Hindu minors what it may, the fact remains that neither was Venkatachallam Pillai expressly declared by the Will to be a guardian of the minors nor did he sign the promissory notes (Exs. D and E) by which limitation is sought to be extended as guardian, but as executor. I am satisfied that if he was a more executor or trustee, the creditor who accepted his personal security for the loan of money had no right thereby to obtain a decree for execution directly against the trust estate, as though a charge had been created on the family property. Vide *Swaminatha Aiyar* v. *Srinivasa Aiyar* (1) to which I was a party, and also Williams on the Laws of Executors and Administrators, Ed. 10, Vol. 2, pp. 1555-6 and 1634-6 and the cases of *Farhall* v. *Farhall* (18) and In re *Evans*, *Evans* v. *Evans* (19). The respondent has now lost his right of recovering the debts from the deceased Venkatachallam Pillai or his legal representatives and they are not parties to this appeal. I therefore agree with my learned brother that the second appeal must be allowed.

S.N./R.K. *Appeal allowed.*

(17) [1912] 13 I. C. 453.
(18) [1872] 7 Ch. App. 123=41 L. J. Ch. 146.
(19) [1887] 34 Ch. D. 597=56 L. T. 768.

A. I. R. 1919 Madras 998

AYLING AND KRISHNAN, JJ.

Gulusam Bivi—Defendant—Appellant.

v.

Ahmadsa Rowther and *others*—Plaintiffs—Respondents.

Second Appeal No. 588 of 1917 Decided on 17th October 1918, against decree of Dist. Judge, Tanjore, in Appeal Suit No. 16 of 1916.

Civil P. C., (1908), O. 20, Rr. 12 and 18—Partition suit—Preliminary decree omitting direction for future mesne profits—Such directions cannot be given in final decree—Partition.

In a partition suit directions for the ascertainment of and inquiry into mesne profits should be embodied in the preliminary decree. Where the preliminary decree is silent as to them, such directions cannot be given in the final decree: 43 *I. C.* 453, *Diss. from*; Appeal against Order No. 277 of 1917, (unreported), *Dist.*; 42 *I. C.* 929, *Expl.* [P 999 C 1]

Per *Ayling, J.*—The principle of O. 20, R. 12, Civil P. C., should be applied to preliminary and final decrees in partition suits under R. 18. [P 999 C 1]

The final decree in a partition suit should be passed as in the cases specifically dealt with by R. 12. O. 20, Civil P. C., The further directions in R. 18 of the Code must be understood as relating to the further inquiry which is found necessary and the final decree, contemplated, though not specifically referred to in R. 18, should be restricted in exactly the same way as the final decree referred to in R. 12. [P 999 C 1]

Per *Krishnan, J.*—The words 'further directions' in O. 20, R. 18, Civil P.C., are wide enough to include a direction for inquiry into mesne profits, but under the rule the direction should be in the preliminary decree. It is not necessary to pray in aid R. 12, which does not properly apply, by its own force, to a partition suit. However in making an inquiry into profits ordered under R. 18 the provisions of R. 12 (1), Cls. (b) and (c), and Cl. (2) will be kept in view as guiding the Court in such an inquiry. [P 1000 C 1]

Where the preliminary decree is silent as to mesne profits, the proper remedy for the party aggrieved is to file a suit. [P 1001 C 2]

T. Narasimha Aiyangar and *K. R. Rangasawmi Aiyangar*—for Appellant.

C. V. Ananthakrishna Aiyar and *C. R. Subramayma Aiyar*—for Respondents.

Ayling, J.—This appeal relates to appellant's claim to future mesne profits on the property awarded to her by the decree in a partition suit in which she was defendant 10. The preliminary decree in the suit is silent on the subject of future mesne profits on appellant's share and the question is whether she is entitled to ask that they should be determined and included in the final decree.

In my opinion she is not. We are not now concerned with the decision of the Full Bench in *Doraisami Aiyar* v. *Subramania Aiyar* (1) that where the decree in a suit for possession leaves a claim to mesne profits undecided, a fresh suit for the mesne profits will lie. What we have to determine is the extent to which the final decree in a partition suit can provide for matters which are not settled or directed to be inquired into by the preliminary decree. The relevant provisions of law are Rr. 12 and 18, O. 20, which have to be read together, and in my opinion their effect is against appellant. A simple suit for possession of specific immovable property, uncomplicated by any question of partition, is governed

(1) [1917] 41 Mad. 188=42 I. C. 929.

specifically by R. 12, and it seems clear to me that in such a suit the final decree could only provide for mesne profits past or future where an enquiry into the same had been directed by the preliminary decree. If either intentionally or inadvertently, the Court had omitted to direct such an enquiry, the aggrieved party must get the preliminary decree amended; no application for mesne profits not provided for in the preliminary decree would be entertained in framing the final decree. This was not in fact, contested by the learned vakil for appellant. I fail to see why the same principle should not be applied to preliminary and final decrees in partition suits. R. 18 (2) says:

"The Court may if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property, and giving such further directions as may be required."

As to what follows the rule is silent; but the law obviously intends that a final decree should be passed as in the cases specifically dealt with by R. 12; and I think the "further directions" must be understood as relating to the "further enquiry" which is found necessary and that the final decree, contemplated, though not specifically referred to, by R. 18, should be restricted in exactly the same way as the final decree referred to in R. 12. With all respect, I am unable to agree with the view expressed by Oldfield, J., in *Venkamamidi Mahalakshmamma* v. *Venkamamidi Rajamma* (2) that a direction for enquiry regarding future mesne profits should be made in the final decree and they should be the subject of a separate final decree after its conclusion. This involves three distinct stages of decree; whereas, as it seems to me, the law expressed in the rules above quoted contemplates only two [see *Bhartendu* v. *Yaqub Husain* (3) and *Kamini Debi* v. *Promotho Nath Mukerji* (4)]. I respectfully agree in this connexion with my Lord the Chief Justice, who says in *Doraisami Aiyar* v. *Subramania Aiyar* (1):

"The change introduced by the new rule is that the award of mesne profits in all cases is to be by preliminary decree and that when ascertained they are to be embodied in a final decree, whereas under Ss. 211 and 212 they were to be ascertained in execution."

We are referred to an unreported case *Maimod Rowther* v. *Doraisami Naicker* (5) (Appeal against Order No. 277 of 1917), in which the learned Judges remarked that unless there was an adjudication on plaintiff's rights to profits before the preliminary decree was passed, there was no reason why the Court should not provide in its final partition decree for an inquiry regarding it. Neither this decision nor that of the single Judge in *Venkamamidi Mahalakshamamma* v. *Venkamamidi Rajamma* (2) is, of course, binding on us, but I may remark that the circumstances of the unreported case were quite different. In that case a party was endeavouring to attack in execution the terms of a final decree which had already been passed, and had conclusively determined the right to the mesne profits in question. Even if the judgment had been directed to be reported, the remarks above quoted would be of an "obiter" nature in so far as they went beyond the facts of the case. I would dismiss the appeal with costs of defendants-respondents.

Krishnan, J.—I agree with my learned brother that this second appeal fails. Defendant 10, who is the appellant before us, claimed past and future profits along with her share in the property in her written statement. But the preliminary decree, which was passed so long ago as 1909, said nothing about future profits while refusing the past profits, though it recognised her claim to a share in the property. She appealed against the decree and again claimed future profits, but the appellate Court also did not deal with them or grant them. Though she filed a second appeal she did not again renew her claim for such profits. The final decree was passed in 1915, in which defendant 10 was given her share in the property. She again appealed to the District Court and there claimed future mesne profits once again. Apparently she did not claim them in the first Court when it was passing its final decree, as there is no reference to them in its judgment. The District Judge refused to allow the matter to be re-opened before him and I think he was right in doing so in the circumstances of this case.

(2) [1918] 43 I. C. 458.
(3) [1913] 35 All 159=18 I. C. 701.
(4) A I. R. 1915 Cal. 272=27 I. C. 317.
(5) A. A. O. No. 277 of 1917.

The learned Judge may be wrong in saying that the appellant's claim to future profits has been "definitely, though not explicitly decided against her", and it may be that it is still open to her to sue for them if so advised under the ruling of the Full Bench in *Doraisami Aiyar* v. *Subramania Aiyar* (1). I do not however think that that is any reason why the final decree should be any longer delayed by directing a fresh enquiry into mesne profits even if it is competent to the Court to do so now. Admittedly the claim for future mesne profits in a suit for possession of immovable property is not one which a party can, as a matter of right, insist upon being adjudicated upon in the suit. I think therefore the Judge was right in refusing to consider the question of future profits in the appeal before him. As the question when exactly the order directing an enquiry into mesne profits should be made in a partition suit has been argued at some length before us, I think it proper to state my view regarding it. I agree with my learned brother that the order should be passed at the time of the preliminary decree itself. It is R. 18, Cl. (2), O. 20, Sch. 1, Civil P. C., that provides for the passing of the preliminary decree in a partition suit. That rule gives power to the Court when passing such a decree to "give such further directions as may be required." These words I think are wide enough to include a direction for an enquiry into mesne profits; but under the rule the direction should be in the preliminary decree. It is not necessary to pray in aid R. 12.

The wording of R. 12, O. 20 is not such as would properly apply to a partition suit for, it contemplates a suit for possession in which a decree for possession can be passed at the very first stage; whereas in a suit for partition, though finally a decree for possession of specific immovable property may be passed, it is not always convenient to do so without a preliminary decree and a further enquiry; and it may also happen that in such a suit directions as to several other matters such as payment of debts and collection of outstandings may become necessary. The rule does not therefore in my opinion properly apply, by its own force, to a partition suit. No doubt in making an enquiry into profits ordered under R. 18 the provisions of R. 12 (1), Cls. (b) and (c), and Cl. (2) will be kept in view as guiding the Court in such an enquiry. But even if we assume that we should read R. 18, Cl. 2 with R. 12 (1), Cls. (b) and (c), and Cl. (2) to grant mesne profits in partition suits, I am of opinion that the preliminary decree which each rule contemplates is one and the same and it is not necessary to have two different preliminary decrees and two different final decrees at different stages. Neither rule contemplates more than one preliminary decree and one final decree in one suit. In fact the Code nowhere contemplates more than one preliminary decree and one final decree in one suit. To have two final decrees and to call the first one a "final" decree will be really a misnomer, as it will not be final. To hold the view taken in *Venkamamidi Mahalakshmamma* v. *Venkamamidi Rajamma* (2) and *Maimod Rowther* v. *Doraisami Naicker* (5), Appeal against Order No. 277 of 1917, is it seems to me with all respect to the learned Judges, to unnecessarily lengthen out proceedings with a possibility of appeals and second appeals from at least three different decrees in the same suit.

Assuming that R. 12 should be read with R. 18 to give mesne profits in a partition suit, is there anything in the former rule that compels the Court to wait till the passing of the final decree in partition, before it can order an enquiry into mesne profits? It is said that there is because the rule speaks of passing a decree for possession in Cl. (a) when directing enquiry into profits under the following clauses and it is argued that in a partition suit the decree for possession is the final decree. In considering the wording of R. 12, as already pointed out, it must be borne in mind that it contemplates suit where a decree for possession can be passed at the very first stage. In applying that rule to a case where such a decree cannot be passed as in a partition suit, we are, I think, not justified in reading it too strictly but we should make the necessary allowance to avoid unnecessary multiplicity of proceedings especially when Cl. (a) does not properly apply to such a suit. I can see no difficulty in holding that an enquiry into mesne profits should, if the Court thinks fit to order it, be directed in the preliminary decree itself and that I believe, is in accordance with the prevailing practice

of the Courts. I therefore consider that when defendant 10 applied for profits before the preliminary decree was passed, she acted properly but when they were not granted to her, her remedy, if any, was by a separate suit. It was too late for her to ask for them in the present appeal. I agree the second appeal should be dismissed with costs of defendants respondents.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 1001

ABDUR RAHIM AND OLDFIELD, JJ.

Nandur Subbayya and *others*—Defendants—Appellants.

v.

Venkatramayya Apparao and *another*—Plaintiffs—Respondents.

Appeal No. 87 of 1916, Decided on 26th September 1917, against appellate order of Sub-Judge, Bezwada, in Appeal Suit No. 29 of 1916.

(a) Limitation Act (1908), Art. 182—Application by decree-holder purchaser for possession is not application for execution—Art. 182 does not apply — Civil P. C. (198), O. 21, R. 95.

Per *Curiam*.—An application by a decree-holder purchaser for possession of the property purchased by him is not an application for execution of the decree within the meaning of Art. 182, Lim. Act and is not therefore governed by that article [P 1002 C 1]

(b) Civil P. C. (1908), O. 21, R. 95—Order for delivery not carried out due to default of purchaser in taking deli-very—Subsequent application is continuation of previous proceeding—(Per *Abdur Rahim, J. Oldfield, J.*—Dissenting)

Per *Abdur Rahim, J.* (*Oldfield, J.*, Dissenting).—Where an order for delivery of possession has not been carried out owing to the default of the purchaser in being present on the premises to take delivery, a subsequent application for possession must be deemed to be only a continuation or a revival of the proceedings under the prior petition. [P 1003 C 1]

(c) Limitation Act (1908), Arts. 180 and 181—Order for delivery of possession—Purpose of Art. 180 is satisfied—Carrying out of order is governed by Art. 181—Civil Procedure Code (1908), O. 21, R. 95.

Once an order for delivery of possession is made by the Court, the purpose of Art. 180, Lim. Act is satisfied and the carrying out of that order is no longer governed by that article. Art. 181 would apply to such a case. [P 1002 C 1]

(d) Limitation Act (1908), Arts. 180 and 181—Applications for execution—Conduct of application should not be taken as criterion for deciding whether applications are in time.

Articles 180 and 181, Lim. Act make no reference to the conduct of the applicant, which should not be taken as the criterion for deciding whether applications are in time, though the fact whether the suspension of execution was due to any default or negligence of the decree-holder or to circumstances over which he had no control has sometimes been taken into consideration in ascertaining what was intended by the order dismissing or striking off a petition for execution. [P 1003 C 1]

(e) Decree—Execution — Order in, should not be cancelled without giving party concerned opportunity of being heard.

A Court should not cancel an order made in execution or otherwise in favour of a party without giving him an opportunity of being heard. [P 1002 C 2]

(f) Limitation Act (1908), Arts. 180 and 181—Application for delivery of possession by purchaser consequent on striking off prior petition ordering delivery, owing to his default in carrying it out is governed by Art. 180 and not by Art. 181.

Per *Oldfield, J.*—An application for delivery of possession by a purchaser, consequent on the striking off of his prior petition ordering delivery owing to his default or laches in carrying it out is governed by Art. 180 and not by Art. 181, and the later application cannot be deemed to be a continuation of the prior proceedings which have already terminated. [P 1004 C 1]

(g) Civil P. C. (1908), O. 21, R. 95—Order under O. 21, R. 95 cannot be treated as general order.

An order obtained under O. 21, R. 91, Civil P. C., cannot be treated as a general order to be worked out in subsequent execution or as including constructively both such a general order and an order executing it: 28 *Mad.* 50 and 14 *I. C.* 264, *Cons.* [P 1003 C 2]

(h) Decree—Execution—To ascertain whether proceedings are pending, fact that order has been worded as one of dismissal is not decisive—It may be suspensory order—Limitation Act (1908), Sch. 1, Arts. 180 and 181.

To ascertain whether proceedings are pending, the fact that the order in them has at any stage been worked as one of dismissal is not decisive. Such an order will be treated as merely suspensory, if the circumstances of the case justify the presumption that such was the Court's real intention. [P 1003 C 2]

(i) Decree—Execution — Continuation of execution proceedings—Proceedings can be held to be continued only when interruption to them has not been occasioned by fault of his own—Limitation Act (1908), Arts. 180 and 181.

A decree-holder's proceedings can only be held to be legally continued when the interruption to them was not occassioned by any fault of his own, but either by the successful objection of a judgment-debtor or a third party or by some obstacle interposed by the Court. They are not continued where the only obstacle is the decree-holder's own default. [P 1004 C 1]

Abdur Rahim, J.—The decree-holder having purchased the property in dispute at an execution sale, which was confirmed on 16th January 1911, applied for delivery of possession by a petition presented on 16th April 1915. If nothing further had happened, there could be no doubt that his application was out of time, applying to it Art. 180 which was for

the first time enacted in the new Limitation Act and lays down a period of three years for an application by a purchaser of immovable property at a sale in execution of a decree for delivery of possession, reckoning time from the date when the sale becomes absolute. Previously however to the present application the respondent had made a similar application first on 9th November 1912 and another on 4th December 1912, and both these petitions were dismissed by one order on 10th December 1912, on the ground that the purchaser was unable to identify the land. A third application was put in on 4th July 1913. On that an order was passed, "Deliver," that is, "deliver possession of the land," on 7th July 1913. Then I take it that the order of the Court to deliver possession was entrusted to the amin or some other proper officer of the Court to give effect to it On 30th July 1913 the order passed on the petition was: "No one to take delivery. V. M's report. Petition dismissed." The contention of the respondents is that having obtained an order from the Court for delivery of possession on 7th July 1913, they are entitled either under Art. 182 or Art. 181 to come within three years of that order and to ask that it be given effect to.

There can be no doubt that it must be taken as settled, so far as this Court is concerned, on the authority of *Sultan Sahib Marakayar* v. *Chidambaram Chettiar* (1), which has been followed in *Ramaswami Aiyar* v. *Abdul Aziz Sahib* (2) by Sadasiva Aiyar and Moore, JJ., that an application by a decree-holder purchaser for possession of the property bought by him is not an application for execution of the decree within the meaning of Art. 182 and that that article does not apply to such cases. Art. 181 will apply if Art. 180 does not. Art 180 will certainly apply, unless it can be held that the order of Court directing delivery of possession dated 7th July 1913, on the petition of 4th July 1913 still stands. If it does there would be no meaning in the Court making a further order for delivery of possession and all that would remain to be done would be the carrying out of the order by an officer of the Court. In my opinion this would be no refinement of construction; on the other hand I should think it will be quite in consonance with what must often happen, namely, that the Court when an application is made to it under Art. 180, makes an order directing delivery of possession but the giving effect to that order is left to an officer of the Court and the order may not be carried out until long afterwards through no default of purchaser. Once an order for delivery of possession is made by the Court in my opinion the purpose of Art. 180 is satisfied and the carrying out of that order would no longer be governed by that Article. The question to be determined therefore is whether the order of Court, dated 7th July 1913, still holds good or must be taken to be cancelled by the order of the 30th July 1913.

It will be no use to review the cases as to the effect of an order of dismissal or striking off an application, which are numerous on the question as to whether such an order puts an end to an attachment or not. The question is, as stated in *Subba Chariar* v. *Muthuveeram Pillai* (3), one of intention to be determined upon the circumstances of each case. In the present case there is nothing to show that the purchaser was heard on 30th July 1913 or that he had any opportunity of showing cause why the order for delivery of possession, dated 7th July 1913, should not be dismissed. The Court cannot cancel an order made in execution or otherwise in favour of a party without giving him an opportunity to be heard I should, therefore, infer that the order "petition dismissed. 30th July 1913" was meant for statistical purposes. In that view of the facts, the present application would merely be a continuation of the proceedings on the petition of 4th July 1913. The present petition, which is made under O. 21, R. 95, no doubt does not say in so many words that what is sought is the carrying out of the order of 7th July 1913, but simply asks for delivery of possession; but there can be no doubt that we are required to look at the substance of the proceedings and not to decide upon the mere form of the application.

Much stress has been laid on the fact that the purchaser was at default in not being present to take delivery of the property when the officer of the Court went there between 7th July and 30th July

(1) [1909] 32 Mad. 136=1 I. C. 998.
(2) [1916] 32 I. C. 993.
(3) [1912] 36 Mad. 553=14 I. C. 264.

1913, for the purpose of ascertaining which article of the limitation applies, Art. 180 or Art. 181 I do not find that these articles make any reference to the conduct of the applicant. Nor can it be said that the decided cases lay this down as the criterion, though undoubtedly the fact whether the suspension of execution was due to any default or negligence of the decree-holder or to circumstances over which he had no control has been sometimes taken into consideration in ascertaining what was intended by the order dismissing or striking off a petition for execution. In this case, even assuming that it was a default on the part of the purchaser in not being present when the amin went there to carry out the order of the Court, though he seems to have encountered difficulties in identifying the properties sold to him owing to a change in the survey numbers, I do not feel obliged to infer from this single fact that the Court, on 30th July 1913, intended to rescind its own order of 7th July 1913 without even giving an opportunity to the purchaser of being heard. I do not think that there is any question involved of any disciplinary measure and I agree with the lower appellate Court that the present application is in continuation of, or a revival of the proceeding under the petition of 4th July 1913. For these reasons, I am unable to agree with the judgment of my learned brother which I have had the advantage of reading and I would dismiss the appeal with costs.

Oldfield, J.—The facts in this appeal lie in a small compass. The respondents are purchasers at Court auction, whose right to possession of the property purchased accrued on 16th January 1911, when the sale was confirmed. They applied for delivery on 9th November 1912, 6th December 1912 and 4th July 1913, but their applications were disposed of without their obtaining it. On 16th April 1913 they applied again in the application now under disposal; and the question, which the lower Appellate Court answered in the affirmative, is whether it is in time. Prima facie it is not. For, as is conceded here, Art. 180, Sch. 1, Act 9 of 1908, is applicable, and it allows a period of only three years from the date when the sale becomes absolute. The contention relied on is that the present application is either a continuation of those already made or is subsidiary or incidental to the first of them, being for execution of the general order for delivery passed on it, and is, therefore, within time with reference to Art. 181.

It is clear that the contention cannot be sustained in either form unless some proceeding initiated by one or other of the previous applications is still pending. For, if there is no pending proceeding, there is nothing which the prsent application can continue or to which it can be subsidiary or incidental. To ascertain whether proceedings are pending, the fact that the order in them has at any stage been worded as one of dismissal is not decisive. For that order will be treated as merely suspensory, if the circumstances of the case justify the presumption that such was the Court's real intention, *Thakur Prasad* v. *Abdul Hasan* (4). and *Subba Chariar* v. *Muthuveeram Pillai* (3). Here the record shows, and it is not disputed, that the orders, of dismissal were passed on the applications of 9th November 1912 and 4th December 1912, because the property to be delivered could not be identified, and on the petition of 4th July 1913, because no one came on behalf of the purchasers to take delivery; and it is not alleged and no reason has been shown for not acting on the ordinary presumption that the Court proceeded regularly and passed these orders on an adjourned date or after notice.

There was no question on any of these occasions of any obstacle to the grant of relief beyond respondents' control or of anything except their default: and the facts in no way resembled those in *Jit Mal* v. *Jwala Prasad* (5), relied on by the respondents, where the obstacle to execution was the evasion of the judgment-debtor. It is argued that the decree-holders' responsibility for the cessation of the proceeding is immaterial. But the only case cited in support of this view, *Qamar-ud-din Ahmad* v. *Jawahir Lal* (6), is really against it. For we are not concerned with the finding, reached in circumstances other than those before us, that the decree-holder then in question had been guilty of no laches, but with the Court's treatment as material of the fact that

" the application under consideration was in substance, as well as in form, an application to revive and carry through a pending execu-

(4) [1901] 23 All. 13.
(5) [1899] 21 All. 155.
(6) [1905] 27 All. 334=32 I. A. 102 (P. C.).

tion, suspended by no act or default of the decree-holder."

On the other hand it has been recognized in a long series of cases [*Thakur Prasad* v. *Abdul Hasan* (4), already referred to] that

" a decree-holder's proceedings can only be held to be legally continued when the interruption to them was not occasioned by any fault of his own, but either by the successful objection of a judgment-debtor, or a third party or by some obstacle interposed by the Court."

This distinction having been drawn lately in this presidency in *Yellampalle Venkatappa* v. *Matam Nanjappa* (7). No such objection or obstacle and nothing except the decree-holder's default is in question in the present case, and I therefore hold that the order on each of their first three applications in each case terminated the proceedings and that the present application cannot be regarded as a continuation of, or subsidiary or incidental to, any of the previous ones.

To do justice however to respondents' contention in its second form it must be stated more fully. It is that the first or in fact any one of their first three applications should be regarded as generally for delivery and the order on it generally as granting it; and that Art. 180 applies only to such an application, not to subsequent applications such as that now before us, which are, it is contended, made for execution of the general order already obtained and are covered by Art. 181. *Suppa Reddiar* v. *Avudi Ammal* (8) and *Subba Chariar* v. *Muthuveeram Pillai* (3). The objection to this is that an application made like those of respondents under O. 21, R. 95, is not in fact of that character and does not result, except by a refinement of construction, which can serve no purpose except to authorize protraction of proceedings, in a general order such as that alleged, requiring further execution before relief can be given. No authority has been shown for treating the order obtainable under O. 21, R. 95, as a general order to be worked out in subsequent execution or as including constructively both such a general order and also, on the assumption (a gratuitous one) that execution of that order has been applied for simultaneously, an order executing it: and the form provided for orders under the Rule Form No. 39, Appendix E, Sch. 1, Civil P. C., expresses either of these views of the proceedings. In these circumstances I dissent from them.

The result is that respondents' application is, in my opinion, out of time; and I have the less difficulty in holding that it is so, because the contrary conclusion would, if the purchaser's right could be kept alive by applications under Art. 181, entail an unlimited extension of the time within which it could be asserted. Such extension would be anomalous in any case; and its necessity in that of a stranger purchaser, who can enforce his right by suit for 12 years after his purchase with reference to Art. 138, Sch. 1, is not apparent, whilst in that of a decree-holder purchaser, such as respondents, who will ordinarily be acquainted with the property and the title to it before the sale, the period of three years should be sufficient. I would allow the appeal and dismiss the petition with costs throughout.

By the Court.—In the result the appeal is dismissed with costs,

S.N./R.K. *Appeal dismissed.*

(7) (1917) 35 I. C. 594.
(8) (1905) 28 Mad. 50.

A. I. R. 1919 Madras 1004

SADASIVA AIYAR AND PHILLIPS, JJ.

S. S. Venkataramana Aiyar— Petitioner.

v.

Emperor— Opposite Party.

Criminal Revn. No. 575 of 1917 and Criminal Revn. Petn. No. 450 of 1917, Decided on 21st September 1917 from the order of 1st Class Sub-Divl. Magistrate, Erode, D/- 1st September 1917 in Misc. Case No. 36 of 1917.

(a) Criminal P. C. (1898), S. 144—Exparte order under—When remedies are open to aggrieved party, High Court will not interfere—Criminal P. C. (1898), S. 439.

The High Court would rarely interfere in revision with an order under S. 144, Criminal P. C. when the other remedies are open to the aggrieved party, especially because the High Court is loath to reject the opinion of the Magistrate responsible for the peace of his locality that there is an emergency which justified his ex parte order. [P 1007 C 1]

Per *Phillips, J.*—Under S. 144, Criminal P. C. it is not necessary for a Magistrate to record in his order his reasons for considering the occasion to be one of emergency. [P 1009 C 1]

Per *Sadasive Aiyar, J.*—In the case of ex parte orders under S. 144, Criminal P. C., the record of the Magistrate should disclose the existence of emergency which called for such ex parte order or that there was not sufficient time to serve notice on the party affected thereby. 7 *I. C.* 343. [P 1006 C 2] *Foll.*

(b) Criminal P. C. (1898), S. 144—Exparte order under—"Material facts" include Magistrate's inability to prevent breach of peace.

The "material facts" required to be set out under S. 144, include, in the case of an ex parte order, the circumstances showing why the Magistrate was temporarily unable to prevent a breach of the peace by intending peace-breakers. [P 1006 C 2]

The flying of Home Rule flag is a perfectly legal act and it is the duty of the Magistrate to support all lawful acts as far as possible. If unreasonable people threaten to commit a breach of the peace, the Magistrate ought not to treat it as a case of emergency, unless through temporary circumstances the Magistrate has no sufficient police or othere force at his command to prevent an immediate breach of the peace and unless he is further unable to find out the persons threatening to commit a breach of the peace so as to bind them over to keep the peace. [P 1006 C 1,2]

(c) Criminal P. C. (1898), S. 144—Exparte order under—Grounds for emergency should be started.

Magistrates should remember that there is a revisional authority over them and should indicate with reasonable fulness the materials on which they conclude that there was an emergency to justify the passing of ex parte orders affecting the liberty of persons. [P 1007 C 1]

L. A. Govindaraghava Aiyar—for Petitioner.

Public Prosecutor—for the Crown.

Sadasiva Aiyar, J.—This is a petition for revision of the order of the Divisional Magistrate of Erode, dated 1st September 1917, passed under S. 144, Criminal P. C., prohibiting the petitioner, who is a High Court Vakil at Erode, from flying a Home Rule flag and directing him to remove the said flag immediately. The order says, "as this is a case of emergency, this order is passed ex parte." It was served on the petitioner at 5 p. m. on 1st September 1917.

The order is defective prima facie in the following matters: (1) it dees not say where the flag was being flown by the petitioner, but this seems to be immaterial as the petitioner knew where it was being flown, that is, over his residence; (2) it does not set out what were the materials on which the Magistrate arrived at the opinion that the flying of the Home Rule flag was (a) "causing annoyance to the public" and was (b) "likely to cause disturbance of the public tranquillity," and (c) "also likely to lead to a riot or affray:"(3) it does not state that annoyance was being caused to any person or persons lawfully employed, the words 'lawfully employed' being found in S. 144, Cl 1; but this also seems to be an immaterial defect as annoyance to persons lawfully employed is only one of several alternative grounds mentioned in S. 144, Cl. 1, and the prevention of disturbance to the public tranquillity or of a riot or affray is sufficient to support the order; (4) it does not mention any facts to support the opinion that it was "a case of emergency." As I have dealt with the irregularities (1) and (3) while mentioning them, there remain only the irregularities (2) and (4) for consideration.

It was held by that very learned Judge Sir S. Subramania Aiyar in *Chinnappudayan*, In the matter of (1), in respect of the analogous provisions in S. 145, Criminal P. C, (which expressly require that the Magistrate should "state the grounds of his being satisfied" while S. 144, requires only the statement of the "material facts of the case") that the omission to state in the preliminary order the grounds on which the Magistrate was satisfied of the existence of a dispute likely to cause a breach of the peace was only an irregularity and did not affect the jurisdiction of the Magistrate and did not make his order void. It is again admitted in the petitioner's clerk's affidavit, paras. 10 and 11, that the Circle Inspector of Police and the Village Munsif of Erode submitted each report to the Sub-Divisional Magistrate and that these reports formed the materials on which the ex parte order was issued. I think therefore this defect No. (2) also is not a sufficient ground for interference with the order.

The fourth and the remaining defect is that the order does not mention any facts to support the Magistrate's opinion that it was a case of emergency. The contention based on this defect deserves serious notice on account of its importance. In *Sundram Chetti* v. *Queen* (2) it was held as regards the corresponding S. 548, old Criminal P. C., of 1872 that:

> "Although the law permits the issue of an order exparte, it intends that ordinarily this course should not be pursued so that each party may have a fair hearing."

In *Govindachetti* v. *Perumal Chetty* (3), I expressed the opinion (and it was concurred in by Sir L. Miller, J.) that ex parte orders should be passed only to meet temporary emergencies. In *Maha-*

(1) [1907] 30 Mad. 548.
(2) [1883] 6 Mad. 203.
(3) [1913] 21 I. C. 381.

maadi Mollah v. *Empress* (4) the followings remarks occur:

"The Deputy Magistrate has submitted an explanation; but there is nothing on the record, or in the explanation to show that there was any such emergency in the matter which required him to take action under Sub-S. 2, S 144, Criminal P. C., as he has done. It is only in cases coming uuder Sub-S. 2, that the law declares that the order may be made ex parte; and as we have already pointed cut; there is nothing on the record, or in the explanation, to show that the matter was of such a nature that the circumstances did not admit of the service in due time of the notice upon the person against whom the order is directed. The law provides that ordinarily in proceedings under S. 144, Criminal P. C., notice should issue upon the person against whom the order was directed. It is only in cases coming under Sub-S. 2 that service of notice is dispensed wtih. Under such circumstances we set aside order etc."

In *Chandra Kanta Kanjilal* v. *Emperor* (5) the following observations occur at p. 983: (of 20 *C. W. N.*)

"The order as made under S. 144, Criminal P. C. by the Subdivisional Officer on 9th December 1915, ought never to have been made. A servant of the first party presented a petition to the Subdivisional Officer in which he complained . . . that if the 'opposite party did certain acts,' there would be a likelihood of a serious breach of the peace. The Magistrate took no evidence and had nothing before him in which to make the necessary record of the material facts of the case but on that petition alone he passed an injunction against the second party under S. 144, Criminal P. C. This appears to us to be wholly irregular. The threat of a breach of the peace was from the first party and the Magistrate might well have on that petition said to the person who presented it that he would bind him down under S. 107. The proceedings were pushed through with great haste. The order is said to have been served at 9 p. m. on that day. . . We think that the whole proceedings were irregular. The rule must be made absolute. The order under S. 144, Criminal P. C. has expired but it is set aside as being the foundation for the proceedings under S. 188, I. P. C. which are also quashed."

I must here remark as has been remarked in several cases including *Sundram Chetti* v. *Queen* (2) and *Govindachetti* v. *Perumal Chetty* (3) that it is the duty of the Magistrate to support lawful acts as far as possible. The flying of a Home Rule flag is a perfectly legal act and if unreasonable people threatened to commit a breach of the peace the Magistrate ought not to treat it as a case of emergency unless through temporary circumstances the Magistrate had no sufficient police or other force at his command to prevent an immediate breach of the peace and unless he is unable to find out the person threatening to commit a breach of the peace or at least the leaders of such persons (if they are unmerous) so as to bind them over to keep the peace. I am clearly of opinion that "the material facts" to be set out under S. 144, Criminal P. C., in a case like the present do include when an ex parte order is purported to be passed the circumstances showing why the Magistrate was temporarily unable to prevent a breach of the peace by intending peacebreakers. In *Venkatroya Gownden* v. *Very Rev. N. Rondy* (6), the judgment (of Munro and Abdur Rahim, JJ.), which is a short one is as follows:

"The order of the Head Assistant Magistrate dated 14th May 1910 was passed ex parte. Such an order can only be passed in cases of emergency or when there is no time to serve notice. Vide S. 144 (2), Criminal P. C. The order of the Head Assistant Magistrate does not disclose the existence of such emergency or that there was not sufficient time to serve notice. The Tahsildar himself in his letter of the 12th June recommended that before any orders were issued evidence should be formally recorded and the record does not in our opinion disclose any such emergency as called for an ex parte order. We therefore set aside the order of the Head Assistant Magistrate."

If I may say so with respect I entirely agree with this decision. In the present case the petitioner is a High Court vakil residing in Erode itself and known well to the Deputy Magistrate and hence it cannot at all be said that the circumstances did not admit of the serving of a notice upon a person against whom the order is directed and it seems to be further improbable speaking prima facie, that the emergency of a raiyat or an affray could not brook a delay of even 12 hours between 9 p. m. on the 1st September when the order was served at 9 a m. on the following day (even if it was a Sunday) when the vakil might have been asked to show cause. To borrow the language of the judgment in *Venkatroya Gownden* v. *Very Rev. N. Rondy* (6) the record in this case even if you take into consideration the Police Inspector's report (which is not mentioned in the order of the Deputy Magistrate), does not in my opinion, disclose any such emergency as called for an ex parte order.

There is however this distinction between the case of *Venkatroyya Gownden* v. *Very Rev. N. Rondy* (6) (the printed papers in which were perused by me) and

(4) [1898] 2 C. W. N. 747.
(5) [1916] 36 I. C. 144.
(6) [1910] 7 I. C. 343.

the present case namely that in that case, the Magistrate in his order neither mentioned the existence of an emergency nor "that there was not sufficient time to serve notice," whereas in the present case the Magistrate mentions in his order the existence of one of the two alternative conditions justifying the ex parte order namely "emergency." I need not say that this Court, while it has got ample powers to interfere in revision with even orders under S. 144, Criminal P. C., is naturally very loath to reject the opinion of the Magistrate responsible for the peace of his locality that there was an emergency which justified his ex parte order. But Magistrates also should, on their part, remember that there is a revisional authority over them and should indicate with reasonable fullness, when passing such ex parte orders, the materials on which they come to the conclusion that there was an emergency which justified their proceeding to pass orders ex parte affecting the liberty of a person before giving him an opportunity to show cause against such orders. Otherwise, the revisional authority finds almost nothing in the record to go upon and the aggrieved party is naturally tempted to attack the order on the ground that the vague mention of "emergency" is merely intended to bolster up an arbitrary exercise of magisterial authority. I am free to state that I have, while considering this case, during two days past, felt often inclined to admit this petition on the ground that the material facts indicating the emergency are not set out in the order of the Deputy Magistrate. The omission is no doubt only an irregularity (though a grave one). Without calling for an explanation from the Magistrate however it is not possible for this Court to find that there could not have been any materials before him to justify his opinion that there was such an emergency.

But the order seems not to have been looked upon as a grievance by the petitioner till 3rd September 1917, because his own case (on his clerk's affidavit, paras. 14 and 15) is that several hours before the order was served on him at 9 p. m. (on 1st September), he had on the morning of 31st August itself removed the flag which he (the petitioner) had hoisted some weeks before that date and that he had so removed it in deference to the wishes of the Sub Divisional Magistrate, who seems to have been moving till then on quite friendly terms with the petitioner. The order in short could not at all affect the petitioner as there was no flag of his flying then, which had to be removed under the order, the petitioner's case being that it was a new flag hoisted by his father on the evening of 31st August 1917 which was the only flag flying on 1st September 1917 and the Deputy Magistrate's order was based on a misconception of the existing facts. Thus, this petition has been filed by the petitioner (according to his own case) to set aside an order which was wholly infructuous when it was served on him, as it directed him to do a thing which he had already done and to take an order with a property which did not belong to him In fact, it was admitted in the course of the arguments that the petition was filed for the indirect purpose of stopping other proceedings taken by the Divisional Magistrate who has issued notice to the petitioner to show cause why sanction should not be granted to prosecute him for having disobeyed the ex parte order now in question and that if these later proceedings had not been commenced on 3rd September, the petitioner would not have thought of attacking the present order which (according to him) was based on an entire misconception of the Deputy Magistrate as to the person who had hoisted the flag then flying over the house.

It might be admitted that even the most eminent and conscientious Judges are liable (being only human) to have their judgments unconsciously biassed or coloured by their peculiar political, social or religious views when questions involving subtle and far reaching principles connected with religion, sociology or politics, though very remotely and indirectly, have to be decided by them. I might instance questions connected with the meaning of the provisions of the Workmen's Compensation Acts, or the liability under the law of conspiracy of members of trade unions or the legality of a society which has anti-Christian or anti-religious objects. It might even be that in times of political excitement the lower ranks of political agitators and of the police might lose their heads and be guilty of quite im-

proper behaviour such as conspiracies to break meetings or to manufacture evidence against persons whose political opinions are supposed (rightly or wrongly) to be viewed with disfavour by high Executive Officers. But I agree with my learned brother (whose judgment I have had the advantage of perusing) that allegations against the honesty of the conduct and of the intentions of responsible officials like a District Magistrate or first class Deputy Magistrate ought not to be made in an affidavit without adequate and strong materials being indicated in the affidavit itself in support of such allegations. I therefore fully share in his surprise at some of the allegations made in the affidavit of the petitioner's clerk (see especially paras. 10, 11 and 16 of the affidavit), which are not based on the deponent's own knowledge, but which he says, he was informed of and believes to be true. The source of the information when such serious allegations attacking the honesty of a Magistrate are made ought to be mentioned and in the absence of such mention, the statements on information become almost valueless. Where executive and judicial functions are combined in the same officer, it might be (human nature being such as it is) that a Magistrate honestly mistakes the extent of his legal powers in his executive zeal: see *Govindachetti* v. *Perumalchetti* (3), but this should not be made the basis of unjustifiable attacks on his intellectual or official honesty.

As I have said already, this is not a case which could be decided without our calling upon the Subdivisional Magistrate to state the reasons which led him to his opinion that it was a case of emergency and I was half inclined to call upon the Magistrate for a statement as to how he considered it to be a case of emergency. But as pointed out by my learned brother, this Court rarely interferes in revision till other remedies open to a petitioner in the lower Courts have been resorted to unsuccessfully, and there is more than one such remedy which has not been availed of by the petitioner in this case. So after anxious consideration, I think it better, having regard to the fact that the petitioner has really not been aggrieved by the order itself and that we cannot presume without stronger materials before us that the Magistrate who passed the order has seriously lost his judicial balance, to leave it to the Subdivisional Magistrate himself to deal with the merits of his ex parte order, when such merits are discussed before him and have to be considered by him in connexion with any other proceedings arising out of that order which the petitioner might be advised to initiate or which the petitioner is or might be involved in. I am therefore glad that I am not obliged to dissent from the opinion of my learned brother that it is not necessary to exercise our revisional powers in this case, at least at this stage.

Phillips, J.—Petitioner has been served with an ex parte order under S. 144, Criminal P. C., directing him to remove a flag called the Home Rule flag from his house, as its display was likely to cause a breach of the peace. The order purports to have been passed ex parte as the case was one of emergency. Petitioner now asks us to set aside that order in revision. The order being passed ex parte it was open to the petitioner to apply to the Subdivisional Magistrate to have it set aside and if as he contends, the order is really an illegal order, we must presume that the Subdivisional Magistrate, on being shown the law on the subject and the true facts of the case, would have acted according to law and would have cancelled his order. Even if the Subdivisional Magistrate failed to apply the law correctly, it was open to petitioner to apply to the District Magistrate to set aside the order of the Subdivisional Magistrate. Instead of taking this course, which is allowed by law under S. 144, Criminal P. C., petitioner has come to ask us to interfere in revision, and he also alleges that it would have been futile to apply to the Subdivisional Magistrate and the District Magistrate, because they hold views which would prevent them from dealing with the case in a judicial spirit and according to law. This is a most serious allegation against the judiciary and is not in any way justified by the very voluminous and wordy affidavit before us, nor have any facts been mentioned in support of this attack upon the honesty of two responsible Magistrates, and I am surprised that it should have been made at all without facts to support it. There being absolutely no ground shown for the insinuations made, petitioner should have applied in the first instance to the Local

Magistrate before coming to this Court to apply for revision. In the circumstances a very strong case would have to be made out to justify the interference of this Court at this stage. The order however complained of seems to me to be on the face of it a legal order in accordance with S. 144, Criminal P. C., for I regret that I cannot agree with my learned brother's view that under S. 144. Criminal P. C., it is necessary for a Magistrate to record in his order his reasons for considering the occasion to be one of emergency. No hardship is caused to petitioner by having to live for a short time without a flag flying above his house. I would therefore dismiss this petition, as the case for intervention at this stage is extraordinarily weak.

S.N./R.K. *Petition dismissed.*

A. I. R. 1919 Madras 1009

KUMARASWAMI SASTRI, J.

R. Ramachandra Naidu and *others*—Plaintiffs.

v.

Malang Hyath Batcha Saib and *others*—Defendants.

Original Civil Suit No. 224 of 1916, Decided on 27th March 1917.

(a) Partnership—Good will—Meaning of, stated.

The "good will" of a firm or partnership means the whole advantage, whatever it may be, of the reputation and connexion of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money. [P 1012 C 1]

(b) Partnership—Good will is part of partnership assets and heirs of deceased partner can claim share in value of good will.

In the case of an ordinary partnership, good will is part of the partnership assets in the proceeds of which the heirs of a deceased partner are entitled to a share. In the event of a dissolution of the firm, and in the absence of an agreement to the contrary, the good will must be sold for the benefit of all the partners, if any of them wish for such a sale, and even in the event of a dissolution by death of a partner the good will does not go to the survivor or survivors. [P 1012 C 1]

(c) Partnership— South India — Working partner cannot claim share in value of good will.

In the type of partnerships common in Southern India, where the ejman or proprietor takes in a person, often a capable clerk or gumastah, as a working partner and gives him, either in addition to or in lieu of his salary, a share in the profits and retains the power to dispense with his services the working partner cannot claim a share in the good will of the business. The presumption is that he has no interest in the good will and it is for the working partner to show that by a special arrangement, he is entitled to a share in it. [P 1012 C 2]

In cases, however of ordinary partnerships, where the terms are embodied in documents which purport to follow the ordinary laws governing the relations between the partners, every partner is prima facie entitled to an interest in the good will. [P 1012 C 2]

(d) Contract Act (1872), Ss. 239 and 253—Heirs of deceased partner claiming share in profits—Court can award interest in lieu of profits.

Where the representatives of a deceased partner claim his share of the profits accrued due to the firm after his death in respect of his capital and where an enquiry into the same would lead to an examination of complicated accounts, the Court has a discretion to allow reasonable interest in lieu of profits: 37 *I. C.* 728, *Foll.* [P 1014 C 1]

C. P. Ramaswami Aiyar and *S. Duraiswami Aiyar*—for Plaintiffs.

W. Barton and *Nugent Grant*—for Defendants.

Judgment.—This is a suit filed by the heirs of one Tirumalasami Naidu for taking partnership accounts. By a deed of partnership, dated 7th January 1901 (Ex. Q), defendant 1, Tirumalasami Naidu (whose heirs the plaintiffs claim to be), the late Muthuswami Naidu, the late Abdul Rahiman Sahib and one Kothandaramiah Chetti entered into a partnership agreement for carrying on business for five years from 1st January 1901. On the expiry of that period Kothandaramiah Chetti left the partnership and a fresh deed of partnership (Ex. R, dated 29th January 1906) was entered into between defendant 1, the deceased Tirumalasami Naidu and the deceased Muthusami Naidu whereby they agreed to carry on business under the name and style of M. A. Hyath Batcha Sahib and Co., for a further period of five years from 1st January 1906 with the option to continue the partnership thereafter on the same terms. Kothandaramiah Chetti, who was a partner in the business previous to 29th January 1906, executed a release deed (Ex. 3, dated 31st January 1906) in favour of the other partners. The partnership under Ex. R. went on for five years and on 23rd February 1911 the parties to Ex. R entered into a fresh deed of partnership (Ex. S).

The important terms were that they should carry on the business for five years from 1st January 1911 under the name, style and firm of M. A. Hyath Batcha Sahib & Co., that the capital of the partnership should in the first in-

stance be Rs. 3 lakhs and be laid out by Malang Abdul Rahiman Sahib and Malang Hyath Batcha Sahib, that the other two partners should have the 'option of laying out capital, that the capital laid out by them and the other two partners should carry interest at 9 per cent. per annum, that the profits of the firm should be divided into 18 shares, nine of which should be paid to Abdul Rahiman and Hyath Batcha, five shares to Muthusami Naidu and four shares to Tirumalasami Naidu, that the accounts of the partnership should be made up at the end of every year and the losses borne by the partners in the proportion of profits to which they are entitled, that the business should be carried under the management of Hyath Batcha Sahib, Muthusami Naidu and Tirumalasami Naidu and that in case of difference of opinion the decision should rest with the majority. The business went on under this deed of partnership. In 1913 Abdul Rahiman Sahib (one of the partners) died leaving him surviving defendant 2 his son, defendant 3 his widow and defendant 5 his daughter as his legal representatives and the other partners continued to carry on the business under the same conditions as before. Tirumalasami Naidu died in November 1915 leaving plaintiff 1 his brother and defendants 2 to 6 his sons, and Muthusami Naidu died in February 1916 leaving defendant 4, his son and legal representative.

The case for the plaintiffs is that the plaintiff 1 is the undivided brother and plaintiffs 2 to 6 are the undivided sons of the late Tirumalasami Naidu and that they are entitled to an account of the partnership and to payment of what is due to Tirumalasami Naidu. It is alleged in the plaint that the three partnerships referred to above are really one partnership, the business under each deed being only a continuation of the business done under the preceding document, that a sum of a lakh of rupees, deposited with Graham and Co. as security is a partnership asset, that Rs. 25,000 kept as a sinking fund in suspense account is to be brought into the partnership account. that the periodical taking of accounts for the ascertainment of profits and losses not having been complete, the plaintiffs are entitled to an account from the commencement, that the good will of the business is a partnership asset in which the plaintiffs are interested and entitled to a share and that the defendants have not complied with the plaintiffs' demand for an account and for payment of what is due.

Defendant 1 filed a written statement admitting the deeds of partnership referred to in the plaint but pleading that Tirumalasami Naidu was only a working partner who had no interest in the good will, that the interests of plaintiff 1 and the other plaintiffs are adverse, that plaintiff 1 has no claim to the amount due to Tirumalasami Naidu, that the accounts of the partnership were, according to the practice of the firm, settled every year, the last settlement being of 31st December 1915, that the plaintiffs are not entitled to re-open the accounts which were taken and the correctness of which has been admitted by Tirumalasami Naidu, that, as regards the one lakh of rupees with Graham & Co., the same has been credited and brought into account in the annual taking of profits and losses, that as regards the sinking fund it was a reserve against bad debts, that once in three or four years at settlement of accounts the sinking fund was set off against bad debts and thus the same was reduced, that the amount standing to the credit of the reserve fund on 31st December 1914 was Rs. 20,312-7-11 without making allowance for depreciation of book and other debts and that the defendants are not liable to account on the footing of wilful default nor should accounts be taken from 1901 as alleged in the plaint. Defendant 1 admits that the amount due to Tirumalasami Naidu was about Rs. 71,717-11-9 on 31st December 1915 and states that he was unable to pay the amount of anybody as one Govindarajulu Naidu (another brother of Tirumalasami Naidu) objected to payment being made and claimed interest on the moneys himself. Defendant 2 filed a written statement adopting that of defendant 1. Defendants 3, 4 and 5 filed no written statements and did not appear at the settlement of issues or trial. The following issues were settled.

1. Is plaintiff 1 a member of an undivided joint Hindu family with the late Tirumalasami Naidu? 2. Was not the deceased entitled to a share of the good will for the reasons stated in para. 9 of the written statement? 3, Are the plaintiffs barred from claiming any share in

the good will of the business by reason of the settlement referred to in the written statement of defendant 1? 4. Are the plaintiffs entitled to account as and from 1901 or only from 1st January 1915? 5. Are plaintiffs entitled to a valuation being made of the stock-in-trade and of the good will or of the former only? 6. Are the plaintiffs entitled to any share in the sum of one lakh of rupees referred to in para. 14 of the plaint? 7. To what relief are the plaintiffs entitled?

First Issue.—After some evidence was let in on this issue, it was agreed between the parties that the money which may be found due in respect of the share of the late Tirumalasami Naidu in the partnership business should be paid into Court and that it should remain in Court to the credit of this suit, and not be paid out to any of the plaintiffs until all the plaintiffs attain majority and agree as to their rights or till the rights of the plaintiffs inter se to the money are decided by a regular suit between them. It was also agreed that the question as to whether plaintiff 1 is entitled to any share as a member of an undivided joint Hindu family which the late Tirumalasami Naidu or whether the other plaintiffs are solely entitled to the money as the sons of Tirumalasami Naidu should be left open for determination as between the plaintiffs either by a suit or otherwise. Leave was also given to the plaintiffs to apply for investment of the moneys paid into Court. It is therefore unnecessary for me to decide the question raised by this issue.

Issue 2.—The plaintiffs claim that the late Tirumalasami Naidu who was a partner in the firm is entitled to a share in the valuation of the good will. Tirumalasami Naidu was originally a broker and was for the first time taken into the partnership under the partnership deed of (1901 Ex. Q). The deed is between defendant 1, the deceased Abdul Rahiman Sahib, Muthusami Naidu, Kothandaramiah Chetty and Tirumalasami Naidu. It recites that the said five persons are desirous of carrying on business in partnership as merchants and commission agents and that they agree to the carrying on of business in partnership for five years under the name, style and firm of M. A. Hyath Batcha Sahib & Co. (M. standing for Malang, A. for Abdul Rahiman Sahib and Hyath Batcha Sahib the name of the other partner, defendant 1.) This deed was renewed in 1906 by Ex. R, the only change in the personnel being that Kothandaramiah Chetty dropped out after executing the deed of release (Ex. 3) in favour of the other partners. The deed recites that it is to have effect from 1st January 1906 leaving the continuing partners to carry on the business under the name, style and firm of M. A. Hyath Batcha Sahib & Co. In 1911 on the expiry of the period mentioned in Ex. R a fresh deed (Ex. S) was executed and it was under this deed that the partnership went on till it was dissolved by the death of Tirumalasami Naidu and two other partners (Abdul Rahiman Sahib and Muthusami Naidu). The defendants resist the claim of the plaintiffs to a share in the good will on the ground that Tirumalasami Naidu was only a working partner. This is what defendant 1 states in para. 9 of his written statement:

"This defendant is willing to have an account taken of the partnership assets and of the moneys standing to Tirumalasami Naidu's credit in the firm, but he denies that any of the partners other than himself and the late Abdul Rahiman Sahib are entitled to any share in the good will, in fact the name under which the firm was carried on had been in existence long before Tirumalasami Naidu was admitted into partnership and when G. Kothandarama Chetti retired from the business he made no claim for, and he was not allowed any share in the good will thereof. This defendant further states that, amongst the class of traders to which the parties belong, working partners who are remunerated by a share of profits are not entitled to a share in the good will of the firm or to claim that the name under which the firm is carried on shall be treated as a partnership asset."

Mr. Ramaswami Aiyar argues that the above plea is no defence to the plaintiffs' claim to the good will and that even assuming that all the facts stated in it are correct, the late Tirumalasami Naidu, who under the terms of the deeds of partnership (Exs. Q. R and S) was a partner in the real sense of the term, being entitled to a share of the profits and liable for the loss, was not a "working partner" within the meaning of the para. 9 of defendant 1's written statement. Having regard to the pleadings and frame of the issues, I do not think I can dispose of the matter on this short technical point; defendants do not anywhere admit that their liability to share losses would make any difference so long as a person is a "working partner." The question is whether on the evidence on

record the defendants have shown that Tirumalasami Naidu is not entitled to share in the good will. Good will has been defined by Lord Macnaghten in *Trego* v. *Hunt* (1) as:

"the whole advantage whatever it may be of the reputation and connexion of the firm which may have been built up by years of honest work or gained by lavish expenditure of money,"

and a similar view was taken in *Hill* v. *Fearis* (2) (see judgment of Warrington, J.). Although at one time it was thought that good will passed by survivorship [*Hanmond* v. *Douglas* (3)], it has now been settled that in the event of the dissolution of a firm and in the absence of an agreement to the contrary the good will must be sold to the benefit of all the partners if any of them wish for such a sale and that even in the event of a dissolution by death the good will does not go to the survivor. [*David* and *Mathews In re* (4). See also *Pawsey* v. *Armstrong* (5) and Lindley on Partnership pp. 506, 507, 511 and 517].

There can be little doubt that under the English law in the case of an ordinary partnership good will is part of the partnership assets in the proceeds of which the heirs of a deceased partner are entitled to a share. The question, however, is how far the English law can be applied to partneships in this part of the country where the system prevails of taking in what are called "working partners." It is well-known that in this Presidency there are peculiar kinds of partnerships where the ejman or the proprietor of the firm takes in what are called working partners for the purpose of helping him in the business. Very often these persons are old gumastahs who having begun as gumastahs and done good work are rewarded by a share of the profits either in addition to or in lieu of their salary. These partnerships consist of three classes of persons. The first, ejmans or proprietors, the second, modalalis, or persons who put in money to be used as capital and who get a share of the profits instead of interest in return, and the third, the working partners who are known as kashtak kuttalagal (working partners) who ordinarily begin by putting in no capital, but who as the business goes on put in the profits earned in the business itself as part of the capital and receive interest on the money so put in. Although every person associated in the business is called either mudalali (one who supplies capital) or working partner, the person who has a real voice in the business is the ejman and his orders have to be obeyed by the others even though they may disagree with the ejman. It is the ejman who determines the period when the accounts are to be settled and who at the settlement fixes the share that should be given to the working partners for their remuneration.

The ejman moreover, has power, to dispense with the services of working partners and send them out of the partnership though this power is rarely exercised except in case of misconduct. Haji Badruddin Sahib and K. Abdul Kadir Sahib (the witnesses called by the defendants) speak to this type of partnership and I have little doubt that in the type of partnership which they speak of, the working partner has no interest in the good will. I have not come across a single case—either in my practice at the Bar or as a Judge—where a working partner in a firm in which there are ejmans has ever got any share in the good will. I do not think they ever claimed any share in the good will till quite recently. In cases where a family business has been carried on or where a person has been doing business with his own moneys it is hardly likely that the parties ever intended that a gumastah or a third person brought in merely as a working partner and who may be sent out at any time should have a share in the good will which is always treated as the exclusive property of the ejman. In such cases I have little doubt that the law as laid down in the cases cited above has no application. The presumption in such cases is that the working partners has no interest in the good will and it is for the working partner to show that by a special arrangment he became entitled to a share of the good will.

In cases of ordinary partnerships, however where the terms are embodied in documents which purport to follow the ordinary laws governing the relation between the partners, different considerations arise and in such cases every partner is prima facie entitled to an in-

(1) [1896] A. C. 7=65 L. J. Ch. 1.
(2) [1905] 1. Ch. 466=74 L. J. Ch. 237.
(3) [1800] 5 Ves. Jun. 539=31 E. R. 726.
(4) [1899] 1 Ch. 378=68 L. J. Ch. 185.
(5) [1881] 18 Ch. D. 698=50 L. J. Ch. 683.

terest in the good will. In the present case the rights of the parties are regulated by three deeds of partnership (Exs. Q, R and S.) They covenant to carry on business under the name, style and firm of M. A. Hyath Batcha Sahib and Co. and in the deed of 1911 (Ex. S) there is no distinction made as regards the powers of the partners. No special rights are reserved to any partner, and para. 3 expressly states that the business shall be under the management of M. A. Hyath Batch Sahab, P. N. Muthusami Naidu and R. Tirumalasami Naidu and that in case of difference of opinion, the decision shall rest with the majority. Although in all the deeds of partnership Muthusami Naidu and Tirumalasami Naidu are called working partners, they as working partners, have been given special powers under the deeds to override M. Hyath Batcha Sahib who is a capitalist partner. It also appears that though under first deed of partnership (Ex. Q) the capital was to be laid out by M. Abdul Rahiman Sahib and M. Hyath Batch Sahib, it was contemplated that the other partners may also lay out capital and we find that so far as Tirumalasami Naidu was concerned, a considerable sum was standing to his credit in the capital account at the time when Exs. R and S were executed. The restriction in Ex. Q as to the clause about signing for the firm does not find a place in Exs. R and S and reading Ex. S, it is difficult to see how the partnership constituted by it (Ex. S) has any similarity with the partnerships of the ejman style referred to by me above and spoken to by the two witnesses called by the defendants to prove custom. The defendants have not, in my opinion, established that this is such a case (where the deeds contain the ordinary clauses.) The rules laid down in the English cases do not apply either by reason of special nature of the partnership or by reason of anything in the course of dealings between the parties which suggests that the good will was treated as the exclusive property of M. Abdul Rahmin Sahib and M. Hyath Batch Sahib. I find this isssue against the defendants.

Issue 3.—It is difficult to see how the settlement made while the business was a going concern and where there was no necessity to refer to the good will can bar the plaintiffs' right. The purpose of these settlements pleaded by the defendants was to ascertain the state of affairs of the business with a view to appropriate the share of the profits or saddle each partner with a share of the loss. This issue was not pressed or argued at the trial.

Issue 4.—The plaintiffs agree that the settlement of account in the lifetime of Tirumalasami Naidu should be taken as the basis on which subsequent accounts have to be taken, leave being given to them to show that any particular item was omitted in the settlements. The settlement of accounts for 1901 has been marked as Ex. T (1), for 1905 as Ex. T (2) for 1906 as Ex. T (3), for 1910 as Ex. T (4), 1911 as Ex. T (5), and for 31st December 1914 as Ex. T (6). As Tirumalasami Naidu died in November 1915, the last settlement of account in his lifetime is Ex. T (6), which takes the accounts up to 31st December 1914. The plaintiffs are prima facie not bound by the settlement made between the surviving patners or the representatives of the other deceased partners behind their back. I find on this issue that an account should be taken on the basis of the settlement of 31st December 1914, Ex. T (6) the plaintiffs being at liberty to show that any particular item was not taken into account at that settlement.

Issue 5.—There is no dispute as to the rights of the plaintiffs to have a valuation made of the stock-in-trade on the date of the death of Tirumalasami Naidu. As regards the good will, I have already given my reasons for holding that the plaintiffs are entitled to a share in the good will.

Issue 6. — The defendants' counsel states that the sum of one lakh of rupees was taken into account in the settlement of 1914 and this seems to be so from the books filed. The plaintiffs are in error when they state that this sum of one lakh of rupees was omitted.

Issue 7.—Though the plaintiffs claim that they are entitled to a share in the profits of the business carried on subsequent to the death of Tirumalasami Naidu it was agreed between the parties that interest at 12 per cent. may be allowed instead of profits, on the amount that may be found to be due to Tirumalasami Naidu on the date of his death. Having regard to the extremely complicated

nature of the accounts to be taken it should be sought to ascertain what the profits are that accrued subsequent to Tirumalasami Naidu's death in respect of his capital. I think the plaintiffs were well-advised in agreeing to take 12 per cent. interest instead of embarking on an inquiry which would involve a very large expenditure and costs without any certainty as to whether any profits would really accrue if an account is so taken. It is pointed out in *Hajee Siddick* v. *Mahomed Hussain* (6) that the Court has a discretion either to allow profit or to allow reasonable interest and if the parties had not agreed I would, in the interests of the minor plaintiffs have allowed interest and would not have directed an inquiry as regards the profits.

As regards Government pro-notes paid into Court they were so paid on 29th September 1916 under an order of Court, dated 19th September. I think that in taking accounts credit ought to be given to defendants for the value of the Government paper as on 29th September 1916 and interest should cease on the sum so paid from that date. It is argued that as money was not paid in but only Government pro-notes were deposited, the Code does not apply. It appears that the plaintiffs who had notice of the application did not object and it is clear from the rules of the original side that if money had been paid in, it would have been invested in Government pro-notes and the result would have been just the same so far as plaintiffs are concerned. As regards the good will of the business, the best course would be to sell it between the parties after accounts are taken.

There will be a decree declaring the shares of the partners as stated in Ex. S and directing accounts to be taken on the basis of my above findings. The Official Referee will take the usual accounts and submit his report. The taxed costs of the plaintiffs and defendants 1 and 2 will be paid out of the partnership funds. Certified for two counsel for defendants.

S.N./R.K. *Suit partly decreed.*

(6) [1917] 37 I. C. 728.

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* A. I. R. 1919 Madras 1014

WALLIS, C. J., AYLING AND KUMARASWAMI SASTRI, JJ.

Annavajhula Venkatachellamayya Garu—Decree-holder—Petitioner—Appellant.

v.

Ramagirjee Neelakanta Girjee—Counter-Petitioner—Respondent.

Letters Patent Appeal No. 42 of 1917, Decided on 26th October 1917, against judgment of Oldfield, J., D/- 7th February 1917, in A. A. O. No. 91 of 1916.

* (a) **Civil P. C. (1908), O. 21, R. 71—Re-sale—It is not necessary that identical property should be resold—Court should give material alterations for information of intending purchasers.**

It is not necessary, in order to attract the provisions of O. 21, R. 71, that what is sold at the re-sale, on default of payment by the auction-purchaser, should in all respects be the identical property that was sold at the first sale. It is the duty of the Court, having regard to the necessity of giving correct information to intending purchasers, to mention material alterations in the circumstances between the first sale and the second sale. [P 1022 C 1, 2]

If therefore owing to natural causes or causes attributable to the defaulting purchaser, there occurs any change either in the property or the wording of the re-sale proclamation, the defaulting purchaser will not be released from liability under O. 21, R. 71. [P 1023 C 2]

Certain zamin villages were brought to sale in execution of a decree against the zamindar. The properties had already been sold to *G*, who executed an agreement of even date to reconvey the properties to the zamindar on the latter's paying him six lakhs of rupees on or before 31st August 1914. The Court sale took place on 25th August 1914. The sale proclamation mentioned both the sale to *G* and the agreement for reconveyance. The respondent, who was declared to be the highest bidder and the purchaser, deposited Rs. 1,72,500 and was given 15 days for payment of the balance. As he made default in the payment of balance, the properties were put up for re-sale. The time for tender under the re-conveyance agreement having expired before the date of the re-sale, the proclamation described the right to get a re-conveyance as in the nature of a redemption of mortgage right and it also mentioned, what was alleged, that *G* had fraudulently left his place of residence to avoid receiving the tender and that the tender made by the judgment-debtor within the stipulated time was thus improperly refused:

Held: that the respondent was liable for the deficiency in the price secured at the re-sale as the depreciation which ocurred between the first and second sales was one for which he was exclusively responsible: 16 *Cal.* 535; 25 *Cal.* 99 and 14 *I. C.* 777, *Dist.*

Held: *also*, that it was the duty of the purchaser to have made the tender himself to secure the reconveyance as a person interested in the property and that his failure to do so could not absolve him from liability under O. 21, R. 71. [P 1021 C 1, 2]

***(b) Civil P. C. (1908), O. 21, R. 91—There is no implied warranty of title in sales by Court and purchaser cannot avoid except on ground of material irregularity.**

Per *Kumaraswami Sastri, J.*—There is no warranty of title in sales by Court in execution of decrees, and an auction-purchaser cannot, except in cases where he would have the right to set aside the sale on the ground of material irregularity under O. 21, R. 91, avoid his purchase. [P 1022 C 1]

***(c) Civil P. C. (1908), O. 21, R. 84—Person declared purchaser has sufficient interest in property.**

A person, who under O. 21, R. 84, is declared to be a purchaser by the officer conducting the sale, has sufficient interest in the property to prevent a forfeiture or preserve the title from destruction. [P 1024 C 2]

(d) Civil P. C. (1908), O. 21, R. 71—Interpretation of R. 71 should not be unduly strict—R. 71 only gives measure of damages—Notice to defaulting purchaser should be issued.

An unduly restricted interpretation should not be placed on O. 21, R. 71. The rule only enacts the rule as to the measure of damages in cases where the purchaser makes default. It does not prevent the defaulter from raising such objections as are competent to him under O. 21, to raise. [P 1024 C 1]

It is the duty of the Court to issue notice to the defaulting purchaser and decide on his objections before issuing execution against him under R. 71. [P 1024 C 1]

S. Varadachariar—for Appellant.

S. Srinivasa Iyengar—for Respondent.

FACTS appear from the following judgments of Oldfield and Bakewell, JJ., in Appeal against Order No. 91 of 1916:

Oldfield, J.—This appeal is against an order dismissing a petition by appellant, a decree holder, under O. 21, R. 71. Full statement of the facts is necessary because the sum at stake is large and this Court has never dealt fully with the law applicable. Appellant in execution of a money decree brought to sale a taluk in the Kalahasti Zamindari; and the purchaser, here respondent, made the obligatory deposit, but failed to pay the balance of Rs. 5,17,500 within the 15 days allowed by O. 21, R. 85. The property was again put up for sale and fetched only Rs. 1,01,000. Appellant claims the deficit of Rs. 5,89,000. These figures were not certified to the lower Court, as R. 71 requires; and the absence of any certificate regarding them has been relied on in support of its order. But no objection to appellant's claim was taken on this ground in the lower Court, where the omission could have been repaired, or in the grounds of appeal here: and there is no dispute regarding the amount of the deficiency, which was ascertained by the lower Court from the sale records. In these circumstances, whatever the legal inference from the reference to a certificate in the order, the objection based on the absence of one must in this case be disallowed.

The facts, on which the main argument has turned, are then, firstly, that the property to be sold was a right in certain villages comprising the taluk, but that a larger number of villages was given in Ex. A, the proclamation at the first sale, than in Ex. C, that at the second. This, as reference to the details given in the proclamation shows, is due simply to the enumeration of hamlets as distinct villages and calls for no further consideration. The more important point is that the descriptions of the right in the taluk in the two proclamations are different. Both proclamations refer to the same two documents Exs. E and F, as constituting that right. But Ex. A goes on to describe it as a right to a re-conveyance, whilst Ex. C, after giving abstracts of the two documents, of Ex. E as a sale-deed to one Gyanagirji for six lakhs and of Ex. F as an agreement of re-conveyance by him entitling the judgment-debtor to regain the villages on re-payment of that sum before the end of August 1914, then another column describes the transaction as a mortgage, the implication being that the purchaser would be entitled to redeem it by payment at any time within the period of limitation. There are however further complications. The sale was held on 25th August 1914, only six days before the date specified for payment in Ex. F. If that date passed without the payment to Gyanagirji being made or tendered, the debtor's right to the taluk was lost, unless its mortgage character could be sustained. Hence, when a second sale became necessary, the mention in Ex. C of that character, to which reference has been made. and further the insertion of a statement that :

"when the debtor tried to tender Rs. 6,00,000 according to the conditions of Exs. E and F within the time stipulated therein, Gyanagirji with evil intent evaded that tender."

Respondent has denied the truth of this statement in his counter-petition; but there has been no inquiry regarding it. If it was true, the debtor's right, apart from its alleged mortgage character,

was after 31st August 1914 only to sue for specific performance of the contract for re-conveyance; and, if it was untrue, he had no further right at all which could be brought to sale. I refer at this point to a question arising on these facts, not because it is in my opinion material, but because I have the misfortune to differ from my learned brother regarding it. It is whether respondent owing to his default is responsible for the change, which the nature of the debtor's right, so far as it was a bare right to re-conveyance, underwent after 31st August 1914. It is argued that he was responsible for it, because he must have known that it would ensue naturally on his failure to pay the balance of the purchase money. This I am unable to follow, since I do not see how respondent, when his purchase was never confirmed, had any duty to make a payment. The analogy between the position of a purchaser at a Court sale, such as respondent, and that of a purchaser at a private sale, on which my learned brother relies, is (with all respect) misleading. The rights of the former do not accrue on the date of the sale, but only on the expiration of 30 days from it; and he cannot curtail that period by paying the balance of purchase money earlier, since it is provided for in the interest of the debtor to enable him, if necessary, to apply under R. 89 or R. 90.

The purchaser's right is under S. 65 and O. 21, R. 94 to acquire title to the property on the date of confirmation of the sale; and such title will count from the date of sale, only if and when the sale is confirmed, It is true that, after confirmation has taken place, he can plead that he had an inchoate and equitable title before it. *Adhur Chunder Banerjee* v. *Aghore Nath Aroo* (1) and *Lanka Gopalam* v. *Lanka Ratnamma* (2). But there appears to be no authority and no reason for holding that, even in cases in which the sale is confirmed and a fortiori in others he is subject to any corresponding duty or is bound to incur expenditure, such as is here in question, in protecting the property or the title to it; and it would clearly be unreasonable to expect it of him, when he is liable to lose his right in consequence of an application under R. 89 or R. 90 by the debtor within the thirty days' period, which he could not foresee and for which he wonld be in no way responsible. In these circumstances, if it were necessary, I should hold that respondent is not answerable for any deficiency due to the determination of the right to re-conveyance.

The facts thus ascertained, it is possible to deal with the general argument that respondent cannot be held responsible or liable for the deficiency in price at the second sale in these proceedings and in particular that it was not a re-sale within the meaning of R. 71, because the property sold was not the same as or, as it has also been put, was not described in the same way as that sold at the first sale. How far is either form of the argument countenanced by the terms of the rule? Further do they authorize inquiry into the purchaser's reasons for default or the decree-holder's conduct as justifying it? The rule deals with

"any deficiency of price, which may happen on a re-sale by reason of the purchaser's default and all expenses attending such re-sale."

and the words "by reason of the purchaser's default" must qualify "re-sale," because (1) that view is consistent with the wording of Form No. 31, Appendix E, (2) it is consistent with the obvious intention to exclude re-sales in other circumstances, those for instance held after a successful objection under R. 90. The procedure is then that such deficiency is to be certified to the Court and recovered from the defaulting purchaser. The whole is expressed every shortly and peremptorily, there being no provision for inquiry into the circumstances or the purchaser's reasons for his conduct. The question whether such inquiry is legitimate has not been decided in Madras, the judgment in *Amir Baksha Sahib* v. *Venkatachala Mudali* (3) dealing only with the question whether an order under the corresponding provision at its date was appealable, not with the grounds on which it could be based. The extreme view was taken in *Tapesri Lal* v. *Deokinandan Rai* (4) by a Full Bench of the Allahabad High Court that the order for recovery was not judicial, but administrative, and that all questions as to its validity must be raised in a separate suit. But the point directly de-

(1) [1898] 2 C. W. N. 589.
(2) [1915] 26 I. C. 353.
(3) [1895] 18 Mad. 439.
(4) [1897] 19 All. 22

cided was that the executing Court did not lose its jurisdiction to pass an order because of the absence of any certificate by the selling officer, and nothing was said regarding the essential character of other conditions for its exercise of it such as the one now in question, the holding of a re-sale. That condition was more directly in question in the remaining group of cases on the first of which, as enunciating the principles applicable, respondent particularly relies,, *Baijnath Sahai* v. *Moheep Narain Singh* (5), *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul* (6) and *Gangadas Dahyabhai* v. *Bai Suraj* (7). In each of these cases the property to be sold was differently described in each of the two proclamations, which were made, and in each that fact was treated as decisive against the second sale being a re-sale. But in the Calcutta cases there was an alternative ground of decision, that the decree-holder had incapacitated himself from recovering from the purchaser by his own conduct. Neither of these grounds seems to me acceptable. But they must be carefully distinguished. The second could usually be taken only after inquiry.

For it would not be as clear and incontestable in every case as it presumably was in those referred to, either that the decree-holder had been negligent or fraudulent in connexion with either description or that his being so in respect of the second had caused the deficiency of price. Such an enquiry would in many cases be most difficult and, when (as in the present case) an estimate of the rights of a third party would be necessary, the decision might easily have no relation to the real facts. True, somewhat similar issues are investigated at the instance of the judgment-debtor in proceedings under R. 92; but such investigation is expressly provided for and has only a negative result, the cancellation of a sale, and not a positive award of damages. In fact the learned Judges in *Baijnath Sahai* v. *Moheep Narain Singh* (5) recognized this in one part of their judgment, observing that: "although the decree-holder may under certain circumstances be entitled to recover damages from the defaulter, that must be by a regular suit and not by an application .... A claim to recover ... by way of compensation would involve inquiry into difficult questions, which must be decided before the proper amount of damages could be ascertained,"

and then follow observations based on the reference in the statute to the selling officer's certificate, which re inforce this conclusion. It is then impossible, and the learned Judges do not attempt, to determine at what point the complexity of the qnestion raised would negative the right to its decision. The only practical and intelligible view is that inquiry into matters other than those affecting the Court's jurisdiction is not contemplated and that they must be adjudicated on in a suit. If therefore I agreed with my learned brother's conclusion as to respondent's responsibility, I should still hold that it did not affect the result. The other alternative ground of decision above referred to may be accepted, if it amounts only to the requirement that the second sale shall be a re-sale, since the occurrence of a re-sale is the condition on which the Court is entitled to proceed. It is the interpretation of a "re-sale" as the sale of the same property under the same description which is doubtful. There is no warrant for it in the word "re-sale" or in the language used in the order; or for more than insistence on the substantial identity of the property, however it be described.

The fact that both sales are made under the same attachment will generally secure this. It is no doubt true that if a decree-holder described what he was bringing to sale in distinctly different terms on the two occasions, a difference in the property might be presumed. But that would not be so, if the difference corresponded merely with a change in the quality or condition of the property, due, for instance, to a cyclone or diluvion, the latter being the case put by the learned Judges of the Calcutta High Court. Cases can, of ccurse, be conceived, in which natural changes have so confused or destroyed the identity of the property, especially if it is moveable, that even in the absence of a fresh attachment, it can be said to be the same at the second sale as at the first. But the crucial test must be the identity of the property itself, not of its descriptions, the latter being merely one ground of decision as to the former.

This conclusion is easily applicable to the present case, so far as the right sold

(5) [1889] 16 Cal. 535.
(6) [1898] 25 Cal. 99.
(7) [1912] 36 Bom. 329=14 I C. 777.

at the second sale is alleged to differ from that sold at the first in consequence of the mention of its mortgage character. The right on both occasions was that conferred by and was described as that conferred by Exs. E and F, of which and of the contents of which intending bidders had notice. There is no warranty of title at Court sales, and the statements in the proclamations as to the nature of the right to be sold are not alleged to have been fraudulent and were no more than expressions of the decree-holder's opinion as to it. The right was in each case the same; and so far there is no difficulty in holding that the second sale was a re-sale. The question is next whether the expiration of the term mentioned in Ex. F before the second sale, even taken with the allegations of a previous tender by the debtor, made a difference, the contention being that, the right heing to redeem a mortgage, not to obtain specific performance of a contract for reconveyance, it did not. The answer, it seems to me, is that a would be purchaser at each sale was entitled to have regard to the possibility of enforcing either of these rights in the alternative, the right to redeem as contingent on his establishing it and the right to enforce re-conveyance as that which Ex. F certainly conferred; and at the second sale the latter right had become uncertain. It was dependant, no longer only on the making of a payment, but on the possibility of proving that one had been made. Shortly an option was sold at the first sale and a litigation at the second; and this difference is fundamental. The conclusion must be that the second sale was not a re-sale. The result is that the lower Court had no power to make an order under O. 21, R. 71, and was right in refusing to do so. The appeal should, therefore in my opinion be dismissed with costs.

Bakewell, J. — In execution of a decree certain villages were attached and proclaimed for sale by the Court. The proclamation of sale, dated 4th July 1914, apparently followed From No. 29 of App. E of Sch. 1, Civil P. C., which states that

"the property will be put up for sale in the lots specified in the schedule. The sale will be of the property of the judgment-debtors above-named as mentioned in the schedule below; and the liabilities and claims attaching to the said property, so far as they have been ascertained, are those specified in the shedule against each lot."

The schedule consists of the columns, in which are to be set out the numbers of the lots, the description of the property the assessment thereon, any incumbrances thereon, and the

"claims if any which have been put forward to the property, and any other known particulars bearing on its nature and value"

(see also O. 21, R. 66). The form also contains a condition that

"in default of payment of the balance of purchase money within the period allowed, the property shall be re-sold after the issue of a fresh notification of sale."

Rules 86 and 87, O. 21 also provide for the re-sale of inmovable property in default of payment, and R. 71 which relates to all sales by the Court and must therefore be read together with these rules, provides a summary remedy against the defaulting purchaser. The proclamation sets out several documents which had been found to be registered in respect of the property and the last column contains this statement,"

"the defendant has the right to the re-conveyance of the said property according to the document 3."

There is a question whether the last mentioned document contains merely an option for the re-purchase of the property before the 31st August 1914, or should be read together with an earlier sale deed and construed as a mortgage. The property was put up for sale on 20th August 1914 and bought by the respondent, who failed to pay the balance of his purchase money on the due date, 9th September 1914, and a fresh sale was held on 16th January 1915 at which a much smaller price was obtained. Upon an application under O. 21, R. 71, the respondent pleaded that at the second sale the proclamation differed in material respects from that made at the first sale, and accordingly there had not been a re-sale of the same property and that the application did not lie. The second proclamation sets out the documents already mentioned in greater detail, and alleges a tender of the amount payable under the option of re-purchase within the stipulated time, and states that

"this property should be sold by auction subject to the said right according to the said documents."

There is no doubt that the title to the property was different at the second sale because the period of the option had ex-

pired and the alleged tender had then become a material part of it, an essential part if the interest was merely an option but still a very material fact with respect to interest and costs if the documents created a mortgage. A proclamation of sale is settled by the Court after notice to the decree holder and judgment-debtor and is intended to give all the information available so as to enable a purchaser to judge of the nature and value of the property (O. 21, R. 66). If he is misled by it, he can repudiate the sale [see *Mahomed Kala Mea* v *Harperink* (8)], but by bidding at the sale he agrees to purchase such right, title and interest in the property as belongs to the judgment-debtor, and he cannot raise objections to title such as might avail a purchaser at a private sale but can only object that the debtor had no saleable interest (O. 21, R. 91), that is, that nothing was attached and nothing sold. A purchaser must be deemed to have made his offer upon the terms set out in the proclamation and conditions of sale and subject to the rules of the Court, and the eighth condition provides for "the issue of a fresh notification of sale," and R. 87 directs

"the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale,"

in case of default of payment of his purchase money. There is no provision for an application for an order of the Court for re-sale upon which the purchaser might appear, and R. 66 contains no provision for notice to him of the settling of the fresh proclamation, as in the English Chancery Practice (Daniell's Chancery Practice. Edn. 8, Vol. 1, p. 968), but the Court should, I think, consider whether summons should go to him under para. (4) of that rule. I agree with my learned brother that the words "by reason of the purchaser's default" in R. 71 qualify the word "re-sale", and think that this rule, which applies to sales generally, must be read immediately after R. 87, which applies to sales of immovable property only. The rules thus provide that any deficiency at a re-sale held under a fresh proclamation must be paid by the purchaser at the previous sale, and they contain no provision for an inquiry as to how far this deficiency has been caused by the default of the purchaser, or has resulted from any difference between the two proclamations or alteration in the description of the property or in the title thereto. The scheme of R. 71 is that the liability of the purchaser arises automatically upon the certificate of the officer holding the sale, and it follows the Chancery Practice in this respect, under which execution may be issued against a purchaser under the order for re sale when completed by the Master's certificate of the result of the sale (Daniell's Chancery Practice, Vol. 1, pp. 968 and 724).

This procedure may sometimes cause hardship to a purchaser, but it forms part of his contract, and in the present case I fail to see what ground he has for complaint. He must be taken to have known from the documents of title disclosed in the proclamation, and was in fact fully aware, that a large sum of money fell to be paid prior to the confirmation of the sale, and he should have applied for leave to pay this money into Court and for its application in accordance with the option for re-purchase. If this was in fact impossible he was fully aware of this defect of title, and was in no way justified in refusing to complete his contract; or if the result of the defect was that the debtor had no saleable interest, he should have applied under R. 91 to set aside the sale. He cannot have any better right than a purchaser under a private contract of sale with notice of the state of the title, who would be taken to have known that if he failed to pay the amount due under the option he would have to rely upon a title as mortgagor, and that if he repudiated his contract the parties would be damnified by the lapse of the option. It was obligatory upon the parties and the Court to set out in the second proclamation the events which had happened subsequently to the first proclamation. The difference in title at the second sale is therefore the natural and probable consequence of the respondent's breach of contract, and is also one which he knew to be likely to result from that breach, and there is no doubt but that in a suit for damages and in the absence of further evidence the price at the re-sale would be taken to be the market value of the property and the deficiency would be attributed to the defects of title re-

(8) [1909] 36 Cal. 323=36 I. A. 32=1 I. C. 122 (P.C.).

sulting from the respondent's default. My learned brother has discussed the authorities cited to us, but I may point out that in the Bombay and Calcutta cases the defaulting purchaser seems to have been misled by the first proclamation of sale and the learned Judges appear to have considered that the contract was not enforceable against him, and that he could set up this defence without taking proceedings to set aside the sale. That is not the present case, but I am inclined to accept the view of the Allahabad High Court that an application under R. 71 is for execution, and that the certificate of the officer of Court is in the nature of a decree and cannot be challenged in those proceedings. I would allow the appeal with costs.

The Court.—The result is, the appeal is dismissed with costs.

Wallis, C. J.—Under O. 21, Rr. 84-86 Civil P. C. on the default of a purchaser at a Court auction either in making the deposit or paying the balance of purchase money within the specified period the property is to be re-sold; and under O. 21, R. 71, any deficiency in price which may occur at the re-sale together with the expenses attending the re-sale, as certified to the Court, are recoverable at the instance of the decree-holder or the judgment-debtor under the provisions relating to the execution of a decree for the payment of money. By his failure to complete his purchase the purchaser commits a breach of contract and is answerable in damages to the Court or the persons on whose behalf it sells, viz., the decree-holder and the judgment-debtor. These damages estimated by the ordinary rule consist of the deficiency, if any, in the price obtained at the re-sale as compared with the price at the first sale together with the expenses of the re-sale; and the rule provides a summary method of recovering these damages in execution by the Court at the instance of either of the parties interested, the decree-holder or the judgment-debtor. This is a salutary provision intended to minimise the hardship resulting from the purchaser's default, and I see no reason why the Court should refuse to give effect to it unless the defaulting purchaser would be substantially prejudiced. This was the case in *Baijnath Sahai* v. *Moheep Narain Singh* (5), where he had been induced to bid for the property as unencumbered by the fact that the encumbrances were not mentioned in the proclamation of sale and the re-sale was on a proclamation in which the encumbrances were mentioned. In such a case the difference between the two prices could not be regarded as a fair measure of damages, as the purchaser who afterwards defaulted must obviously have made a higher bid than he would have done if he had known of the encumbrances. If the learned Judges in *Baijnath Sahai* v. *Moheep Narain Singh* (5) and *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul* (6) intended to lay down a more stringent rule, I am with great respect unable to agree with them.

There was no circumstance of this kind in the present case. The efforts, in which the legislature joined, to save the ancient zamindari of Kalahasti from being sold in execution having finally failed a taluk of the North Arcot District, was attached and brought to sale at the instance of a judgment-creditor. The taluk had been conveyed to a Mahant for six lakhs of rupees with an agreement for re-conveyance if the money was re-paid before a stipulated date, 31st August 1914. The sale in execution to the respondent took place on 25th August 1914, only a few days before the stipulated time for repayment to the Mahant, and the respondent was no doubt aware of this when he bid, as he would not have bid more than five lakhs for the judgment-debtor's interest without satisfying himself of the terms of the agreement for re-conveyance mentioned in the sale proclamation, and in any case he must be taken to have had notice of it. The case for the appellant is that he was a man of straw employed by the Mahant to get the property knocked down to him as the highest bidder and make the necessary deposit with the money supplied by the Mahant, in order to keep out genuine purchasers and to ensure that the specified date should be allowed to go by without repayment and the right to a re-conveyance be lost; but all this has not been gone into and it is unnecessary to rely on it. On 25th of August, the date of the sale, the respondent made the necessary deposit of Rs. 1,72,500, which entitled him to a delay of 15 days to complete the purchase, vide O. 21, R. 85. On the completion of the 15 days he defaulted,

and it became necessary to re-sell. By that time 31st August 1914 had gone by and the purchaser would no longer have a clear right to a re-conveyance from the Mahant on payment of six lakhs, and could only rely on the position that the transaction was really a mortgage or that the tender had been made before the specified date and refused. Now it is quite clear that what was put up to sale and purchased by the respondent on 25th August included the right to get back this taluk from the Mahant on payment of 6 lakhs before 31st August, and if he chose to purchase the judgmeht-debtor's interest and let the day go by I am clearly of opinion that he is the person to bear the resulting loss. The other view as regards this part of the case appears to be that the judgmont-debtor's right to a reconveyance on payment of a fixed sum before a stipulated day, which might be a most valuable right and in this case is said to have been worth much more than the five lakhs which the respondent agreed to pay for it, cannot be made the subject of an effective sale in execution, if the sale takes place less than fifteen days before the stipulated date, as under O. 21, R. 85, the purchaser has fifteen days to pay the balance and the sale is not final until confirmed after not less than thirty days. These provisions in my opinion were made alio intuitu and were not intended to have that effect. He could if necessary, have procured the concurrence of the judgment debtor in making the tender to the Mahant without preju lice to the question of the confirmation of the sale, and in that case would have been entitled to a charge on the property so released. In any view he got what he bargained for, and I can see no reason why he should not incur the ordinary consequences of failing to complete his bargain.

It is quite clear, and has not been disputed before us, that at the re-sale consequent on the respondent's default, the judgment-debtor's right, title and interest in the same properties was brought to sale. It was however no longer possible to put up a right to reconveyance on payment before 31st August 1914 as that date had gone by; but the nature of the judgment-debtor's interest was represented as favourably as possible in the proclamation, as it alleged that the transaction with the Mahant was a mortgage and also that the agreement for the re-conveyance still subsisted because it alleged, the Mahant had fraudulently gone away from his residence to avoid receiving the tender of six lakhs which the judgment debtor made before the stipulated date. In this case the sale and the re-sale were both duly held and were of the judgment-debtor's interest as it existed at the date of the sale and re-sale respectively, and the depreciation which occurred in the meantime was one for which the respon dent was exclusively responsible. In these circumstances I see no reason why the deficiency should not be recovered from him under the Code. It was scarcely disputed before us that he would have no answer to a suit for a damages and I see no reason for refusing to give effect to the plain language of the Code. I concur in the order proposed by Kumaraswami Sastri, J.

Ayling, J.—I concur.

Kumaraswami Sastri, J.—This appeal arises out of an application by the decree-holder to recover from the auction-purchaser the loss arising from a re-sale held in consequence of his default. Certain villages forming part of the Kalahasti zamindari were brought to sale in execution of a decree against the zamindar. The villages had been conveyed by the zamindar to one Raja Bahadur Narsingar Gyangirji of Hyderabad for six lakhs of rupees by a deed, dated 4th August 1908. The zamindar got an agreement to re-convey bearing the same date if the sum of six lakhs was re-paid by 31st August 1914. The sale proclamation specified the two documents as also other documents not material for the purpose of this appeal. The zamindar's interest in the property conveyed was described as

"the right of obtaining a re-conveyance under the re-conveyance agreement, dated 4th August 1918, executed and given to the defendant by Raja Narsingar Gyangirji Garu residing at Hyderabad and all the other rights and interests possessed by the defendant in these villages."

The sale took place on 25th August 1914, and the respondent who was the highest bidder was declared the purchaser for six lakhs and ninenty thousand rupees. He paid Rs. 1,72,500, the deposit required by O. 21, R. 84, Civil P. C. R. 85 gave him 15 days for the payment of the balance, but he failed to pay the sum and complete the purchase. There was so

far as I can see no excuse for his not paying the balance. It is not shown that there was any irregularity in the proceedings that led up the sale or that any circumstances existed on the date of sale which would justify the purchaser in refusing to complete the purchase. He knew perfectly well what he was purchasing and the risks he ran. There is no warranty of title in sale by Court in execution of decrees as O. 21, R. 91, only applies to cases where there is no saleable interest. So long as the judgment-debtor has any interest however small in the property the purchaser cannot, except in cases where he would have the right to set aside the sale on the ground of material irregularity under O. 21, R. 91, avoid his purchase. O. 21, R. 86, provides for a re-sale in case the purchaser makes default in paying the balance of the purchase money within the time limited by R. 85. The defaulting purchaser is, under R. 71 liable to pay the deficiency in price, if any and the same on being certified by the officer holding the sale is recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

Owing to the respondent's default the property was put up for re-sale. Both Oldfield and Bakewell, JJ. agree in holding that the same villages were put up for sale the second time and this is not disputed before us. When the property was purchased by the respondent at the first sale, there were only six days within which six lakhs had to be paid in pursuance of the agreement to re-convey dated 4th August 1908. This period elapsed within the 15 days allowed to the respondent to pay the balance of purchase money and it is clear that no resale was possible within the period when the six lakhs were payable. At the date of the fresh proclamation rendered necessary by R. 87 before resale the position of the zamindar the judgment-debtor, in relation to the villages advertised for sale became altered. Whereas prior to 31st August 1914 he was entitled to a re-conveyance on tender or payment of six lakhs, he could after that date in the absence of proof of tender in time only get a re-conveyance if he was able to show that the transaction evidenced by the sale deed and agreement to re-convey of the same date was in law a mortgage, and not a mere sale with an agreement to re-purchase. It was alleged by the zamindar that he did make a tender within 31st August which was improperly refused, but as this allegation has not been inquired into by the District Judge, I shall proceed on the footing that no such tender was made.

The proclamation for re-sale had to mention the state of facts as they stood on the date when it was settled by the Court. There is nothing in the Code requiring that the prolamations of sale and re-sale should in all respects be identical and having regard to the duty of the Court to give intending purchasers correct information, it is difficult to see how the mention of a material alteration in the circumstances between the first and second proclamations could be avoided. The second proclamation therefore contained a statement to the effect that tender of six lakhs was made and was improperly refused, that the transaction evidenced by the deed of sale and agreement to re-purchase dated 4th August 1908 was a mortgage, that Gyangirji had only the right to recover six lakhs of rupees and that the property was sold subject to the right. It is difficult to see how these statements could be prejudicial to the first purchaser. Their tendency was if anything to induce persons to purchase for a higher price, as a bald statement after 31st August 1914 that the property was agreed to be re-conveyed if six lakhs were paid before 31st August 1914 would be useless. The only person to complain would be the second purchaser if the allegation as to the tender and the effect of the sale and agreement to reconvey were not correct, but he has raised no objection and the sale to him has been confirmed. The chief contention raised by the learned Advocate-General for the respondent is that in order to attract the provisions of O. 21, R. 71, what is sold at the re-sale should be in all respects the identical property that was sold the first time, identical not only with reference to the description and area of the property sold but also with respect to the interest of the judgment-debtor therein, and that consequently the sale at which his client purchased being the right of the judgment-debtor to get a re-conveyance on tender of six lakhs without reference to the nature of the transaction evidenced

by the sale-deed and agreement to re-convey (which was a clear and good title), the re-sale of the properties in which the judgment-debtor's interest was only the right to obtain a reconveyance on proof that the transaction was only a mortgage a fact which the subsequent purchaser had to prove at his risk, was not a re-sale contemplated by R. 71. Reference has been made to *Baijnath Sahai* v. *Moheep Narain Singh* (5). *Kali Kishore Deb Sarkar* v. *Guru Prasad Sukul* (6) and *Gangadas Dahyabhai* v. *Bai Suraj* (7). In *Baijnath Sahai* v. *Moheep Narain Singh* (5) the first proclamation of sale contained no statement as to the encumbrances on the property put up for sale, while the proclamation for re-sale set out the encumbrances.

It was therefore clear that the purchaser at re-sale would have paid considerably less than the first purchaser who purchased the property on the assumption that it was unencumbered, and the deficiency of price was attributable not to the first purchaser's default but to the misdescription in the first proclamation. In *Kali Kishore Deb Sarkar* v. *Guru Prasad Sukul* (6) the defaulting purchaser had applied to set aside the sale under S. 313, Civil P. C. and the finding was that there was a material misdescription in the sale proclamation. In the first case the learned Judges observe that a change in the nature of the property by diluvion and the like causes beyond the control of anybody might not relieve the defaulting purchaser from liability. Their observations as to the effect that S. 293 of the Act of 1882 applied only to cases where the same property was sold under the same description at both sales must be read in the light of the later observations as to the change in the property by causes beyond the control of the parties. I do not think that it was intended to lay down as an inflexible rule that if a few trees on the land fell down or a portion was washed away between the dates of sale and re-sale, there could be no re-sale so as to make the defaulting purchaser liable for the deficiency. The observations in *Kali Kishore Deb Sarkar* v. *Guru Prasad Skul* (6) as to the effect of correctly stating in the proclamation for re-sale what was incorrectly set out in the first proclamation are obiter, and with all respect I fail to see why the correction of errors, at least of such as would in the ordinary course enhance the value of the property at the second sale, should be a valid ground of objection. The general rule no doubt is that it is the property which was sold on the first occasion that must be put up for sale, but this is subject to the property remaining identical. If owing to natural causes or causes attributable to the defaulter, there should be any change either in the property or the wording of the sale proclamation, there is nothing in the Code to release the defaulting purchaser from his liability under R 71. *Gangadas Dahyabhai* v. *Bai Suraj* (7) was a case where it was admitted that the first proclamation did not state either fairly or accurately the property to be sold. The property was described as that of *A* in the first sale and as that of *B* in the second.

Baboo Sooruj Baksh Singh v. *Sree Kishen Doss* (9) (Miscellaneous rulings) cited by the vakil for the appellant is more in point. In that case a purchaser at a Court sale declined to complete the purchase on the ground that the property had been sold the next day in execution of another decree by a party who had a previous mortgaee on the estate. The property was subsequently re-sold and he was asked to pay the difference. The Sudder Ameen held that the first purchaser was not liable under S. 254 Act 1 of 1859, which is substantially the same as O. 21, R. 71 of the Act of 1908, but his decision was reversed by the High Court on the ground that he had purchased something though perhaps less than what he had expected and that if he chose to bid he was bound to complete his purchase. From the facts as set out in the judgment it appears that the decree obtained by the mortgagor was in force at the date of sale which, unless discharged before the sale fixed for the day after the first sale, would entail the consequences that the property would pass under a title paramount to that of the first purchaser and that the re-sale was after the sale in execution of the mortgage decree when no title remained in the judgment-debtor.

Time runs and with it follows change. The provisions of O. 21, Civil P. C., as to re-sale in case the balance of purchase-money is not paid necessitate a delay of at least one and a half months from the

(9) [1866] 6 W. R. Mis. 126.

date of the first sale. The reasonable construction to place on R. 71 is that the re-sale should be within a reasonable time after the first sale and property re-sold should be substantially the same, and that any difference will not matter if the difference in the condition of the property or the title thereto is one which would occur in the ordinary course of things, having regard either to the nature of the property or the transactions in respect thereof having legal force at the date of sale or was brought about by the first purchaser's default.

It has been argued that the provisions of R. 71 are summary in their nature and so should receive a very strict interpretation. R. 71 only enacts the rule that the measure of damages in cases where a purchaser commits default is the difference between the price at which he agreed to purchase and the price realized at a re-sale. I do not think the rule prevents the defaulting purchaser from raising such objections as are competent to him nnder O. 21, Civil P. C. to raise. It is a principle of natural justice that a person should be given an opportunity of showing cause before an order adverse to him is passed and though R. 71 does not expressly provide for the issue of a notice to the defaulting purchaser, it is the duty of the Court to give him notice and to hear and decide on his objections before it orders execution to issue against him. In all the cases decided under the old and the new Code the defaulting purchaser did appear and raise objections which were adjudicated upon by the Court, and he was held by the Calcutta and Madras High Courts to have a right of appeal. I need only refer to *Baboo Sooruj Buksh Singh* v. *Sree Kishen Doss* (9), *Baijnath Sahai* v. *Moheep Narayan Singh* (5), *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul* (6), *Amir Baksh Sahib* v. *Venkatachala Mudali* (3).

I do not therefore see any good reason for placing an unduly restricted interpretation on O. 21, R. 71. Having regard to the fact that there is no warranty of title in the case of sales by Court (the maxim caveat emptor applying) and that the purchaser cannot avoid the sale so long as the judgment-debtor has some interest, however small, in the property, the objections which the defaulting purchaser can urge are practically confined to those which can be urged in an application to set aside a sale under O. 21, and proceedings under R. 71 are neither more nor less summary than proceedings under O. 21 to set aside a sale.

It was also argued that it was the duty of the judgment-debtor or the decree-holder to keep the title alive between the period of sale and confirmation and that as no tender was made of six lakhs the defaulting purchaser is not liable. As the sale was only of the right, title and interest of the judgment-debtor subject to the conditions in the agreement to re-convey on re-payment of six lakhs, it is clear that the person to pay the six lakhs was the purchaser the price he pays being estimated with reference to the existing liability on the property. There was under the terms of the proclamation no duty on the decree-holder or judgment-debtor to pay six lakhs.

With reference to the argument that the defaulting purchaser had no legal right to tender six lakhs as he acquired no title on 31st August, the last date for the tender, I think the auction-purchaser has an interest in the property which would make any tender by him valid. The position of a person between the date of sale and the date of confirmation is not that of a person who has only an agreement to sell in his favour, S. 65 of the present Code unlike S. 316 of the old Code vests title in him from the date when the property is sold, and not from the time the sale becomes absolute. It is, no doubt, true that the sale is liable to be set aside either by payment under O. 21, R. 89, or for irregularity or want of title under O. 21, Rr. 90 and 91, but it does not follow that a person who under O. 21, R. 84, has been "declared to be the purchaser" by the officer conducting the sale has no interest in the property sufficient to prevent a forfeiture or preserve the title from destruction. The observations of their Lordships of the Privy Council in *Bhawani Kumar* v. *Mathura Prasad Singh* (10) as to the rights and duties of an auction-purchaser as from the date of sale are in point.

I am of opinion that no valid grounds exist in the present case for not making the defaulting purchaser liable for the loss arising from the re-sale. I would

(10) [1912] 40 Cal. 89=39 I. A. 228=16 I. C. 210 (P.C.).

allow the Letters Patent Appeal and set aside the order of the District Judge with costs in this and the lower Court. The District Judge will dispose of the application of the appellant with regard to the deposit paid by the respondent according to law.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 1025

ABDUR RAHIM AND BAKEWELL, JJ.

Boddulurn Nagayya—Defendant—Appellant.

v.

Bachu Chenchuramayya and *others*—Plaintiffs—Respondents.

Civil Misc. Appeal No. 1 of 1917, Decided on 14th August 1917, against the decree of Dist. Judge Nellore, in Appeal Suit No. 234 of 1915.

(a) Easements Act (5 of 1882), S. 17—Easement from artificial channels or tanks can be acquired by prescription.

S. 17 implies that a right of easement in connection with the use of water of artificial channels or of water derived from artificial tanks or pools can be acquired by prescription. [P 1025 C 2]

(b) Easements Act (5 of 1882), S. 17—Water from waste weir flowing in defined channel—Easements can be acquired under S. 17.

A person can acquire a right of easement with respect to water which is discharged over the surplus weir of a tank and which flows therefrom in a defined channel, if he has been using and enjoying the water for a sufficient length of time and as a matter of right as laid down in S. 17. [P 1025 C 1,2]

T. V. Venkatarama Aiyar and *T. R. Vaidyanatha Aiyar*—for Appellant.

K. Krishnaswami Aiyangar—for Respondents.

Judgment.—The appellant is the owner of certain land, through which the water of a tank belonging to another person flows in a defined channel on to the respondents' land. The case of the appellant is that since the water that is turned into this artificial channel is what overflows the surplus weir of the tank in question, therefore no right of easement can be acquired with respect to that water. It must be noted that the owner of the tank has not raised the question, but objection was raised only by the owner of the intermediate land through which water flows before reaching the respondents' land. We think there can be no doubt that a person can acquire a right of easement with respect to water which is discharged over the surplus weir of a tank if he has been using and enjoying the water for a sufficient length of time and as a matter of right, as laid down in the Easements Act.

The learned vakil for the appellant relied very strongly on *Arkwright* v. *Gell* (1) and *Wood* v. *Waud* (2). These cases enunciate the principle that if a person in using his own land pumps out the drainage water and throws it over another's land, the person on whose land the water is so thrown, cannot acquire an easement by prescription so as to enable him to say to the person from whose land the water is allowed to come by way of drainage that he must be prevented from so altering the user of his land as will stop such drainage water flowing to the lower land. But as pointed out by Lord Abinger in *Arkwright* v. *Gell* (1), the water in that case was pumped and discharged by the owner of the dominant land for his own convenience and for temporary purposes, and he also observes that the question would be different where the owners of intermediate land tried to intercept the flow of water so discharged. Reliance has also been placed on a ruling of the Privy Council in *Ramessur Persad Narain Singh* v. *Koonj Behari Pattuk* (3), where their Lordships cited *Wood* v. *Waud* (2) with approval. The proposition laid down in *Rameseur Presad Narain Singh* v. *Koonj Behary Pattuk* (3) is to the effect that the right to enjoyment of water of an artificial channel or tank can be acquired either by grant or by some arrangement of that nature, but that a grant may be presumed in a proper case. In fact in that case, their Lordships found that there was a grant of the right to enjoyment of water discharged from a large artificial lake. Supposing this case applied there should be no difficulty in presuming a grant in the present case.

S. 17, Easements Act, however, which is in force in this Presidency, implies that a right of easement in connection with the use of water of the artificial channels or of water derived from an artificial tank or pool can be acquired by prescription, and this question has been settled, so far as this Presidency is concerned, by the decision in *Rayappan* v. *Virabhadra* (4) which we have no hesita-

(1) [1839] 5 M. & W. 203=2 H. & H. 17.
(2) [1849] 3 Ex. 748=18 L. J. Ex. 305.
(3) [1879] 4 Cal. 633=6 I. A. 33 (P. C.)
(4) [1884] 7 Mad. 530.

tion in following. The law laid down in that case has not, so far as we are aware, been doubted hitherto. The whole gist of the learned vakil's argument is based upon the fact that the water that flows on to the respondents' land is what he called the surplus water of the tank. But there is a substantial difference between a case of this nature and the one that is dealt with in *Arkwright* v. *Gell* (1). Here there is a tank which is fed by rain water as well as surface water from neighbouring lands, and the mere fact that the owner of the tank does not want more than a certain quantity of water and allows the rest to pass through the surplus weir, does not suggest that nobody else can acquire a right in connection with the water which is allowed to flow therefrom in a defined channel. We may further observe that the system of irrgation by means of connected tanks, which so largely prevails in this presidency, has been in existence from time immemorial and this is indisputable proof that the law in this Presidency is not as suggested by the learned vakil for appellant. We, therefore dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 1026

WALLIS, C. J. AND KRISHNAN, J.

Vathiar Venkatachariar— Plaintiff—Appellant.

v.

P. Ponappa Ayyengar and *others*—Defendants—Respondents.

Appeal Suit No. 223 of 1916, Decided on 12th February 1918, against decree of Sub-Judge, Tuticorin, in O. S. No. 11 of 1913.

(a) Civil P. C. (1908), O. 22, R. 4 — Cross objection by deceased respondent — Legal representative's name substituted— It need not be done again in appeal.

The omission by an appellant to bring on record the legal representative for a deceased respondent will not cause the abatement of the appeal if the latter, on his own initiative, has brought himself on the record in the memorandum of cross-objections filed by the deceased. The effect of the legal representative being added in the memorandum of objections is, in effect, to make him a party to the appeal.

The appeal and memorandum of objections are not disconnected and independent proceedings but are part of the same proceedings: *Andrew* v. *Aitken*, (1882) 21 *Ch. D.* 175, *Dist*; *A. I. R.* 1917 *P. C.* 156 (*P.C.*), *Appl.* [P 1027 C 2]

(b) Civil P. C. (1908), S. 9—Suit for right to office with emoluments attached lies when existence is proved— Essential of office is existence of duty—Voluntary service does not constitute office.

A suit to establish a right to an office to which emoluments are alleged to be attached is maintainable, when the existence of the office as also the connexion between the office and the honour and dignities and perquisites is proved by clear evidence: 36 *I. C.* 568, *Foll.* [P 1028 C 1]

To constitute an office, the one, if not the essential, thing is the existence of a duty or duties attached to the office which the office-holder is under a legal obligation to perform and the non-performance of which is visited by penalties. The rendering of a voluntary service cannot constitute an office. [P 1028 C 1]

Plaintiffs sued to establish their right to recite prabandams or holy verses in a temple and in the procession of a temple deity and a certain rank or precedence in such procession. They also claimed an injunction restraing defendant 6 from receiving the teerthams and being ranked above them. The Court dismissed the suit as not being one of a civil nature, but disallowed defendant 6's costs. Plaintiffs appealed and defendant 6 filed cross-objections against the portion of the decree disallowing his costs. Defendant 6 died pending the disposal of the appeal and the plaintiff appellant did not bring his legal representative on record within the time allowed by law, but the latter brought himself on record in the memorandum of objections. The appellate Court confirmed the Munsif's decree:

Held: (1) that the appeal did not abate by reason of appellant's omission to bring the deceased respondent's representative on record, as he was on the record in the memorandum of objections which is substantially the same proceeding as the appeal; (2) that as there was no obligatory duty on plaintiffs to recite the prabandam, the suit was not cognizable by the civil Court under S. 9, Civil P. C. [P 1027 C 2]

V. Vencatachariar and *K. Srinivasa Aiyangar*—for Appellants.

T. Rangachariar and *N.S. Rangaswami Iyengar*—for Respondents.

Krishnan, J.—This is an appeal from the decree of the Subordinate Judge of Tuticorin, in Original Suit No. 11 of 1913, dismissing the plaintiff's suit on the ground that his claim was not of a civil nature under S. 9, Civil P. C. Plaintiff 1 having died, plaintiff 2 alone has appealed to us against that decree and his learned vakil has strongly urged that the finding of the lower Court is wrong.

The plaintiffs' case, as stated in the plaint, is that in the Adinada Alwar temple in Alwar Tirunagari in the Tinnevelly District there is an office called "Teertham or Teerthakar's" office of which they and others, in all 29 in number, are the office holders, that the duty of the said office holders is to recite the Prabandam or Tiruvoimoli and the Vedas in the temple and in places where the idol is taken in procession when the

Goshti or group of Teerthakars is formed, that special places are allotted to each of them in the temple for this purpose and that attached to this office as an emolument of it is the right to receive Teertham or holy water and Prasadam or holy food and some other small perquisites in a fixed order of precedence. The rank of the plaintiff's family is stated to be the 14th in what is called the 1st oup group; considerable importance no doubt is attached to this rank by the parties. The plaintiffs complain that the trustees, defendants 1 to 5, have improperly introduced into their group, in a place above theirs in rank, defendant 6 who has no right to be there according to the practice in the temple and have thus illegally interfered with their rank or right of precedence.

They do not complain that any portion of the Teertham and Prasadam which have to be given to them has been reduced; but they ask the Court to declare that defendant 6 is not a Teerthakar officer and is not entitled to any place or Stanam and any honours as such officer, and to restrain him by an injunction from occupying such a place and receiving such honours and the trustees from allowing him to do so. Both the trustees and defendant 6 have denied the existence of any such office and of any duties or honours attached to it and have pleaded that the suit was not maintainable in a civil Court. They also alleged that defendant 6 was entitled to the rank given to him.

Before considering the question whether a civil right has been made out it is necessary to refer to a preliminary objection to the appeal raised by Mr. Rangachariar, viz., that the appeal has abated under O. 22, R. 4, Civil P. C. The facts in this connexion are these. Defendant 6 was made respondent 6 in the appeal. He filed a memorandum of cross-objections under O. 41, R. 22, Cl. 1, for the costs disallowed to him; some time thereafter he died but the appellant took no steps to bring his legal representative on record; and the time for doing it has now expired. If the facts stood there, there would be no answer to the objection. But defendant 6's legal representative, who is Mr. Rangachariar's client, applied in time to have himself brought on the record in the memorandum of cross-objections and he was added to the record as prayed. It is argued that this did not make him party to the appeal. Mr. Rangachariar contends that the appeal and the memo. of cross-objections are two distinct and independent proceedings and therefore the addition of the legal representative to the latter will not save the former from abating. He refers to the facts that the memorandum of objections has to be stamped as an appeal and that under O. 41, R. 22, Cl. 4, the withdrawal of the appeal does not affect the hearing of the memorandum of objections as supporting his contention. He also relies on the case of *Andrew* v. *Aitken* (1). R. 22, Cl. 1, itself furnishes the answer to this argument. That rule requires that a person should be a respondent in the appeal before he can file any cross-objections or be heard on them. It follows therefore that when the legal representative of respondent 6 was allowed to come on the record in respect of the memorandum of objections he was in effect made respondent in the appeal and there can, consequently, be no abatement of the appeal on the ground alleged. Moreover the Privy Council has recently laid down broadly in the case of *Brij Indar Singh* v. *Lala Kanshi Ram* (2) that the introduction of the legal representative of a plaintiff or a defendant for one stage of a suit is an introduction for all stages. Applying this principle to appeals, the preliminary objection must fail as the appeal and the memorandum of objections are only parts of the same proceedings. There is no force in the argument that they are two disconnected and independent proceedings. The English case cited is easily distinguishable, as it refers to a suit and a counter-claim which is treated as an independent suit tried with the first suit. The preliminary objection must therefore be overruled.

Turning now to the main question in the case, it is clear from the plaint itself that the claim refers to a religious honour which consists of receiving Teertham and Prasadam in the temple, in a certain order of precedence. The claim is therefore prima facie not one of a civil nature. But plaintiffs have tried to bring it within the explanation to S. 9, Civil P. C., by alleging that it is attached as an

(1) [1882] 21 Ch. D. 175=51 L. J. Ch. 784.
(2) A. I. R. 1917 P. C. 156=45 Cal. 94=42 I. C. 43=44 I. A. 218 (P.C.).

emolument to a religious office. It is conceded by the learned vakil for the appellant that unless he establishes this, his suit must fail. This High Court recently held in the case of *Thirumalai Alwar Aiyangar* v. *Srinivasachariar Swamigal* (3), that on an examination of the previous authorities on the subject, in a case like the one before us:

" the existence of the office to which the emoluments claimed are said to attach must be proved and so must the connexion between the office and the honour and dignities and prequisites claimed be established by clear evidence,"

Accepting this statement of the law, we have to consider whether the plaintiffs have established on the evidence in this case the two above-mentioned positions they are bound to establish. The first question then is whether there is such an office as the Teertham office in this temple. It is clear that, to constitute an office one, if not the essential, thing is the existence of a duty or duties attached to the office which the office holder is under a legal obligation to perform and the non-performance of which may be visited by penalties such as suspension, dismissal, etc. The rendering of any voluntary service cannot of course constitute an office. Ordinarily temple offices have substantial emoluments attached to them in the shape of income from inam lands and money payments; and though the absence of such emoluments is not necessarily by itself evidence of the non-existence, it makes it necessary to scrutinize carefully the evidence for its existence. Admittedly there is no emolument of any value attached to the so-called Teertham office. Plaintiff alleged that the duties of a Teertham office are to recite the Prabandam and the Vedas on stated occasions. Though the Teerthakars do recite Prabandams and Vedas the evidence does not establish that they are bound to do so as a matter of obligation.

It may be mentioned that among the Teerthakars there are some 5 or 7 in number, who are called Adhypakamdars, whose special duty it is to recite these Prabandams and they are remunerated by inam lands given to them. They are what may be called the official reciters in this temple. Plaintiffs are not such Adyapakamdars. It is therefore very unlikely that there would be any other unremunerated office holders for doing the same duty. It should also be remembered that it is not merely the Teerthakars that recite the Prabandams but all Vaishnavites present join in the recital. The only difference between the outsiders and the Teerthakars, as shown by the evidence is that the Teerthakars have special places allotted to them in the temple to stand and recite and they are given the honour of Teertham and Prasadam before the outsider gets them and they have what is called an "Arulapad" that is their names are called out by the Archaka in a certain order when if present they have to respond by saying "Nayinde" meaning "I am here." This does not seem to show that they are anything more than a recognized and privileged class of worshippers who are shown special consideration by having places allotted to them in the temple and by being given the honours before the ordinary worshippers in an order of precedence fixed by the usage of the temple. Plaintiffs' own witnesses who are mostly Teerthakars admit that no duties are attached to the position of Teerthakars and no penalty has been inflicted on any one of them for not reciting Prabandams. This evidence corroborates that of the defence witnesses to the same effect. P. W. 1 says: "If I do not do my duty (i. e.. reciting) nothing could be done against us by the temple." Second witness says the duty of the office is the getting of Teertham and Viniyogam; there is no other duty.

The third witness confesses that he does not know the Prabandams and has never recited them though he was always getting the Teertham like the others and that he has never been asked to explain his conduct or been punished for it for the last 30 years. The fourth witness, who is a cook says that though he is a Teerthakar he knows very little of the Prabandam and has never recited any but he has always been getting his Teertham. D. Ws. 3, 4, 5 and 11 say the same thing and two of them, viz., Nos. 4, and 5 are Teerthakars. In Original Suit No. 7 of 1877 one of the then Teerthakars examined as the then P W. 6 and who is now dead stated categorically that as a Teerthakar he had no duties to discharge in the temple: see Ex. 25. There is a list of office holders in this temple produced by the defendants, Ex. 26, in which there is no men-

(3) [1916] 38 I. C. 568.

tion of any Teertham office. Perhaps much reliance should not be placed on this exhibit as it was produced at a late stage of the case and is not free from suspicion. Ex. 2, a document of 1817, contains the list of persons who are recognized as entitled to Teertham and Prasadam in this temple. There are in it a number of persons who are not office holders at all in the temple. As against all this evidence on the defendants' side the learned vakil for the appellant has been able to call our attention only to one statement in cross-examination of D. W. 7 and to one document Ex. C as in his favour. The witness says that the Teerthakars recite Prabandam and that it is their duty. It is not clear in what sense he used the word duty. It may be said in a general way that it is the duty of all persons present to recite the Prabandams if they can but that does not show that legally enforceable duty exists. The witness is not an important man and his evidence is of little value. Ex. C is a petition submitted by certain Teerthakars in 1870 to the Dharmakartha to exclude a convicted Teerthakar from joining their assembly. In it no doubt they describe themselves as persons who perform Kainkaryam or service in the temple. The statement is not of much value in these cases as in a way the Teerthakar were doing some work in the temple by reciting the holy verses but it is a different thing to say that it was an obligatory duty. If there is such an office as plaintiffs claim it would have been easy to give cogent evidence of it. On the evidence as set out it must be held that plaintiffs have not made out the existence of any obligatory duty on the part of the Teerthakars or of any office called the Teertham office.

On the next branch of the case viz., as to the connexion between the honours claimed and the position of the Teerthams we have been referred to a statement in a petition in 1902 by the whole body of the Teerthakars the appellant himself being a party to it that "there is no connexion whatever between the said Vrithi" (that is the work of reciting the Prabandam and the Vedas) "and the Teertham and honours." This is strongly against the plaintiffs on this part of the case and it has not been satisfactorily explained. On a previous occasion when the existence of the Teertham office and the connexion of the honours with it was asserted they were denied and both were found against by the Subordinate Judge and by this Court. See Exs. 27 (c) and 27 (e). No successful assertion of the right now claimed by the plaintiffs has ever been made up to date. The existence of the Teertham office and the connexion of the honours with it must therefore be held not to be proved and the appeal fails in consequence and it must be dismissed with costs.

Wallis, C. J.—I entirely agree both as to the law to be applied and the effect of the evidence.

Judgment in the Memorandum of objections.

We allow the memorandum and award the representative of defendant 6 his costs of the suit which were disallowed by the lower Court and also the costs of the memorandum of objections.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 1029

ABDUR RAHIM AND OLDFIELD, JJ.

Lakshminarayana Tantri—Appellant.

v.

Ramachandra Tantri—Respondent.

Appeal Nos. 357 of 1916 and 9 of 1917, Decided on 1st October 1917, against decree of Dist. Judge, South Canara, D/- 13th September 1916, in O. S. No. 3 of 1916.

(a) Civil P. C. (1908), O. 32, R. 11—Principles of O. 32, apply to reference to arbitration.

The principles of O. 32, R. 11, apply to references to arbitration made out of Court.

[P 1031 C 1]

(b) Civil P. C. (1908), Sch. 2, Para. 15—Reference by guardian—Guardian negligent—Award can be set aside.

Where the guardian of a minor, on whose behalf a reference was made to arbitration, has been grossly negligent or has acted fraudulently in conducting the proceedings before the arbitrators, it is open to the minor to impeach the award by a suit instituted through a guardian or when he attains majority: *Hoghton, In re, Hoghton* v. *Fiddey*, (1874) 18 *Eq.* 573, *Appl.*

[P 1031 C 1]

(c) Civil P. C. (1908), Sch. 2, Para. 21—Objection on minor's behalf is ground for refusing to file award.

The Court may also refuse to file the award on objection taken on behalf of the minor.

[P 1032 C 1]

(d) Civil P. C. (1908), O. 32, R. 11 and Sch. 2, para. 15—Reference by guardian revoked—Award cannot bind minor—Arbitrators must see that minor is represented.

Where a reference on behalf of the minor is revoked by the guardian and the arbitrators nevertheless proceed with the reference, it is the

duty of the guardian to watch the proceedings on the minor's behalf, and any award passed binding the minor without his being duly represented is liable to be vacated at his instance. It is the duty of the arbitrators to see that the minor is properly represented.

(e) Civil P. C. (1908), Sch. 2, Para. 15—Award is not invalid merely because it is not shown to be for minor's benefit.

Per *Abdur Rahim, J.*—An award cannot be said to be ipso facto invalid because it is not shown to be advantageous or beneficial to the minor: 11 *I. C.* 481; 19 *Cal.* 334, *not Appr.* [P 1030 C 2]

(f) Civil P. C. (1908), Sch. 2, Para. 15—"Otherwise invalid" includes award where minor was not represented.

An award that is invalid under the law governing minors, as where it is passed on a reference out of Court without the minor being duly represented, comes within the expression 'or otherwise invalid' in para. 15 (c) of Sch. 2, and the Court can, for that reason, set aside the award. [P 1031 C 2]

(g) Civil P. C. (1908), Sch. 2, Paras. 14 and 15—Void and voidable awards—Awards liable to be set aside under para. 15 are not void but voidable awards.

There is no distinction between void and voidable awards so far as para. 15, Sch. 2, is concerned. The rule itself states the circumstances under which an award becomes void in cases dealt with in para. 14, suggesting that awards which can be set aside under R. 15 are not to be treated as void awards. [P 1031 C 2]

(h) Civil P. C. (1908), Sch. 2, Para. 15—Term "otherwise invalid" includes all cases of invalidity on other grounds than those mentioned.

The words 'or otherwise invalid' in para. 15 (c) of Sch. 2, are not ejusdem generis with the other cases mentioned in the clause, but are meant to include all cases of invalidity on grounds other than those mentioned. [P 1032 C 2]

(i) Civil P. C. (1908), Sch. 2, Para. 21—Court must be satisfied about validity of reference—Benefit of minor can be inqured in the connexion.

Per *Oldfield, J.*—Under para. 21 (1), Sch. 2, the Court must be satisfied that the matter has been referred to arbitration and must therefore inquire into the validity of the reference. In such inquiry the question of benefit to the minor can be raised. [P 1033 C 1]

(j) Civil P. C. (1908), Sch. 2, Para. 15 (1)—Minor not represented—Award should be set aside under para. 15 (1) as for misconduct.

An award passed on a reference out of Court binding a minor who was not in fact represented in proceedings before the arbitrators, should be set aside under para. 15 (1) of the Schedule as for the arbitrator's misconduct. [P 1033 C 2]

(k) Civil P. C. (1908), Sch. 2, Para. 15—Failure to give opportunity to parties to represent their case amounts to misconduct.

An arbitrator fails in his duty and is guilty of misconduct if he does not secure for each party an opportunity to present his case, and he should even go beyond strict legal requirements to do so. [P 1033 C 2]

(l) Civil P. C. (1908), Sch. 2, Para. 15—Proceedings should be adjourned to get proper representation of minor—Arbitrator should refuse to act in case where no representation is possible.

An arbitrator should refrain from passing an award, so long as he is deprived of the power to give a just one, and should either adjourn the proceedings in case a change in the representation of the minor is probable, or, if one is not probable either generally or within the time, if any, fixed for the award, he should refuse to act. [P 1033 C 2]

K. Y. Adiga and *K. P. Lakshmana Rao*—for Appellant.

B. Sitarama Rao—for Respondent.

Abdur Rahim, J.—This appeal arises in a suit to file an award and is preferred by defendant 2, who is a minor represented by his mother the other parties being the defendant 1 his father and the plaintiff the brother of defendant 1 and uncle of defendant 2. All these three persons were members of an undivided Hindu family, and the arbitration was sought for the purpose of partitioning the properties between the plaintiff on the one hand and defendants 1 and 2 on the other. The very next day after the submission defendant 1, who was acting as the guardian of defendant 2, gave notice to the arbitrators revoking the submission; thereafter he did not appear at all in the proceedings and the arbitrator proceeded to make the partition no one being there to watch the proceedings on behalf of defendant 2 and to protect his interests. It has been held that the revocation by defendant 1 was not justified and the question for decision therefore is whether the failure of defendant 1 as guardian to conduct the case of defendant 2 before the arbitrator which in my opinion amounted to gross neglect of his duty is sufficient to vitiate the award. I am clearly of opinion that the contention of the learned vakil for the appellant that an award is ipso facto invalid if it cannot be shown to be beneficial or advantageous to the minor is not sustainable.

I am not clear that the learned Judge in the decision in *In the matter of Romon Kissen Sett* v. *Hurrololl Sett* (1) has laid down any such proposition. At any rate I agree with the view of the law as propounded in *Ramji Ram* v. *Salig Ram* (2) on this point. Nor am I able to accept the contention of the appellant that defendant 1's interest in the arbitration proceedings was adverse to that of the minor and the submission was bad on

(1) [1892] 19 Cal. 334.
(2) [1911] 11 I. C. 481.

that ground. No doubt one of the questions which the arbitrator had to deal with was whether certain debts incurred by defendant 1 were binding, but that question was not raised between defendant 2 and defendant 1, but only between the plaintiff on the one side and defendants 1 and 2 on the other and the decision of the arbitrator has in no way concluded that matter between defendant 1 and defendant 2. On the main question there can be little doubt that it would be open to the minor by a suit instituted either through a guardian or when he attains majority to impeach the award if he can prove that his guardian has been grossly negligent or has acted fraudulently in conducting the proceedings before the arbitrator. There can be no doubt that a decree may be impeached where there has been negligence on the part of the next friend in the conduct of the plaintiff's case, and it is stated by Vice-Chancellor Malins in *Hoghton In re Hoghton* v. *Fiddey* (3):

"The question which I have to decide is whether this infant on whose behalf a decree was taken by consent in 1867 is to suffer by any negligence or want of knowledge on the part of her then next friend. I am clearly of opinion she cannot be called upon to endure that inconvenience. The proposition that an infant of tender year may have her whole fortune wrecked by the neglect of her next friend is so monstrous that I cannot pay attention to it. She is entitled to have a next friend who is diligent and who will protect her interests."

See also *Lalla Sheo Churn Lal* v. *Ramnandan Dobey* (4). It is unfortunate that there is no provision in the Civil Procedure Code which makes it incumbent on the arbitrator where a reference has been made out of Court to see that the case of the minor is in the hands of a proper guardian similar to that laid down by O. 32, R. 11, with respect to the Court. I think the proposition laid down by Vice-Chancellor Malins is equally applicable to the proceedings before an arbitrator. This has hardly been disputed before us. The argument which is used to uphold the award is that the Court can refuse to file an award only on the grounds mentioned in Sch, 2 of the Code R. 15, 14 etc., and that though a separate suit may lie the same objections to an award which would justify a suit are not available to the minor when the award is filed and sought to be made a decree of Court under the special procedure provided by Sch. 2. If this argument were accepted it would follow that where an award which affects a minor is invalid because of the fraud or neglect of the guardian in the conduct of the arbitration proceedings the Court is bound to pass a decree in the terms of the award although the next day it would be set aside by a suit on the very same allegations. Unless one is compelled by clear words of the Statute one would not countenance such an interpretation of the law. Rule 15 says: "No award shall be set aside except on one of the following grounds" be it noted that this does not seem to be confined merely to objections to filing an award, but is wide enough to cover suits to set aside an award including those mentioned in Cl. (c) which runs as follows:

"the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court or being otherwise invalid."

The phrase "or being otherwise invalid" was for the first time introduced into the new code and it seems to me that it is wide enough to cover such a case as this. If an award is invalid under the law governing minors, I see no difficulty why such invalidity is not included in these words. It was suggested that "invalid" means "void" and an award which an infant could get set aside would only be voidable, but I do not think that there is any substance in this distinction. If a party does not choose to get rid of an award even in cases falling under Cl. (c) it would be binding on him, and there seems to be no sense in the distinction between void and voidable awards so far as R. 15 is concerned. In fact, that rule itself states the circumstances under which an award becomes "void" in cases dealt with in R. 14, suggesting that awards which can be set aside under R. 15 are not to be treated as void awards.

Then it was suggested that we must read the words "or being otherwise invalid" as ejusdem generis with the other cases mentioned in Cl. (c), that is to say, it would only apply to cases where an award is bad on grounds like want of jurisdiction. It seems to me that those words do not call for an ejusdem generis interpretation, but are meant to include all cases of invalidity on grounds other

(3) [1874] 18 Eq. 573=43 L. J. Ch. 758.
(4) [1895] 22 Cal. 8.

than those mentioned. This view seems to have the support of a Full Bench decision of the Allahabad High Court in *Lutawan* v. *Lachiya* (5), where Richards C. J., says:

"It seems to me that it was the clear intention of the legislature by this amendment of the Code that objections to the award on the ground of invalidity from any cause whatever would be decided by that Court and by no other Court."

This passage might also suggest that the only remedy of defendant 2 to the suit would be under R. 15, Sch. 2 and not by a separate suit. But it is not necessary in this case to consider whether that general proposition is correct. It is argued by Mr. Sitarama Rao in support of the lower Court's order that it has not been shown that defendant 1 as the guardian of defendant 2 was, in fact, negligent in the conduct of the case of defendant 2 before the arbitrator. But he was not justified in rescinding the submission and when he found that the arbitrator proceeded with the arbitration, it was his duty to appear and watch the proceedings and put forward the case of the minor before him. This is not one of those cases in which there may be a question whether the minor had a good defence or not, if a minor has not a good defence to a suit it is undoubtedly not the duty of the guardian to incur unnecessary costs in defending the suit. The very nature of the arbitration proceeding is ordinarily such that every person having a claim would be interested in seeing that the partition made by the arbitrator is just and fair. In this case the minor alleges that by the partition he has been prejudiced. I am of opinion that the appellant has a valid objection to any decree being passed on the award.

Having regard to the nature of the award which is one for partition, the proper order to be passed is that the suit must be totally dismissed. As regards costs, since it was the conduct of defendant 1 that led to the award being treated as invalid, I would make him pay the costs of defendant 2 in this Court and in the lower Court. The plaintiff-respondent will bear his own costs throughout.

Oldfield, J.—This is an appeal against an order of the District Judge, South Canara, under S. 21, Sch. 2, Civil P. C., filing an award, and against the decree passed in its terms. We have to deal only with the order, since no independent objection has been made to the decree. The arbitrators were asked to make a partition of family property between plaintiff and defendant 1 brothers, and defendant 2, minor son of the last mentioned, the present appellant. The first objection to the award is that on defendant 2's behalf there was no valid submission to arbitration, defendant 1, who acted for him, having an interest adverse to his in the proceedings, because an important question in them was whether defendant 1 had incurred certain debts as manager of the family and whether he or its members, including defendant 2, were liable for them. But the partition, it was not disputed before us, was of the family properties between the plaintiff on one side and defendants 1 and 2 on the other and the interest of the two last mentioned was identical in it, to establish the liability of the family and make a portion of the debts recoverable from the plaintiff instead of the whole being recoverable from defendant 1 primarily and defendant 2 secondarily in virtue of his sonship.

It is urged next that the lower Court should before filing the award have considered whether the submission to arbitration under the award itself were advantageous to defendant 2. As regards the latter there is so far as we have been shown, only one authority in support of defendant 2's claim, *Romon Kissen Sett* v. *Hurrololl* (1), and its weight is small, since it is the decision of a single Judge in an uncontested case. It is in fact impossible to consider whether the award, as distinguished from the submission, is advantageous to the minor concerned, without a discussion of the merits of the questions referred which would be inconsistent with the principles of arbitration procedure; and it was held in *Balaji* v. *Nana* (6), following *Jagan Nath* v. *Mannu Lal* (7), that where the reference was not impugned, the Court was bound to pass a decree in terms of the award, if there were none of the objections specified in the Code to doing so. I accordingly turn to the objection that the reference itself was disadvantageous and therefore invalid. Under S. 21 (1),

(5) A. I. R. 1914 All. 446=21 I. C. 989=36 All. 69.

(6) [1903] 27 Bom. 287.

(7) [1894] 16 All. 231.

Sch. 2, Civil P. C., the Court must be satisfied that the matter has been referred and, no doubt, must therefore inquire into the validity of the reference. There is then authority in the first of the two last mentioned cases, which I should be inclined (if necessary) to follow, for the view that the question of benefit to any minor concerned can be raised in such inquiry. See also *Ramji Ram* v. *Salig Ram* (2). But it is unnecessary to pursue the matter further because the objection to the reference, as distinguished from the award, on the ground of disadvantage to the minor defendant 2 has not been taken in the grounds of appeal here and was not so far as appears, taken in the lower Court; and I am not prepared to condone the omission and dispose of the point on the materials on record, because it is eminently one which should be stated explicitly with a clear specification of the matters in respect of which disadvantage to the minor was to be feared. It may be added that no attempt at such specification was made in the argument before us.

The next objection is more important. Defendant 1 the day after he consented to the reference revoked his consent and no suggestion has been made that this revocation was legally effective. Subsequently he did not attend the arbitration proceedings, although as regards him personally the arbitrators fully complied with their duty because they did not proceed or place him ex parte until they had given him notices of their intention to do both. But as throughout defendant 1 appears to have acted also as the guardian of defendant 2, the decision to proceed ex parte affected both; and the proceedings took place and the award was passed without any person attending to protect the latter's interest. It is contended that in these circumstances the award should be set aside either under S. 15 (1) on account of the arbitrator's misconduct or under S. 15 (3) as "otherwise invalid."

As I shall accept the first of these contentions, I need not consider whether the general words "otherwise invalid" cover all conceivable grounds, other than those already specified, on which an award might in proceedings of any description be set aside or only grounds ejusdem generis with those specified in S. 15 (3). Turning to S. 15 (1), I observe first with reference to *Lalla Sheo Churn Lal* v. *Ramnandan Dobey* (4), a decision which has been followed in various unreported cases, that if defendant 1's conduct had occurred in proceedings before a regularly constituted tribunal, it would have justified the subsequent vacation of any decision passed adversely to the minor he represented, since there is no suggestion that he absented himself on consideration of the merits of the case or because he could have had no contention worth advancing with reference to them; and next with reference to O. 32, R. 11, that the Court would have been bound to be vigilant in the minor's interest and after removing defendant 1 for his failure in his duty, to appoint another guardian in his stead.

Are arbitrators acting, like those here in question, on a reference without the Court's intervention under that or any similar duty and is their failure to perform it misconduct? No authority directly in point has been shown us. But generally arbitrators will fail in their clear duty and be guilty of misconduct, if they do not secure for each party an opportunity to present his case: and according to English authority they should even go beyond strict legal requirements in order to do so. *Crompton & Co. and Mohan Lal* (8), *Gladwin* v. *Chilcote* (9), *Haigh* v. *Haigh* (10) and *Whatley* v. *Morland* (11). The principle involved is one of substance and the case of a minor, such as that before us is not one, in which it should be relaxed. True, arbitrators cannot like a regularly constituted Court, protect his interest by removing the defaulting guardian and appointing another in his stead. But their duty may fairly be taken to be to refrain from passing an award, so long as they are deprived of the power to pass a just one, and either to adjourn the proceedings in case a change in the representation of the minor is probable, or if one is not probable either generally or within the time (if any) fixed for the return of the award to refuse to act. In the present case the arbitrators' failure in this duty amounted, in my opinion, to

(8) A. I. R. 1914 Cal. 770=41 Cal. 313=25 I. C. 391.
(9) [1841] 9 Dow. P. C. 550.
(10) [1861] 31 L. J. Ch. 420=3 De. G. F. & J. 157.
(11) [1834] 2 Cr. & M. 347=2 Dow. P. C. 249.

misconduct and on this ground their award must be set aside.

This entails that the appeal should be allowed, the lower Court's decision being set aside and the petition being dismissed. I agree with the order proposed by my learned brother as to costs for the reason he gives.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 1034

OLDFIELD AND SADASIVA AIYAR, JJ.

Sivanarasa Reddi and *another*—Plaintiffs—Appellants.

v.

Doraisami Reddi and *another*—Defendants—Respondents.

Second Appeal No. 372 of 1917, Decided on 21st February 1918, against decree of Temporary Sub. Judge, Cuddalore, in Appeal Suit No. 7 of 1915.

Cosharer — Collection of rent — Contribution—Cosharer collecting rent must be deemed to be doing it for all—In suit for contribution defendant can claim set off of share of rent collected towards peishcush.

Plaintiffs owned a three-fourths share in a mitth and the defendant owned the remaining one-fourth share. Plaintiffs paid the peishcush and sued defendant for the share of the peishcush paid by them which he was bound to pay. The defendant pleaded that plaintiffs were bound to give him a fourth of the amount of rent collected and he claimed a set-off of such amount as against his share of the peishcush. The plaintiffs contended that the total amount collected by them did not exceed their share of the rent and that defendant was bound to meet the common charge, viz., the Government revenue:

Held, that the plaintiffs should be deemed to have made the collections on behalf of all owners each co-owner being entitled to his fraction in that amount in proportion to his share and that defendant was, therefore, entitled to the set-off claimed.

Per *Sadasiva Aiyar, J.*—Where a co-sharer expressly intends to collect rents for his own share alone and is paid by the tenants expressly for that share, he must be deemed to have collected his own share and not for all the co-owners.

[P 1038 C 1, 2]

T. M. Ramachendra Aiyar, T. M. Krishnaswami Aiyar and *N. A. Krishna Aiyar*—for Appellants.

T. Rangachariar and *C. Padmanabha Iyengar*—for Respondents.

Oldfield, J.—Plaintiffs 1 and 2 appellants, with plaintiff 3 sued defendant to recover his share of the peishcush they had paid on the Mitta which all own in common, defendant's interest being one-fourth. The defence was that plainiffs had collected from the tenants sufficient to cover what they paid for defendant in addition to what they were entitled to retain as their own share of the collections; and the issue between the parties relates to the manner in which the collections should be apportioned, plaintiffs contending that as co-owners they are entitled to all they may collect up to a sum equal to three-quarters of the total demand of the estate; defendant, as his case was put forward in the lower appellate Court and finally here, that they are entitled to retain only three-quarters of their total actual collections and must hold the balance in trust for him and credit it against the amount they have paid out on his behalf.

Of these methods of calculation that proposed by plaintiffs is evidently open to the objection, regarded by the lower appellate Court as decisive, that it admits of one side collecting its share of the rents from the solvent tenants and leaves the other to collect at excessive trouble and expense from the insolvent and recalcitrant, But plaintiffs have founded their contention on their alleged right as co-tenants to any enjoyment of the common property which does not involve their receipt of more than their just share of the profits realisable from it or the ouster of the other co-tenants; and this is supported by reference to two Indian and two English cases, in which it is contended, the law applicable to the co-tenants before us is laid down.

The first of these, *Nallayappa Pillai* v. *Ambalavana Pandara Sannadhi* (1), no doubt dealt with collection of rents and it was said that

"not only was the kattalai, as one of the tenants-in-common, not bound to pay over to the mutt (the other) a moiety of what it received from the raiyats, so long as such receipts did not exceed its proper share, but in an action against the Kattalai to account for its receipts over and above what it was entitled to, it was for the mutt distinctly to allege and show that the kattalai's receipts did in fact exceed its due share."

But the judgment proceeded:

"no averment of that kind having been made and no proof in support of it having been offered, the suit"

(brought on an agreement, not as the District Munsif treated it, for an account) "necessarily failed." The circumstances were peculiar and it appears from the record that not only was the suit not for an account, but the kattalai had been tendering pattas and presumably collecting only its half share. With the

(1) [1904] 27 Mad. 465.

English authorities referred to, including *Kennedy* v. *DeTrofford* (2), I deal later. The material fact is that the Court referred to the share of receipts, not of demand; and this is in defendant's favour. The other Indian decision *Mahesh Narain* v. *Nowbat Pathak* (3), relied on as supporting plaintiffs, can, in my opinion be distinguished. The dispute was between one co-tenant of a quarry and a lessee under another, the lessee's rights being discussed as equivalent to those of his lessor; and it was, no doubt, held that, as there was no ouster or destruction of the common property, the co-tenant plaintiff, who himself had not attempted or been debarred from any enjoyment of it, was not entitled to an account in the absence of proof that the lessee had taken more than his lessor's just share of the stone. The case however differs from that before us in respect of the manner, in which the profits are claimed and in which they were obtained. Firstly in *Mahesh Narain* v. *Nowbat Pathak* (3) they were claimed directly by the plaintiff co-tenant, whilst as the judgments show, he was disclaiming any liability to contribute towards the expenses incurred. Here not only has defendant been ready to give and plaintiffs have not refused credit for the proper proportion of the expense incurred by the latter in collection, but also defendant's claim is made in answer to one by plaintiffs to be reimbursed for expenditure, essential to the continuance of the common property in the common ownership, but for which it would have been brought to sale by Government for arrears of peishcush and no profits could have accrued. It is not suggested that contribution is claimed from defendant in respect of any distinct portion of the estate for which plaintiffs have not collected and he is at liberty to collect, or otherwise than for his unascertained share in the property as a whole.

The second distinction between the present case and *Mahesh Narain* v. *Nowbat Pathak* (3) appears clearly from the quotation from the judgment in one of the English authorities now relied on, *Henderson* v. *Eason* (4), on which the Calcutta decisions are based. The claim in *Henderson* v. *Eason* (4) was to an account and share of the profits derived by a co-tenant from common property, of which he was in possession and which he had cultivated directly, just as the lessee and the co-tenant lessor had enjoyed the quarry, which was in question in Calcutta; and it was observed that in such cases it is impossible to say that the co-tenant has received more than his just share.

"He takes the whole of the crops and is he to be accountable for any of the profits, when it is clear that if the speculation had been a losing one altogether, he could not have called for a moiety of the losses, as he would have been enabled to do had the land been so cultivated by the mutual agreement of the co-tenants? . . . . He receives in truth the return of his own labour and capital to which his co-tenant has no right."

This ground of decision was as directly available in *Mahesh Narain* v. *Nowbat Pathak* (3) as it is excluded by the facts before us plaintiffs' acceptance of profits' to the making of which their own exertions or expenditure have not gone except as regards the latter so far as they claim that defendant was jointly liable for the peishcush with them. The portion of the judgment in *Henderson* v. *Eason* (4) relating to a state of facts similar to those before us is also relied on because it also is said to support plaintiffs' claim inasmuch as it shows that the English common law to be applied in the present case had previously been that whilst the co-tenancy continued, one co-tenant had no remedy against another who had received the profits, unless the latter had been expressly appointed the former's bailiff or the former had been ousted. Vide also the extract from Co. Litt. 200b in the argument. And it is urged that this view is further supported by *Kennedy* v. *De Trofford* (2), in which Lord Herschell said that 'a co-tenant collects rents in the right which he possesses as such and does not need any special contract (such as was proved in that case) or any agency, express or implied, to justify him in collecting. This dictum was however relevant only to the question then in issue, whether the co-tenant, who collected the rents, was that account in a fiduciary relationship with the other co-tenant which would debar him from purchasing the property, when it was sold by a mortgagee. There was no issue and no decision as to his liability to account for any part of his collections or its extent; and there is nothing to affect the conclusion as to the libility in

(2) [1897] A. C. 180=66 L. J. Ch. 413.
(3) [1905] 32 Cal. 837.
(4) [1851] 17 Q. B. 701=21 L. J. Q. B. 82.

Henderson v. *Eason* (4) based on the Statute 4 Ann. C. 16, which was held applicable, in supersession of the common law, to:

"cases in which one of two tenants-in-common of lands leased at a rent payable to both receives the whole or more than his proportionate share according to his interest in the subject of the tenancy," that "he is bailiff only by virtue of his receiving more than his just share and as soon as he does so and is answerable for only so much as he actually receives."

The Statute is dependent on no local or temporary considerations and has been the English law from prior to the date of its reception in India, as representing Justice, equity and good conscience and if there were no Indian provision for the case I should treat it not the earlier common law as applicable. It is however argued it seems to me correctly, that such provision is available in S. 90. Trusts Act (2 of 1882) the relevant portion of which provides that:

"where a co-owner, by availing himself of his position as such gains an advantage in derogation of the rights of the other persons interested in the property or where any such owner, as representing all persons interested in such property gains any advantage, he must hold for the benefit of all persons so interested the advantage so gained but subject to re-payment by such persons of their due share of expenses properly incurred in gaining such advantage."

It is unnecessary to decide whether the section was intended to embody the English rule. For it is sufficient that it applies to a co-owner's right existing like defendant's in the present case, but unlike that in question in *Mahesh Narain* v. *Nowbat Pathak* (3) independently of and antecedently to the realizations, which not only his position as co-owner but also his special exertions or expenditure enable him to make. Here defendant, as the plaint admits and the claim made involves, is a co-owner; and it is not disputed that he is apart from plaintiffs' collection of the rents, entitled to a proportionate share in them. The co-owner, who collects them can in the absence of arrangement with the others, do so only as their representative, this appearing from the fact that, if he attempts to recover by suit, he is bound to join those others, either as plaintiffs or defendants, the Court being able to protect their interests at the execution stage by an order under O. 21, R. 15. *Nepal Chandra Ghose* v. *Mohendra Nath Roy Chowdhury* (5) and *Pramada Nath Roy* v. *Ramani Kanta Roy* (6). The terms of the section being fulfilled, plaintiffs under it must account to defendant for the advantage they have gained in the shape of the excess over their own proportionate shares in the collection. No other ground of appeal being argued, this entails concurrence in the lower appellate Court's decision. The second appeal is dismissed with costs.

Sadasiva Aiyar, J.—Plaintiffs 1 and 2 are the appellants. They and plaintiff 3 own ¾ths share in the mitta and the defendant owns the remaining ¼th share. The lands in the mitta are enjoyed by tenants and the plaintiffs' share of the net rents (after deducting costs of collection) is a ¾th fraction and the defendant's the remaining ¼th fraction. Both the plaintiffs and the defendant are jointly liable for the peishcush due to Government. The plaintiffs paid more than their ¾ths share of the peishcush due for faslis 1319 and 1320 and the defendant paid much less than his ¾th share and hence the plaintiffs brought the suit for the recovery of the excess (over ¾ths share) paid by them. The defendant contended (among other defences) that the plaintiffs have collected and enjoyed more than their ¾ths share of the rents due by the tenants and that if accounts are taken, nothing would be found due to the plaintiffs. The District Judge passed an order on 27th January 1915 calling for a finding from the lower Court, the material portions of the order being as follows:

"The defendant claims in issue 3 that the rents collected by the plaintiffs should be set off against their demand. The lower Court has held that so long as the plaintiffs have not collected more than their share of the whole rental, they are not accountable to the defendant. I think that the correct view is that the plaintiffs are accountable for a proportionate amount *on each pattah*." (Italics are mine.) "With joint holders, it would never do for one to be allowed to collect his fraction of the total rent from the solvent tenants leaving it to his fellows to collect their dues from the other tenants. Each landholder is entitled *to a proportionate amount from each tenant who contracts* with *the landholders jointly*. It is therefore necessary in this case to have a statement of account showing what has been paid by each pattadar or tenant to each landholder from the beginning of fasli 1318 up to date of plaint together with the expenses incurred by each landholder for collection. Accordingly I remand this case for submission of such an account."

(5) [1904] 31 Cal. 707.

(6) [1908] 35 Cal. 331=35 I. A. 73 (P. C.).

It is not very clear from this remand order whether the District Judge thought (a) that after totalling the collections from all the tenants holding under several pattahs, it should be ascertained whether the total amount exceeded ¾ths of the total demand from all the holdings in the village and plaintiffs should account for the balance to the defendant, or (b) whether the plaintiffs should account for ¼th of the total collections made by the plaintiffs to the defendant, or (c) whether they should account to the defendant whenever they had collected more than ¾ths *of the demand due on any pattah* for the excess over that ¾th on that pattah, though their total collections from all the holdings might be less than ¾ths of the demand on all the holdings or might be less than even ¾ths of the total amounts due by the tenants from whom they made collections. From the way however in which the accounts were afterwards taken by the District Munsif and by the Commissioner appointed by him without protest, it appears that all the parties understood that the District Judge held that, out of the net collections made by the plaintiffs in each fasli from all the tenants, they should account for ¼th share to the defendant while the defendant in his turn should account for ¾ths of his net collections (that is, collections after deducting expenses of collection) to the plaintiffs and that the accounts should be taken in the above manner. When accounts were taken as above, it was found that a sum of Rs. 134 odd was due by the plaintiffs themselves to the defendant, and hence the Subordinate Judge (to whom the appeal had been transferred after remand) dismissed the plaintiffs' suit with costs. The second of the grounds in the memorandum of second appeal before us is as follows:

"It having been admitted and proved that the plaintiffs did not collect more than their share of the rent from the raiyats and they paid not only the peishcush due by them but also that due by the defendant, the lower Court should have held that the plaintiffs are entitled to contribution and the suit should have been decreed."

It is not clear whether the expression "plaintiffs' share of the rent" found in this second ground of the appeal memo, means, (a) plaintiffs' share of the total annual demand from all the raiyats, or (b) whether it means plaintiffs' share of the total demands due by those tenants alone from whom they made collections, or (c) the plaintiffs' share of the demand on each particular holding from the tenants of which they made collections. At the arguments Mr. T. R. Ramachandrier for the appellants contended that as the plaintiffs' total collections were not alleged by the defendant to have exceeded ¾ths of the total demand from all the raiyats, the plaintiffs were not in law bound to account for ¼th share of the net sum so collected by the plaintiffs as decided against them by the lower appellate Court in the remand order which decision was adopted by the Commissioner in taking the accounts. In support of this proposition of law, the learned vakil relied on the observations in certain English cases and on the dicta found in *Nallayappa Pillai* v. *Ambalavana Pandara Sannadhi* (1) and *Mahesh Narain* v. *Nowbhat Pathak* (3). A few more facts might be stated here to appreciate the relative positions of the parties. The defendant and plaintiffs 2 and 3 were willing in January 1910 to have plaintiff 1 recognized as the "manager" of the whole mitta estate and registered by the Collector as "the senior joint owner" so that he may be recognized as proprietor under Act 2 of 1894 to exercise the powers of appointment of village officers of reporting against them, of punishing them and so on. As manager plaintiff 1 alone issued pattahs to the tenants in Faslis 1319 and 1320. And this could have been done only on behalf of all the four joint proprietors. As regards arrears not collected from the tenants, all the three plaintiffs and the defendant filed suits jointly in the Revenue Court for such arrears due for Faslis 1320, 1321 and 1322, and most of the suits have been decreed in favour of all the four jointly. Plaintiff 1 says in his evidence:

"Under ordinary circumstances all the four mittadars should share equally profit and loss. The profit or loss can be ascertained only after payment of peishcush."

Each of the four mittadars seems to own the kudivaram also in some of the lands in the estate and usually the rent due by each of the four mittadars as a raiyat of these lands (to the four mittadars jointly as landlords) is not actually collected, but each debits the rents due by him in the account of collections which he gives to the common karnam (see the evidence of the

karnam P. W. 2). Where attachments or other proceedings have to be taken and expenses incurred, the net collections alone are considered as received by the proprietor who has incurred the cost of such collections. On the above facts, it is clear to my mind that the justice and equity of the case is in favour of the view taken by the lower appellate Court that every one of the co-owners must be deemed to collect on behalf of all every rupee he obtains as net collection from any tenant, that the net amount must therefore be brought into the common account and that each co-sharer is entitled to his fraction in that amount in proportion to his share. After I prepared my judgment up to this point, I had the advantage of a perusal of the judgment just now pronounced by my learned brother and as I entirely concur with him in his discussion of and conclusions on the English and Indian precedents. I think it unnecessary to myself refer to them or detail them. Where there is no risk, no question of adventure or enterprise, no question of employment of real or appreciable labour or skill or capital or industry in the obtaining of pecuniary profits from the common property by one co-sharer, the reason of the decisions quoted by the appellant does not apply and even if there are old English decisions in which wide language is used as to the irresponsibility of a cosharer to his other cosharers under all circumstances, it should be remembered that the rights and liabilities of joint owners joint debtors and joint creditors were looked at sometimes under the English common law in a too technical manner, not quite consistent with plain equity and justice, and I am not prepared to follow such old decisions especially after the English Statute of Anne was passed evidently in order to get rid of some at least of the said technicalities based upon the old forms of action. Of course where one co-sharer obtains the amenities of mere comforts, conveniences or residential advantage of mere user and occupation whithout an adverse animus against the other co-owners, he cannot be treated as bound to account to his other co-sharers as if he had obtained the common premises for the rent to which they could have been let to a stranger.

In cases other than those in which the cosharer expressly intended to collect for his own share alone, made a demand on tenants for his own share alone as in the case of *Nallyappa Pillai* v. *Ambalavana Pandara Sannadhi* (1), and was paid by the tenants expressly for or towards that share alone (those facts being required to be alleged and proved by that cosharer in any litigation between him and other cosharers if he wants to rebut the natural presumption that he collected for the common benefit, plain law and equity in my opinion is in favour of the view that he collects whatever he collects on behalf of all. In the result I concur in dismissing the second appeal with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 1038

OLDFIELD AND SADASIVA AIYAR, JJ.

Vikrama Deo Garu—Plaintiff—Petitioner.

v.

T. R. Lakshmi Narasimha and *others*—Defendants—Opposite Parties.

Civil Misc. Petn. No. 3425 of 1914, Decided on 8th January 1918, from judgment, in Appeal Suit No. 4 of 1914.

(a) Vizagapatam Agency Rules, R. 10, Cl. (5)—"Suit for land or other immovable property" has same meaning as in Letters Patent (Madras), S. 12,

The expression 'suit for land or other immovable property' in Cl. 5, R. 10 of the Vizagapatam Agency Rules bears the same construction as in S. 12, Letters Patent of the Madras High Court. [P 1039 C 1]

(b) Madras Local Boards Act (5 of 1884), S. 73—Suit for recovery of cesses recovered after execution sale and for restraining defendant from recovering cesses in future falls under S. 73 and suit lies in Agency Court without agent's permission—Vizagapatam Agency Rules, R. 10.

The plaintiff purchased a mokhasa held by some of the defendants in a Court sale in execution of a decree against defendant 1 the zamindar, part of whose estate it was. Defendant 1 having collected cess by virtue of his being the registered zamindar, the plaintiff sued for recovery of the amounts collected by defendant 1 and for an injunction restraining him from making future collections :

Held : that this was a suit to recognize the plaintiff as a land-holder for the purpose of S. 73 Madras Local Boards Act and could be filed in the Agency Court, Vizagapatam, without the Agent's permission. [P 1039 C 2]

B. N. Sarma—for Petitioner.

G. Venkataramiah, P. Narayanamurthi and *V. Ramesam*—for Opposite Parties.

Order.—No valid objection has been made to the judgment under appeal. But, the question being one of jurisdiction,

we are constrained to differ from it and to decide on a ground not referred to in it, though it was considered by the Assistant Agent that the suit, being one for land or immovable property, could be filed in an Agency Court without the Agent's previous permission. Agency R. 10, Cl. 5, repeats the description "suit for land or other immovable property," which occurs in the Letters Patent of this High Court, S. 12; and we have been shown no reason why the authorities, in which that description was construed in the latter connexion, should not be considered also in the former. The decisions of this Court, like those in Calcutta, have given it a wide construction, as covering :

"all suits, in which a decree is asked for operating directly on the land in accordance with the principle that all questions relating to land should ordinarily by decided by the Court within whose jurisdiction it lies."

Sundara Bai Saheb v. *Thirumal Rao Saheb* (1). *Srinivasa Aiyangar* v. *Kannappa Chetti* (2), has also been referred to; and although the judgment of Seshagiri Aiyar, J., identifies the description in the Letters Patent only with Cls. (*a*), (*c*) and (*e*) of S. 16, Civil P. C., that is presumably because reference to Cls. (*b*) and (*d*) was unnecessary for the purpose of the case before him, since he expressly referred to the judgment in *Nalum Lakshimikantham* v. *Krishnasawmy Mudaliar* (3) in which the latter clauses also are specified. This is material, because plaintiff-appellant contends that his suit is for land, because it involves a determination of the nature contemplated in Cl. (*d*) of an interest in immovable property.

Plaintiff's allegations in his plaint, on which (and not on the defence) the jurisdiction must depend, are that he bought the mokhasas held by some of the defendants in a Court sale in execution of a decree against defendant 1, the zamindar, part of whose estate they were; that the Collector held him liable for cess, which he paid; and that he is entitled to recover the amount claimed from the defendants notwithstanding S. 73, Local Boards Act (Madras Act 5 of 1884). He has impleaded defendant 1 because the latter, being still the registered zamindar, is collecting cess and has filed some suits for it. Plaintiff asks for a decree against defendant 1 for the amounts thus collected by him or in the alternative against the others for amounts not yet collected from them and for an injunction restraining defendant 1 from collecting in future or interfering with plaintiff's collecting. In effect, he alleges that the Court sale made him land-holder for the purpose of S. 73, Local Boards Act and asks the Court to negative defendant 1's right to deny this. We think that the declaration of plaintiff's character as land-holder under S. 73, amounts to a determination of his and defendant 1's interest in the mokhasas, immovable property; and that therefore the suit is for land within the meaning of Agency Rule 10 Cl. 5. Plaintiff's suit was, therefore in our opinion, rightly filed in an Agency Court; and no previous permission for its institution there was necessary. The Agent's decision must be set aside and the appeal must be remanded to him for re-admission and disposal on the merits. Costs will abide the event. Those up to date will be provided for in the Agent's final decree.

S.N./R.K. *Appeal allowed.*

(1) [1909] 33 Mad. 131=3 I. C. 930.
(2) [1916] 33 I. C. 906.
(3) [1904] 27 Mad. 157.

A. I. R. 1919 Madras 1039

WALLIS, C. J. AND SPENCER, J.

K. Gopalakrishna Kudva—Plaintiff—Appellant.

v.

Bangle Narayana Kamthy — Defendant—Respondent.

Appeal Suit No. 393 of 1915, Decided on 17th January 1918, against decree of Sub-Judge., South Kanara, in original Suit No. 8 of 1914.

(a) Malicious prosecution—Essentials of, stated — Plaintiff need not prove his innocence.

In an action for malicious prosecution the plaintiff must prove four things, (1) that he was prosecuted, (2) that the prosecution ended favourably to him, (3) that the defendant acted without reasonable and probable cause, and (4) that the defendant was actuated by malice. Under the second and third heads, questions as to plaintiff's innocence generally arise. But they must be regarded only as incidental to the question whether the prosecution ended in the plaintiff's discharge or acquittal and whether the defendant acted without reasonable or probable cause. [P 1042 C 1]

The plaintiff is not charged with the onus of affirmatively proving his innocence: *Abrath* v. *North Eastern Railway Co.*, (1883) 11 *Q. B. D.* 440, *Expl*; 24 *Mad.* 59, *doubted.*

(b) Malicious Prosecution.— Reasonable and probable cause—What is stated.

Reasonable and probable cause means an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily prudent and cautions man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

[P 1041 C 1]

C. Madhavan Nair—for Appellant.

K. Srinivasa Aiyangar—for Respondent.

Judgment. — The plaintiff's suit, which was brought to recover Rupees 3,500 as damages for malicious prosecution, was dismissed in the Court of the Subordinate Judge of South Kanara and the plaintiff appeals. The plaintiff was the managing trustee of Shri Venkataramana temple of Mulki and the defendant complained to the Sub-Divisional Magistrate of Mangalore that the plaintiff had as trustee, committed offences of criminal misappropriation and criminal breach of trust in respect of the temple properties. At the trial the plaintiff was discharged under S. 253, Criminal P. C., by the Magistrate on 15th July 1912. For the purposes of this case we may leave out of consideration those allegations of the defendant which merely imputed breach of the rules framed under the award of arbitrators for the management of the temple, and we may at once proceed to those charges in which an element of criminal dishonesty was disclosed by the prosecutor's allegations. In the defendant's complaint, which was prepared by Counsel, were specified eight acts of the plaintiff as constituting offences of the above description under the Penal Code. Of these the most substantial were, (1) that the accused had constructed a golden palanquin and had misappropriated about 4 seers of gold of the value of Rs. 2,000 by charging the temple with the value of 30 seers of gold while utilizing only 26 seers, (2) that the accused had debited the temple with Rs. 400 worth of fire works for use at festivals, although the amount really spent was only Rs: 200, and that he had misappropriated the difference, (3) that Rs. 4,843 had been paid into Court about six months previously but had not been brought into the temple accounts and that the accused was using the same for his own purposes, and (4) that the accused had misappropriated 50 muras of rice and Rs. 10 collected as offerings to the temple. In his sworn statement of the Magistrate, the defendant further alleged that if the temple chest was examined, it would be found that there was a deficiency in the money in hand when compared with the amount stated in the accounts.

The first charge, namely, that of misappropriating Rs. 2,003 worth of gold is a very serious one and in our opinion, was quite unwarranted by the information of which the defendant was at the time possessed or by what has since transpired.

When the defendant was in the witness box and was asked upon what basis he made this allegation his only explanation was that many people were saying that the plaintiff undertook the work of repairing the palanquin with a view to commit misappropriation and that he also believed that the plaintiff was going to misappropriate the gold. He admitted that he had not personally examined the goldsmith who made the palanquin before he complained to the Magistrate. The only information that he had was that which Vasudeva Shanbhogue and Hari Pai gave him. These persons have not been examined as witnessess and it is clear from the defendant's own statement that he had no information, that could justify him in making the statement that the accused had misappropriated this large amount of gold. The Magistrate's judgment shows that this charge was dropped at the trial as the prosecution found it to be groundless.

The second allegation of importance, which is the 4th charge in Ex. C namely, that the accused had misappropriated Rs. 4,843 beloning to the temple, was equally unjustifiable. This money had been recovered by a suit instituted on behalf of the temple and the money was in the hands of the vakil who represented the temple. In the vakil's hands, it was, presumably, quite safe. The defendant admitted in cross-examination that he knew that the amount had been with the vakil. Yet he had the audacity, in his complaint, to declare that the accused was utilizing the same for his own purposes. The fact that this money was not entered in the temple accounts as having been paid to the vakil would not justify the defendant in making such an accusation when, as he admits, he had no information that the plaintiff had actually

misappropriated the amount. The next accusation, which is number 3 in serial order, is that the accused had misappropriated about Rs. 200 shown as spent on fire works by means of entries in the account showing payment to certain fictitious persons. When he was asked about this, the defendant stated that, before the institution of the criminal complaint all he knew was that the plaintiff had made it appear in the accounts that fire works had been purchased from unlicensed vendors, but he did not know the names of the persons from whom the purchases had been made, He gathered from the fact that it was entered in the accounts of the plaint temple that fire works had been obtained from unlicensed persons, that the plaintiff must have misappropriated the money under this head of expenditure. That, again, seems to have been a reckless and unwarranted assumption. He stated that the payments had been shown in the accounts as having been made to several fictitious persons, but he took no trouble to ascertain whether the persons shown as having sold the fire works were really fictitious. As observed by Lord Atkinson in *Corea* v. *Peiris* (1) the pivot upon which all such actions turn is the state of the mind of the prosecutor at the time that he institutes or authorizes the prosecution. In *Hicks* v. *Faulkner* (2) Hawkins. J,. defined reasonable and probable cause to be

> "an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

Applying these tests, it can only be concluded on the evidence that the defendant must have acted without reasonable or probable cause when he accused the plaintiff of misappropriation and criminal breach of trust with respect to the above-mentioned three charges.

The fourth of the charges which we need consider relates to the misappropriation of 50 muras of rice and Rs. 10. At the criminal trial an entry of Rs. 256 in the accounts was shown as representing the value of these 50 muras of rice and Rs. 10. The accused had not brought this item into the general accounts, but had kept it under the head of "Kadanathaya." The prosecution failed to prove that this entry of Rs. 256 related to any money received from any other source The statement that the accused had misappropriated this amount was not justified, but as the defendant might have entertained some reasonable suspicion from the manner in which the entry was made in the accounts we do not think that in respect of this item there was entire absence of reasonable cause. As regards the defendant's allegations that there was deficiency in the cash balance, the Magistrate found on examination Rs. 492 as the deficiency. But this was accounted for by a loan of Rs. 510 granted upon the pledge of jewels as evidenced by an entry in the account book seized at the search. As the Magistrate observed, there was no reason to suppose that there had been any falsification of accounts or misappropriation of money in respect of these items. At the same time we do not consider that the defendant's statement in this respect was without reasonable cause, as there was an actual shortage of cash. On the whole, we cannot agree with the Subordinate Judge in his finding that no case has been made out of malicious prosecution. Leaving aside the statements made in the complaint with regard to inaccuracies in the accounts or to irregularities in the plaintiff's conduct as trustee, there are at least 3 serious accusations cf misappropriation which the defendant had no justification for making. We are of opinion on the first issue that the complaint in question was in these respects made without any reasonable and probable cause.

There is also no doubt from the evidence that the defendant's action was dictated by malice. Shortly before the accusation was made the plaintiff had excommunicated the defendant. The defendant retaliated by accusing the plaintiff of defamation. The defendant in his evidence admitted that there had been misunderstanding between him and the plaintiff in the year 1907 in consequence of dealings which they had with one another in respect of a mortgage transaction which resulted in civil litigation. The manner in which the defendant raked together every conceivable charge in his endeavour to procure

(1) [1909] A. C. 549=79 L. J. P. C. 25.
(2) [1882] 8 Q. B. D. 167=51 L. J. Q. B. 268.

the conviction of his enemy and to cause him the maximum amount of difficulty in defending himself spells vindictiveness. It was provided in the scheme sanctioned by the award of arbitrators for the conduct of the temple affairs that this defendant and others might inspect the accounts at any time for ascertaining whether they were properly kept and that the temple money was properly accounted for. Instead of proceeding accordingly and inspecting the accounts before launching the criminal prosecution the defendant rushed into Court and attempted to make criminal charges out of trifling irregularities, which might every well have served as grounds for applying for the removal of the trustee in proceedings properly instituted for that purpose in a civil Court, but not for his prosecution.

As Mr. K. Srinivasa Aiyangar, in his arguments for the respondent, has raised the question whether the plaintiff in an action of this kind is bound to prove his innocence, and as the Sub-Judge's judgment containing a remark that the plaintiff had not proved his innocence by the mere fact that he was discharged in the Magistrate's Court, it is necessary to say a few words on this point. It is well settled that in actions for malicious prosecution, the plaintiff must prove four things: (1) that he was prosecuted, (2) that the prosecution ended favourably to him, (3) that the defendant acted without reasonable and probable cause, (4) that the defendant was actuated by malice. Under the second and third heads questions as to the plaintiff's innocence generally arise. But they must, we think, be regarded only as incidental to the questions whether the prosecution ended in the plaintiff's discharge or acquittal and whether the defendant acted without reasonable or probable cause. In *Abrath* v. *North Eastern Railway Company* (3), where the plaintiff had been acquitted of the criminal charge and the Jury had expressed the opinion that he left the Court without a stain upon his character and his innocence was not challenged by the defendants at the trial of his action for malicious prosecution, Bewen, L. J., as he then was, in discussing the onus of proof in such cases, observed that the plaintiff in an action for malicious prosecution must prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made. As already observed, no question as to proof of innocence arose in the case, and we do not think that the learned Lord Justice intended to do more than lay down that the prosecution must be shown to have ended favourably to the accused. The substance of the judgment was that proof of innocence was not by itself prima facie proof of want of reasonable and probable cause. This would appear to be the view taken by Sir Frederick Pollock in his well-known work on Torts, as after citing Bowen, L. J.'s observations in the text he observes in a note:—

"A plaintiff who being indicted on the prosecution complained of has been found not guilty on a defect in the indictment is sufficiently innocent for this purpose."

It is in the same sense that the word "innocent" appears to have been used by Lord Macnaghten in *Pestonji Muncherji Mody* v. *Queen Insurance Company* (4) and by Lord Davey in *Cox* v. *English, Scottish and Australian Bank Ltd.* (5) and by Maclean, C. J., in *Harish Chander Neogy* v. *Nishi Kanta Banerjee* (6). In some cases the innocence of the plaintiff has been treated as an element of consideration that enters into the question whether the defendant acted without reasonable and probable cause. If in *Nalliappa Goundan* v. *Koilappa Goundan* (7) the learned Judges intended to lay down that something further must be proved in suits of this nature beyond proof that the prosecution ended favourably for the accused and that there was an absence of reasonable cause in the prosecution, then we think that they went too far and that Lord Bowen's observation above referred to does not support their dictum to the extent. Failure to prove more than this may be relevant to the question of damages. In our opinion the Subordinate Judge misdirected himself in observing that the fact of the plaintiff having been discharged by the Magistrate was no evidence of his innocence, and in assuming, apparently, that the plaintiff was prima facie guilty and that he was bound affirmatively to prove his innocence. In

(3) [1883] 11 Q. B. D. 440=52 L. J. Q. B. 620.

(4) [1901] 25 Bom 332. (P. C).
(5) [1901] A. C. 168=74 L. J. P. C. 62.
(6) [1901] 28 Cal. 591.
(7) [1901] 24 Mad. 59.

parts of his judgment, e g., paras. 69, 104 and 107, the learned Subordinate Judge has applied to the plaintiff's conduct the test whether his motive was righteous or unrighteous, which is of course quite beside the point. We cannot accept the view of the Subordinate Judge in para. 108 of his judgment that the

"plaintiff has failed to establish his innocence in respect of any one of the accusations."

As regards damages, the plaintiff states that he had to pay about Rs. 2,500 as vakil's fees in defending himself at the criminal trial. Ex. B. series are receipts for Rs 1,150 passed by certain pleaders in his favour. In allowing this appeal and reversing the decision of the Subordinate Judge, we allow the plaintiff altogether Rs. 2,000 as damages, and we direct the defendant to pay the plaintiff's costs in this and in the lower Court.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 1043

OLDFIELD AND SADASIVA AIYAR, JJ.

Manjappa and *another*—Defendants—Appellants.

v.

Rajagopalachariar and *another*—Plaintiffs—Respondents.

Letters Patent Appeal No. 102 of 1917, Decided on 11th January 1918 against judgment of Bakewell, J,, in Civil Revn. Petn. No. 1116 of 1916.

Civil P. C. (1908), Ss. 19, 20 and 21—Goods ordered from Kumbakonam to be supplied at Sagaram in Mysore—Goods not ordered sent with goods ordered—Whole parcel returned—Suit for price of goods ordered and damages caused by negligence in resending goods not ordered—Suit for price for goods ordered lay in Kumbakonam but not for damages as it was caused in Mysore—S. 21 does not help to assume jurisdiction for cause of action arising out of British India.

Defendants, who were residents of Sagaram in the Mysore State, contracted with the plaintiffs, residing at Kumbakonam in British India, for the supply of certain articles by the latter. The plaintiffs sent the goods ordered by the defendants along with goods not ordered. The defendants having returned all the goods, the plaintiffs instituted the present suit at Kumbakonam for the value of the six articles ordered and of the other articles also on the ground that they were negligently retransmitted causing loss to the plaintiffs.

Held, (1) that the cause of action arose at, and the suit was properly filed, at Kumbakonam in respect of the goods ordered, as the proposal by defendants was impliedly accepted at that place; (2) that the cause of action in respect of the other articles was distinct, and the defendants' liability being for damages for alleged negligence, the cause of action arose at Sagaram and it was not competent for the Kumbakonam Court to take cognizance of that portion of the claim and (3) that S. 21, Civil P. C. did not apply to usurpation of the jurisdiction of a foreign Court. [P 1043 C 2]

Ramanath Shenai—for Appellants.

T. Narasimha Iyengar—for Respondents.

Judgment.—The plaintiff's claim is first to be paid for six articles ordered by defendants, which the latter were, therefore, bound to pay for and which they had no right to return. Part of the cause of action as regards these articles arose at Kumbakonam, where plaintiffs complied with defendants' order by despatching the articles to them, thus impliedly accepting their proposal. The lower Court therefore had jurisdiction as regards this part of the case. There is no answer to it on the merits. Next however plaintiffs claim the value of 17 other articles, which, it is not disputed, they sent in excess of defendants' order, on the ground that they failed to use the proper amount of care in the method by which they returned them to them at their request and that they consequently did not reach them It is argued first that the cause of action for this amount arose in part at Kumbakonam, where plaintiffs were, because it is based on a contract entered into between defendants and plaintiffs to return the articles and plaintiffs entered into that contract there. It is clear however that there was no contract, defendants simply undertaking to return the articles at plaintiffs' request made without reference to the passing of any consideration. The liability, if any, is in fact for damages for their alleged negligence, and that negligence took place, it is not denied, at Sagaram in the Mysore State. They must therefore be sued there. Next S. 21, Civil P. C. is relied on. But we have been shown no authority for holding, and we do not think, that this provision is applicable to usurpation of the jurisdiction of a foreign Court. It is then suggested that, as the part of plaintiffs' claim relating to the six articles was properly made at Kumbakonam, the whole could be made there. But when the causes of action in respect of the six and the 17 articles were distinct, there is no reason why the jurisdiction competent in the case of one should be competent in the case of the other also. The claim as regards the 17 articles was therefore not

made in a competent Court and it should have been disallowed. The claim as regards the six articles should have been decreed. The lower Court's decision and that of the learned Judge are set aside and the small cause suit is remanded in order that a fresh decree may be passed in the light of the foregoing. Costs in this Court will be costs in the case and will be provided for in the decree to be passde.

S.N./R.K. *Appeal allowed.*

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* A. I. R. 1919 Madras 1044
Full Bench

WALLIS, C. J., SADASIVA AIYAR AND SPENCER, JJ.

Kadirvelu Nainar—Plaintiff—Appellant.

v.

Kuppuswami Naicker — Defendant—Respondent.

City Civil Court Appeal No. 7 of 1917, Decided on 9th April 1918, against decree of City Civil Court, Madras, in Original Suit No. 498 of 1916.

*** Decree—Setting aside—Fraud—Perjured evidence is not ground.**

No suit can be instituted to set aside a decree on the ground that it was obtained by perjured evidence: 29 *Mad.* 179 **Overruled.**; 19 *I. C.* 579; 15 *I. C* 893 and *A. I. R.* 1915 *All.* 400, *Foll.* [P 1046 C 2]

K. S. Ganapathi Aiyar—for Appellant.

K. Venkataraghavachari — for Respondent.

Order of Reference.

Sadasiva Aiyar, J.—The plaintiff is the appellant. The present defendant had brought a suit against the present plaintiff in the Presidency Small Cause Court for money due by the plaintiff to a Chit fund, of which the defendant was the stake-holder and in which the plaintiff had four shares, the plaintiff having executed a promissory note in favour of the defendant. The defendant obtained a decree for Rs. 117-2 0 in the suit filed in the Presidency Court of Small Causes against the plaintiff notwithstanding certain defences raised by the plaintiff. The decree is dated 5th February 1914. The present suit was brought on 14th December 1916 in the City Civil Court (a) for a declaration that the decree in Small Cause Suit No. 1492 of 1914 is null and void, and (b) for a decree directing the defendant to pay the plaintiff Rs. 399-12-0 (the damages incurred by the plaintiff through the defendant's fraud in obtaining the unjust decree) with interest thereon and costs of suit. The grounds alleged as the foundation of this claim are found in paras. 8 to 10 of the plaint as follows: "The defendant falsely swore in that suit that he paid only ten monthly instalments" (to the Chit) and that certain receipts were passed only for instalments paid in respect of the Chit fund transaction, and not for independent loans advanced by the plaintiff to the defendant,

"that the defendant also dishonestly suppressed the fact that he was bound to give credit for Rs. 68 due to the plaintiff as premia in the Chit and that the decree of the Small Cause Court which was obtained by the plaintiff's wilful perjury and suppression of material facts was obtained in fraud of the Court."

The plaintiff's suit was dismissed by the learned City Civil Judge, on the ground that his Court cannot be converted into a Court of Appeal on a question of fact from the decision of the Small Cause Court. In *Venkatappa Naick* v. *Subba Naick* (1) Boddam and Moore, JJ., purported to follow the English cases in *Abouloff* v. *Oppenheimer* (2) and in *Vadala* v. *Lawes* (3) and held that a judgment obtained by perjury is a judgment obtained by fraud committed upon the Court and could be set aside in a separate suit. The learned Judges evidently thought that the decision in the well-known case of *Floor* v. *Lloyd* (4) was overruled by the two later English decisions referred to by them. The decision in *Venkatappa Naick* v. *Subba Naick* (1) has been afterwards considered in at least two cases in this Court. In *Kumarasawmy Chetty* v. *Kamakshi Ammal* (5), which came before Sundara Aiyar, J., and myself, I said:

"I also wish to add that I should not be understood as admitting that a plaintiff can maintain a suit to set aside a decree on the ground of fraud simply because the decree had been obtained on perjured testimony. I know it has been so held in *Venkatappa Naick* v. *Subba Naick* (1), but I have grave doubts as to the correctness of that decision."

Sundara Aiyar, J., agreed with my above observations. Then there is a reported case in *Logadapatti Chinnayya* v. *Kotla Ramanna* (6) in which Benson and Sundara Aiyar, JJ., dealt

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(1) [1906] 29 Mad. 179.
(2) [1883] 10 Q. B. D. 295=52 L. J. Q. B. 1.
(3) [1890] 25 Q. B. D. 310=63 L. T. 128.
(4) [1879] 10 Ch. D. 327=39 L. T. 613.
(5) [1912] 16 I. C. 843,
(6) [1913] 19 I. C, 579=38 Mad, 203.

elaborately with the same point. At P. 206 of *I. L. R.* 38 *Mad.* it is said:

"It is indisputable that the decree may be vacated on the ground that it was obtained by the successful party by fraud. The question is what would amount to fraud which would entitle an unsuccessful litigant to get the decree vacated. He cannot, it is clear, be allowed to get round the rule of res judicata and to prove that the judgment given by the Court was wrong because it came to a wrong conclusion on the evidence before it. It follows from this that the Court's conclusion, both on the construction to be put on the evidence placed before it and on the inference to be drawn from such evidence as well as on the trustworthiness of the evidence, should be regarded as final. If the Court acts erroneously in forming its judgment on any of these matters, the proper remedy is to invoke the help of the appellate tribunal where an appeal is allowed by law. Another mode of rectifying an erroneous judgment is to apply for review of judgment. The unsuccessful party has, in such an application, an opportunity to adduce any evidence which he failed to adduce at the hearing and which he could not, with all proper diligence, have then adduced. It cannot be doubted that, in such cases, he cannot institute a fresh suit to get the judgment vacated."

"The test to be applied is, is the fraud complained of not something that was included in what has already been adjudged by the Court, but extraneous to it? If, for instance, a party be prevented by his opponent from conducting his case properly by tricks or misrepresentation, that would amount to fraud. There may also be fraud upon the Court if, in a proceeding in which a party is entitled to get an order without notice to the other side, he procures it by suppressing facts which the law makes it his duty to disclose to the Court. But where two parties fight at arm's length, it is the duty of each to question the allegations made by the other and to adduce all available evidence regarding the truth or falsehood of it. Neither of them can neglect his duty and afterwards claim to show that the allegation of his opponent was false." Then the learned Judge refers to Black on Judgments in 23, Cyclopaedia of American Law and Procedure, as regards the acts which can be relied on as constituting the fraud which would vacate a judgment, namely, things which are collateral to the matters which have been adjudged by the Court. Then the passages from the judgment of the James, L. J., in *Flower* v. *Lloyd* (4) are quoted:

"Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very great consideration indeed, before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants sui juris and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories or a misleading production of documents or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour, the present defendants, in their turn might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury and so the parties might go on alternately ad infinitum. There is no distinction in principle between the old Common law action and the old Chancery suit and the Court ought to pause long before it establishes a precedent which would or might make, in numberless cases, judgments, supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely, but in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods and frauds."

The learned Judge declined, therefore to follow *Venkatappa Naick* v. *Subba Naick* (1). As regards the two English cases *Abouloff* v. *Oppenheimer* (2) and *Vadala* v. *Lawes* (3), they were cases of suits brought upon foreign judgments. In the case in *Nanda Kumar Howladar*

v. *Ram Jiban Howladar* (7) Jenkins, C. J., says at p. 998 *of I. L. R.* 41 *Cal.* that the jurisdiction to set aside a decree for fraud

"is to be exercised with care and reserve for it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation."

In *Ramratan Lol* v. *Bhuri Begam* (8) Richards, C. J., quotes with approval passages from *Flower* v. *Lloyd* (4), dissents from *Lakshmi Charan Shaha* v. *Nur Ali* (9), which was disapproved of in the Calcutta High Court itself in *Moruful Huq* v. *Surendra Nath Roy* (10), and approves of Jenkins, C. J 's observations in *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (7), In *Janki Kuar* v. *Lachmi Narain* (11) also *Venkatappa Naick* v. *Subba Naick* (1) was expressly dissented from and the learned Judges say that the weight of authority is in support of the view taken in *Nanda Kumar Howldar* v. *Ram Jiban Howladar* (7) and in *Moruful Hug* v. *Surendra Nath Roy* (10), that is in favour of the view taken in *Flower* v. *Lloyd* (4), and in the Madras case *Logadopatti Chinnayya* v. *Kotla Ramanna* (6). I think that in India the considerations mentioned by James, L. J., in *Flower* v. *Lloyd* (4) apply with very great force, as it is dangerous to allow a suit to be brought by an unsuccessful litigant to set aside the decree passed against him on the ground that his opponent had imposed on the Court by letting in perjured evidence. The two cases relied on in *Venkatappa Naick* v. *Subba Naick* (1) and the later case in *Cole* v. *Langford* (12) merely follow old English precedents and do not attempt to tackle with the weighty reasons given in *Flower* v. *Lloyd* (4). The passion for litigation, wherever it exists in this country, is likely to turn into almost incurable mania and the doctrine of res judicata would become practically useless if *Lakshmi Charan Shaha* v. *Nur Ali* (9) is followed in Indian Courts. Having regard, however, to the conflict of views found in the decisions in *Venkatappa Naick* v. *Subba Naick* (1) and in *Logadapatti Chinnayya* v. *Kotla Ramanna* (6), I would refer the following question to the Full Bench:

"Was the question of law considered in *Venkatappa Naick* v. *Subba Naick* (1) rightly decided in that case?"

Wallis, C. J.—I concur in the order of reference.

Opinion.— In *Venkatappa Naick* v. *Subba Naick* (1) the Court decided that a suit could be instituted to set aside a decree on the ground that it had been obtained by false evidence tendered at the trial and by the suppression of evidence. On reference to the printed papers it appears that the alleged suppression of evidence consisted in the non-production of a promissory note the very existence of which the defendant denied when giving evidence in the case. There has been considerable difference of opinion in England as to whether an action would lie to set aside the judgment of an English Court on the ground that it had been obtained by perjured evidence. In India the weight of authority appears to be in favour of holding that such a suit will not lie for the reasons given by Sundra Aiyar, J., in *Lagadapatti Chinnayya* v. *Kotla Ramanna* (6), by the Calcutta Court in *Moruful Huq* v. *Surendra Nath Roy* (10), and by the Allahabad Court in *Janki Kuar* v. *Lachmi Narain* (11). We are therefore of opinion that *Venkatappa Naick* v. *Subba Naick* (1) was wrongly decided and must be overruled.

S.N./R.K. *Answered in the negative.*

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(7) A. I. R 1914 Cal. 232=23 I. C. 337 =41 Cal. 990.
(8) A. I. R. 1914 All. 543=30 I. C. 792=38 All. 7.
(9) [1911] 38 Cal. 936=11 I. C. 626.
(10) [1912] 15 I. C. 893.
(11) A. I. R. 1915 All. 400 = 30 I. C. 789=37 All. 535.
(12) [1898] 2 Q. B. 36.

** A. I. R. 1919 Madras 1046

Full Bench

AYLING, COUTTS-TROTTER AND SESHAGIRI AIYAR, JJ.

Chidambara Pillai and *others*—Plaintiffs—Appellants.

v.

Rangasami Naicker and *others*—Defendants—Respondents.

Appeal No. 84 of 1915, Decided on 20th February 1918, against the decree of Temporary Sub-Judge, Tanjore, in O. S. No. 3 of 1913.

****(a) Hindu Law — Guardianship — Joint family—Appointment of guardian by only adult coparcener by will is improper.**

It is not competent to the only adult co-parcener of a Mitakshara family cosisting of himself

and his minor co-parceners to appoint a testamentary guardian to the co-parcenary properties of the minor co-parceners. 7 W. R. 73, *not Foll.*; 13 M. I. A. 209; 16 M. L. J. 357 and 25 All. 407, (P. C.), *Dist*; A. I. R 1914 Bom. 300 *Diss. from*; 21 I. C. 848; 29 I. C. 475 and 34 I. C. 766 *Foll.* [P 1050 C 1, 2]

(b) Maxim—What is not prohibited is lawful—Applicability.

Per *Ayling, J.*—The attractive doctrine that everything which is not expressly forbidden should be held lawful, if expedient, is one which has its dangers and requires careful consideration before application. [P 1050 C 1]

(c) Hindu Law—Will—Powers of—Person who cannot will away cannot be allowed to control that property after death.

Per *Seshagiri Aiyar, J.*—On principle, a person who is not capable of making a gift of his property or todispose of it by testament cannot be in a position to control that property after his death. [P 1051 C 1]

(d) Hindu Law—Guardian—Appointment—Guardian for co-parcenery property cannot be appointed under will—Enactment dealing with guardianship do not confer such authority—Guardians and Wards Act.

The Indian enactments dealing with guardianship, viz., the Court of Wards Regulation, the Guardians and Wards Act and the Widow's Remarriage Act give no statutory authority for the appointment of a testamentary guardian in respect of co-parcenary property. They only refer to cases in which such power of appointment is permissible under the law, for example, cases of self-acquired property in Madras or Dayabhaga property in Bengal. [P 1050 C 1]

K. Srinivasa Aiyangar, C. Krishnamachariar and *S. Venugopala Chetty*—for Appellants.

T. R. Ramachandra Aiyar and *T. R. Krishnasami Aiyar*—for Respondents.

Order of Reference.

Kumaraswami Sastri, J.—This appeal arises out of a suit filed by the appellants against defendant 1 and several others for an account of the management of their properties by defendant 1 during their minority and for the setting aside of the alientions made by him in favour of the other defendants. The case of the plaintiffs is that one Chidambaram Pillai died leaving two undivided sons, Ramasami Pillai the father of plaintiff 4 and Appukutti Pillai the father of plaintiffs 1, 2 and 3. Ramasami Pillai died in 1900 and Appukutti Pillai in 1902. At the time of Appukutti Pillai's death all the plaintiffs were minors and he was the only adult member of the undivided family. He left a will, dated 6th October 1902. The material portion of the will runs as follows :

"As my sons and my elder brother's sons are minors, I have appointed Venkatachella Pillai son of Theagaraja Pillai of Puduputhur, Nagapatam Taluk, executor herein having requested him regarding the management of the affairs for the purpose of looking after all the affairs of the family after my death till the minors come of age, as a near relative of mine being maternal uncle and a reliable man who would faithfully look after the affairs and take pains in improving the property . . . . . If the creditors press for payment, the lands in Orathu Kannur Vattam Vadakathalai village shall be sold to him who wants the same. The properties after paying up the debts shall be added to the family property."

This defendant who was appointed executor took possession of the estate and made the alienations complained of in the plaint. Plaintiff 1 attained majority in 1908 and defendant 1 is alleged to have severed his connexion with the estate and to have put him in possession of the properties that then remained. The alienations made by defendant 1 are impeached on the ground that the will is invalid under Hindu law and that there was no necessity for the alienations. As the will on its face purports to deal with joint family properties, it cannot confer any title on defendant 1 so far as the properties are concerned, as S. 4, Probate and Administration Act, expressly provides that no property which would otherwise have passed by survivorship shall vest in the executor or administrator. It is argued that the will is valid in so far as it appoints defendant 1 the guardian of the minor members of the undivided family and that under the terms of the will the appointment of defendant 1 as executor and the conferring upon him of the powers of management (set cut in detail) amounted to his appointment as a testamentary guardian. The question for determination therefore is whether a Hindu, who is the only adult member of a co-parcenary consisting of himself, the sons and nephews, can appoint a testamentary guardian to his minor coperceners.

So far as appointment of a guardian to the person of minors is concerned, the power of a Hindu father is not disputed. In *Albrecht* v. *Bathee Jellamma* (1) Wallis, C. J., and Abdur Rahim J., held, following *Soobah Prithee Lal Jha* v. *Soobah Doorgah Lal Jha* (2), that a Hindu father was entitled to appoint a guardian for his child by will so as to exclude the mother from the guardianship. This decision was followed by Sadasiva Aiyar and Moore, JJ., in *Alagappa Iyengar* v. *Mangathai Amman-*

(1) [1912] 13 I. C. 458.
(2) [1867] 7 W. R. 73.

gar (3), where the learned Judges held that it was competent to a Hindu father to appoint a guardian by will to the person of his minor son, though he could not do so in respect of undivided family property. As regards appointment of a guardian to the properties of minor coparceners there is a conflict of authority. In *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (2) it was held that under Hindu Law the father has power to appoint either orally or by writing a person to be guardian of his minor children. The facts appearing in the report show that the parties were governed by the principles of Hindu Law current in Mithila, where the Mitakshara is the leading authority though it is supplemented by the Vivada Ratnakara and the Vivada Chintamani. In dealing with the powers of the father, Loch, J., observed:

"We think the Principal Sudder Ameen has taken an erroneous view of the Hindu Law as regards the power of a parent to appoint a guardian for his children. No doubt the mother is the natural guardian of her child; and were any person to attempt to deprive her of this right without authority, her right would, under ordinary circumstances, be supported; but we are not aware of any provisions of the Hindu Law nor have any such been shown in support of the Principal Sudder Ameen's view, which prohibit a father from appointing by writing or by word any other person than the mother to be the gurdian of his minor children. The Principal Sudder Ameen has found the will to have been duly executed. If his finding in this respect be correct, the will, though inoperative as regards the disposition of the property which is contrary to the principles of the Hindu Law current in Mithila, is not so as regards the appointment of a guardian."

The decision has not been questioned in any of the subsequent decisions and is clear authority for the proposition that a will, though invalid as a disposition of property, can be effective to create a testamentary guardian. In *Bindaji* v. *Muthurabai* (4) Jenkins, C. J., and Aston, J., held that the principle that no guardian can be appointed to the property of a minor, who is a member of a joint and undivided Hindu family and whose only property is his interest in the joint property, does not apply to cases where all the members of the family are minors and that a testamentary guardian can be appointed, subject to the limitation that it would be open to any minor on attaining majority to apply for the removal of the guardian so appointed. This case was followed in *Ramchandra* v. *Krishnarao* (5). In *Mahableshwar Krishnapa* v. *Ramchandra Mangesh Kulkarni* (6) Scott, C. J., and Beaman, J., after referring to *Soobath Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (2) and *Rai Lukhee Dabia* v. *Gokool Chunder Chowdhry* (7), were of opinion that it was competent to a Hindu father to appoint a testamentary guardian to the property of his minor children and to give directions for management. A contrary view, however has been taken in *Kanakasabai Mudaliar* v. *Ponnuswami Mudaliar* (8) by Sadasiva Aiyar and Spencer, J. The appeal arose out of an application to remove a guardian who purported to act as guardian appointed by a will of the father of certain minors. It appears from the report that Abdur Rahim and Spencer, JJ., without expressing any opinion, called for a finding as to whether the properties dealt with by the will were ancestral or self-acquired. On receipt of the finding Sadasiva Aiyar and Spencer, JJ., observed as follows:

"On the finding that the properties are ancestral properties of the testator (petitioner's father) he had no right to appoint guardians by will in respect of such properties which survived to his sons"

and treated the guardian as a "mere trespasser." No authorities seem to have been cited at the Bar and the judgment does not refer to or discuss any of the previous authorities on the subject. In *Krishna Aiyar* v. *Chakrapani* (9) Oldfield J. was of opinion that a testamentary guardian was not a person "appointed by a competent authority" within the meaning of O. 32, R. 6 (2), Civil P. C., so as to entitle him to draw moneys from Court without giving security. The learned Judge simply followed *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar* (8) and *Budhilal* v. *Morarji* (10). The question again arose for decision in *Alagappa Iyengar* v. *Mangathai Ammangar* (3). Sadasiva Aiyar, J., who delivered the judgment of the Court, was of opinion that though a Hindu father can appoint a testamentary guar-

(3) [1916] 34 I. C. 766=40 Mad. 672.
(4) [1906] 30 Bom. 152.
(5) [1908] 32 Bom. 259.
(6) A. I. R. 1914 Bom. 300=21 I. C. 350=38 Bom. 94.
(7) [1869-70] 13 M. I. A. 209=12 W. R. P. C. 47 (P. C.).
(8) [1913] 21 I. C. 848.
(9) [1915] 29 I. C. 475.
(10) [1907] 31 Bom. 413.

dian to the person of his minor sons, he was incompetent to appoint a guardian to the joint family properties which on his death survived to his minor sons. The learned Judge after referring to *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (2) and distinguishing *Albrecht* v. *Bathee Jellamma* (1) as only deciding that it was competent to a Hindu father to appoint testamentary guardian [though the decision followed without reservation the broader rule laid down in the case of *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha's* (2)] preferred and followed the decision in *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar* (8).

In Second Appeal No. 73 of 1916 *Chidambaram Pillai* v. *Veerappa Chettiar* (11) the question again came up for consideration before Sadasiva Aiyar and Spencer, JJ., and they differed as to the testamentary capacity of the father to appoint a guardian to the properties of his minor sons. Sadasiva Aiyar, J., after distinguishing the cases reported as *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (2) and *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (7) as being cases under Dayabhaga law and *Ramchandra* v. *Krishnarao* (5) as being a case deciding the power of Courts to appoint, dissented from the decision of the Bombay High Court in *Mahableshwar Krishnapa* v. *Ramchandra Mangesh Kulkarni* (6). Spencer, J., after referring to the conflict between the Bombay and Madras views, was inclined to follow *Ramchandra* v. *Krishnarao* (5) and *Mahableshwar Krishnappa* v. *Ramchandra Mangesh Kulkarni* (6). He observed that there might be exceptional cases where a Hindu father may validly and properly appoint by will a guardian to manage the joint family property during the minority of his sons where he was the only adult male member of the co-parcenary at the time of his death such an act being:

"a natural act on the part of a prudent Hindu father dying without grown up sons or agnates."

I can find nothing either in the Mitakshara or the Smritis which prohibits a father from providing for the care and management of property during the minority of his sons. The only possible ground for negativing the power of a Hindu father governed by the Mitakshara to exercise his natural right (conferred by every civilized system of jurisprudence) to make provision for the care and custody of properties of his minor children on his death is that under the Mitakshara he cannot dispose of property by will to the prejudice of his co-parceners, but I do not think that arrangements made for the protection of property for the benefit of minors amount to a disposition of property or a disturbance of the rights of the minor co-parceners to take the property by survivorship. *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (2), which as I have already pointed out is a case under the Mitakshara, clearly points out and recognizes the distinction between a disposition of property contrary to the provisions of Hindu law and an arrangement for its preservation and management. The limitation to the power of the testamentary guardian to the period when any one of the minors comes of age and so becomes competent to exercise his right of management, which as an adult co-parcener he would have in a Mitakshara family so far as the other minor co-parceners are concerned, would effectually remove any conflict. The decision of the Privy Council in *Gharib-Ullah* v. *Khalak Singh* (12) only prevents a Court and by a parity of reasoning a father or other adult co-parcener from appointing a guardian to the property of minor members of a joint family where there is an adult co-parcener. *Bindaji* v. *Mathurabai* (4) and *Mahableshwar Krishnapa* v. *Ramchandra Mangesh Kulkarni* (6) distinguish *Gharib-Ullah* v. *Khalak Singh* (12) on this ground and are clear authorities for the view that the decision in *Gharib Ullah* v. *Khalak Singh* (12) has no application when all the co-parceners are minors.

As observed by Scott, C. J, in *Mahbaleshwar Krishnapa* v. *Ramchandra Mangesh Kulkarni* (6) and by Spencer, J., in his judgment in Second Appeal No. 73 of 1916 *Chidambaram Pillai* v. *Veerappa Chettiar* (11) it is a matter of practical convenience and necessity that a dying adult member of a co-parcenary, where all the other co-parceners are minors, should be able to make arrangements for the guardianship of the minors and the management of the co-parcenary property, and I am of opinion that unless there is any express prohibition in the Hindu Smritis or commentaries recognized as authorities in this Presidency, there is no reason why the rulings of the Calcutta

(11) [1918] 43 I. C. 865.

and Bombay High Courts should not be followed. In view of the conflict of authorities referred to by me between the Madras and other High Courts, I think it desirable that the question should be settled by Full Bench and would refer the following question for determination. Whether it is competent to the only adult coparcener of a Mitakshara family consisting of himself and his minor co-parceners to appoint a testamentary guardian to the co parcenary properties of the minor coparceners?

Wallis, C. J.—I agree to this reference.

Opinion

Ayling, J.—I have had the advantage of perusing the judgment which my learned brother, Seshagiri Aiyar. J., is about to pronounce; and I agree in the conclusion arrived at by him. It is impossible to contend that the power of appointing a testamentary guardian is supported by anything in the ancient texts; and the attractive doctrine that anything which is not expressly forbidden should be held lawful, if expedient, seems to me one which has its dangers and requires careful consideration before application. In the present case, the power claimed seems to run counter to the conception of a Hindu joint family in which every member obtains an interest at birth. I can only agree with Sadasiva Aiyar, J.'is remark in *Chidambaram Pillai* v. *Veerappa Chettiar* (11) in which that learned Judge says:

"On principle I find it difficult to hold that a man who cannot deal with a particular species of property by will can make arrangment for the management of that property by will after his death or can appoint guardians to manage that property for minor owners who obtain it by survivorship after his death."

This seems to me to sum up the whole matter. I am not even clear that considerations of general expediency support respondents' contention. The reference covers the case, not only of the adult copercener's own minor sons, but of his minor nephews, and even minor brother regarding whom the natural right of a father discussed by Kumaraswami Sastri, J., in his order of reference can have no application. Even as regards sons, I think the interests of the minors are sufficiently protected by the power of the Court to appoint a guardian; and while the expressed wishes of the father are sure to receive attention at the Court's hands, nothing further is required. I would answer the question in the negative.

Coutts-Trotter, J.—I also have had the advantage of perusing my learned brother Sesbagiri Aiyar's judgment. I only abstain from simply expressing my own concurrence in it, because my doing so might seem to be associating myself with a familiarity with the ancient authorities which I cannot pretend to possess. I therefore put what I have to say in my own words. To speak of natural rights has always been recognized as a slippery path for the political thinker to tread from the days of Hobbes and Rousseau. It is an even greater pitfall to a lawyer. To appoint a guardian to the person of his infant children may be, 'natural' right vested in the father. To clothe him with authority over property which belongs to so complex an institution as a Hindu joint family may be, seems to me to be something which cannot be derived from nature, but must be founded on some legal warrant. In England the warrant is statutory, and it is not pretented that there is any statutory authority in force in India. The citations from Manu seem to show that the original conception was that the custody of properties of the joint family where there was no adult member should be the care of the King, which in modern language means the Courts of the country. No case has been cited which can be said to recognize the suggested right. The case in *Soobh Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (2) contains expressions which tend to show that the learned Judges supposed that such a power would be possible; but they do not definitely so decide. Mr. K. Srinivasa Aiyangar supported that judgment on the ground that as the properties dealt with were the properties of the father absolutely and were not joint properties, his right to appoint a guardian for them might be considered as an inherent part of his total right of ownership. That again seems to me to be lapsing into abstract speculation, and it may be that Mr. T. R. Ram-Chandra Aiyar's attack on this theory—which not insignificantly formed almost the whole of his argument—was well-founded. Beyond that his argument seemed to me to come merely to this. The thing is convenient, it is consonant with all right notions of what a father ought to be able to do for his children; it is now here expressly prohibited; therefore, it can be done. To

me on the contrary it seems that to put a person in a definite legal relation to property of which he is not the owner, is a a step which cannot be taken unless there is legal authority for taking it. Its convenience and justice may be admirable reasons for the legislature to take action. They cannot, in my opinion, suffice to set in motion a Court of law.

Seshagiri Aiyar, J.—The question referred for our consideration is whether it is competent to the only adult co-parcener of a Mitakshara family consisting of himself and his minor co-parceners to appoint a testamentary guardian to the coparcenar properties of the minor co-parceners. It was argued before us that the real point for decision is whether the manager of a Hindu family, be he the father, the uncle or an elder brother, can appoint a testamentary guardian for the property of his minor co-parceners. In the Hindu Law there is no provision for the appointment of a testamentary guardian. That may be due to the fact that the idea of making a will is of recent origin. The only texts of Hindu Law which relate to this subject are all collected in Colebrooke's Digest, Vol. 2, pp. 574 to 577. These authorities cast upon the King the duty of protecting the property of a minor. Mr. T. R. Ramachandra Aiyar for the respondents drew our attention to the commentary of Kullookha Bhatta on Manu's text and argued that the protection of the King should be invoked only where the infant was otherwise unprotected. I do not understand the commentator to indicate by the use of the expression 'Anadha' that the deceased father or manager is competent to appoint a guardian and that it is only in default of such an appointment the King can step in On the other hand it is clear from Manu's verses that the primary right of guardianship is in the King, and it is only by reflection that the father during his life-time exercises that right (as if by delegation by the Sovereign). On principle, it appears to me that a person who is not capable of making a gift of his property or to dispose of it by testament cannot be in a position to control that property after his death. However convenient it may be, and however consonant with natural justice, that a father or manager should indicate his preference of an individual as guardian by a testament, in my opinion it would be inconsistent with the theory of survivorship that he should have the power to dictate to the King or to the Judges appointed by him as to who should be the guardian of his minor co-parceners. In the majority of cases the wishes of the father or manager would be acted upon by the Courts. But to that his directions should be regarded as amounting to a legal appointment is opposed to the principle underlying the Mitakshara system of law.

In the order of reference Kumaraswami Sastriar J, refers to the natural right of a father to appoint a guardian and says that such a power is conferred by every civilized system of jurisprudence. Mr. K. Srinivasa Aiyanger in a very learned argument has drawn our attention to the theories of guardianship enunciated in the ancient and modern systems of jurisprudence. An examination of the citations shows that whereas the right of appointing a guardian for the person of an infant has been in some systems regarded as the natural or the nurtural right of the parent, in none of them has it been stated that the right to appoint a guardian of property is a Common Law right. In Roman law just as in the Hindu law, the protection of property was enjoined upon the State. In English law the power to appoint a testamentary guardian was first given by 12 Carl. 2, Cap. 24. (See Simpson on Infants, p. 105.) It is stated in the textbook that the right of appointing a testamentary guardian is not a Common law right. In America where the Civil law of Rome and the English law have been further developed, it is clear that the right of appointing a testamentary guardian is not regarded as an inherent right in the parent. (See 21 American Cyclopaedia, p. 12.) Therefore, I am unable to accept the statement of the learned Judge that in other systems of jurisprudence the right of appointing a testamentary guardian exists as a Common law right in the parent.

I shall now discuss the cases. The earliest decision upon the subject, barring the decision of the Sudder Adawlat of the High Court of the N. W. Provinces, is *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (2). There are undoubtedly observations in that judgment which show that the learned Judge believed that he had the authority of the Hindu law in holding that a testamentary guardian

can be appointed for a Mitakshara minor. The actual decision itself is supportable upon other grounds. There were two classes of property in respect of which a person purporting to act on behalf of the minor had entered into a compromise on behalf of the minor. This person was appointed gaurdian by the father in his will; he was also recognized by the civil Court as the guardian ad litem of the minor. The compromise in the suit related to ancestral property. It was upheld. It is well settled that where a guardian is appointed by the Court and an honest compromise is come to in the presence of the Court it is prima facie binding upon the minor unless the latter can show that his guardian was guilty of fraud or other invalidating circumstances. There was another species of property in regard to which the guardian appointed by the will had entered into a compromise outside the Court. That property was the self acquisition of the father. In respect of such property it can hardly be disputed that it is open to the testator to appoint a guardian to manage it. Therefore the conclusion come to in the case is right. The observations of the learned Judge that Hindu law sanctions the appointment of a guardian receive no support from any citation made by him or from any authority to which we have been referred in the course of the argument in this case. I am therefore not prepared to follow the obiter dicta contained in that judgment.

The next case very strongly relied upon by Mr. T. R. Ramachandra Aiyar is the decision of the Judicial Committee in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (7). It was a case under the Dayabhaga law under which it was competent to a father to dispose of property notwithstanding the existence of sons. The suit was brought to set aside the alienation made by the widows of one Guruprasad Sarma. The latter had executed a document in favour of the widows under which the alienees claimed that the widows had ample power of disposition. The Judicial Committee came to the conclusion that the document conferred no rights of property on the widows. They regarded it as providing only:

"a species of trust for management and that it did not interfere with the devolution of the estate according to the ordinary law of succession under the Hindu law."

Following this view, their Lordships of the Judicial Committee considered whether the disposition by the widows as managers of the property of Guruprasad's sons was impeachable. It is clear from the facts that the question before the Committee did not relate to co-parcenary property or to the power of a Mitakshara father to appoint a testamentary guardian. Notwithstanding the argument of the learned vakil for the respondents I am unable to see why a person who is competent to devise his property whether to his own children or to strangers should not deal in his testament only with the right of management of that property. It is not necessary to validate such an appointment of a guardian or manager that the testament should make a gift of the property as well.

The right over property involves two definite rights, the right, of management and the right of enjoyment. A person may devise the right of management only by providing that his legal heirs shall have the benefit and advice of a person in whom the testator had confidence. That was really what happened in the Bengal case. Sir James Colville in delivering the judgment points out that the right of succession under the Hindu law was not interfered with by the testator. I see nothing in the judgment of the Board in that case to warrant the contention that a person who cannot deal with a species of property by a testamentary document can devise the right of management over such property. *Mahableshwar Krishnapa* v. *Ramchandra Mangesh Kulkarni* (6) was the next case referred to. I cannot help saying that the learned Judges have not correctly understood *Rai Lukhee Dabea* v. *Gokool Chunder Chowdhry* (7) on which they base their conclusion; I feel constrained to differ from that decision. These are all the cases in the other High Courts. So far as Madras is concerned, the preponderance of authority is in favour of holding that a Mitakshara father has no power to appoint a testamentary guardian to his son's property, a fortiori a Mitakshara manager has no power to appoint such a guardian. The first decision is *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar* (8), to which Spen-

cer, J., was a party. *Krishna Aiyar* v. *Chakrapani* (9) is to the same effect.

In *Alagappa Iyengar* v. *Mangathai Ammangar* (3) Sadasiva Aiyar, J., and Moore, J., came to the same conclusion. In *Chidambaram Pillai* v. *Veerappa Chettiar* (11) Sadasiva Aiyar, J., once again expressed the same view. Spencer, J., seems to think that the matter requires further consideration. The learned Judge does not give any definite opinion on the point at issue. Mr. T. R. Ramachandra Aiyar attacked the view of Sadasiva Aiyar, J., on two points. I do not think that the criticism really affects the main conclusion at which the learned Judge has arrived. It is true that his reference to *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (2), as a Dayabhaga case is not quite accurate and something may be said also against his reference to the Privy Council decision but the principle enunciated by him has my entire approval. Some other cases were referred to by Mr. T. R. Ramachandra Aiyar, viz., *Sami Row* v. *Eliavatha Row* (12) and *Gharib Ullah* v. *Khalak Singh* (13). In the first of these cases the property dealt with was the self-acqnired property of the testator. The second case has really no bearing upon the point. The learned vakil referred to the enactments dealing with guardianship, viz , the Court of Wards Regulation, the Guardians and Wards Act and the Widow's Remarriage Act, and contended that these legislative provisions preserve the right of a Hindu father to appoint a guardian. I do not think these Acts give any statutory authority for the appointment of a testamentary guardian in respect of co-parcenary property. They only refer to cases in which such power of appointment is permissible under the law, for example, cases of self-acquired property in Madras or Dayabhaga property in Bengal.

The case has been very fully argued by the two learned vakils and my answer to the question referred to us is in the negative.

S.N./R.K. *Reference answered in the negative.*

(12) [1906] 16 M. L. J. 357.
(13) [1903] 25 All. 407=30 I. A. 165 (P. C.).

A. I. R. 1919 Madras 1053

WALLIS, C. J. AND SADASIVA AIYAR, J.

Ismail Sait & Sons—Plaintiffs—Appellants.

v.

Wilson & Co.—Defendants—Respondents.

Original Side Appeal No. 32 of 1917, Decided on 31st January 1918, from judgment and decree of Kumaraswami Sastry, J. D/- 21st March 1917.

(a) Contract Act (9 of 1908), S. 73, Ill. (a) —Damages for faliure to supply goods where no market exists and goods are for buyer's personal use—Measure is difference of price contracted and price at which goods could be obtained.

The measure of damages in case of breach of a contract for delivery of goods, where there is no market at the place of delivery and where the goods are not to be resold, but are intended only for the buyer's use is that contained in Illus. (a) to S. 73, i. e., the sum by which the contract price falls short of the price for which the purchaser might have obtained goods of like quality at the time when the goods ought to have been delivered. [P 1055 C 2]

(b) Contract Act (9 of 1872), S. 73—Two alternative remedies in S. 73—Latter alternative can be availed of as additional right.

Per *Sadasiva Aiyar, J.*—Section 73 mentions two alternatives, the latter alternative being an additional right to be availed of at the plaintiff's option [P 1057 C 1]

(c) Contract Act (9 of 1872), S. 73—Scope of Illus. (a) stated.

Illustration (a) to the section authoritatively interprets what the Legislature meant by the phrase 'loss or damage which naturally arose in the usual course of things from a breach of the contract' in 'no market' case also. The language of the illustration is absolutely general and wide and it makes no exception on account of special circumstances, such as (a) where the party complaining of the breach could get some other substitute for the goods ordered, (b) where he was made a gift of the articles as substitute on the day fixed for delivery and (c) where there was no market at all for the goods at the place of delivery. [P 1058 C 1, 2]

D. Chamier and *K. Pandalai* for *Short, Bewes & Co.*—for Appellants.

Nugeni Grant for *King* and *Partridge*—for Respondents.

Wallis, C. J.—The plaintiffs in this case are a well-known firm carrying on business in Mysore and Madras. In 1913 they obtained from the Mysore Government the Abkari contract for Mysore and arranged with the defendants who carry on business in Madras that they should go on importing molasses for them in the same way as they had done for the previous holders of the contract. Admittedly the goods contracted for were intended for use by the plaintiffs in their

factories at Bangalore, Owing to the disorganization of shipping consequent on the outbreak of the war at the beginning of August 1914, the defendants were unable to ship 800 tons from Java in the month of October 1914 as they were bound to do under their contract. This was a breach of contract for which admittedly they are bound to compensate the plaintiffs in damages and the main question argued before the learned Judge and before us is as to the measure of damages. The learned Judge awarded the plaintiffs only nominal damages on the ground that they had failed to put before him the proper materials for estimating the damages and the plaintiffs have appealed. The law as to this subject is to be found in S. 73, Contract Act and the explanation thereto. Under the body of the section the damages are to be those which naturally arise in the usual course of things from the breach which the parties knew when they made the contract to be likely to result from the breach. By the explanation, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

The explanation is in accordance with the decisions in *Dunkirk Colliery Co.* v. *Lever* (1) and the decision of the house of Lords in *British Westin[illegible]lectric* and *Manufacturing Co.* v. *Underground Electric Railways* (2). In that case Lord Haldane, L. C., observed:

"The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach, but this first principle is qualified by a second which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps."

The law was recently laid down to the same effect by the Judicial Committee in *Jamal* v. *Moolla Dawood Sons & Co.* (3). The rule that where there is a market at the place of delivery the damages are the difference between the contract price and the market price at the date of delivery may be regarded as an application of the principle embodied in the explanation that the buyer must take the necessary steps to minimize the damage. Where there is a market and the seller has no notice of any contract entered into by the buyer the market price in the case of failure to deliver is the test by which to estimate the value of the goods independently of any circumstances peculiar to the buyer and so independently of any contract made by him for sale of the goods. This is the rule in *Rodocanachi* v. *Milburn* (4), approved by the House of Lords in *Williams* v. *Agius* (5) and applied by the Judicial Committee under the Indian Contract Act in *Jamal* v. *Molla Dawood Sons & Co.* (3). This is the rule in cases of non-delivery. It has recently been stated in the House of Lords that there is a difference where delivery is only delayed, but that is not the case here and also we are bound by the terms of the Indian Contract Act.

When there is no market for the goods at the place of delivery the buyer may procure a substitute at a higher cost if it is a reasonable and business-like thing to do and calculate to diminish the loss and may recover the difference in price as damages from the seller. It has not yet been decided that he is bound to do so and apparently he may refrain from doing so and rely on his claim for damages. See the observations of Lord Atkinson in *Erie County Natural Gas and Fuel Co.* v. *Carrol* (6). Where there is no market Mr. Mayne says:

"the principle upon which the damages are to be assessed is exactly the same. They are to be taken at the value of the article at the date of breach. But the mode of estimating this value is different for there is no market price which can be quoted."

Where the buyer was under a contract to re-sell, as in *Borries* v. *Hutchinson* (7) and *Hinde* v. *Liddell* (8), the re-sale price is evidence of the value of the goods at the place and time of delivery as observed by Mr. Mayne, and as recently held in *Stroms, Bruks, Aktie Bolag* v. *Hutchison* (9). which approved the judgment of Blackburn, J., as he then was, in *O'Hanlan* v. *Great Western Railway Co.* (10), that the natural and fair measure of damages is the value of the goods at the

(1) [1878] 9 Ch. D 20=39 L T. 239.
(2) [1912] A. C. 673=81 L J. K. B 1132.
(3) A.I.R. 1915 P. C. 48=43 Cal. 498=31 I. C. 949=43 I. A. 6 (P.C.).
(4) [1887] 18 Q B. D. 67.
(5) [1914] A. C. 510=83 L. J. K. B. 715.
(6) [1911] A. C. 105=80 L. J. P. C. 59.
(7) [1865] 18 C. B. (n. s.) 445=34 L. J. C. P. 169.
(8) [1875] 10 Q. B. 265=44 L. J. Q. B, 105,
(9) [1905] A, C. 515=74 L. J. P. C. 130.
(10) [1865] 6 B. & S, 484=34 L. J. Q. B, 154.

time and place at which they ought to have been delivered to the owner, which I read as meaning the value of the goods to the owner of such goods at the time and place they ought to have been delivered. In that case also, the goods were intended for re sale by the buyer.

Where as in the present case, the article is purchased not for sale but for use to the knowledge of the sellers, Mr. Mayne observes:

" damages will also be assessed with reference to its value to the purchaser. But its value will be determined by other considerations, that is to say, by the use for which it was intended, the loss which followed from its not being supplied, and the profit which would have been made out of it if it had been delivered in time."

In *Portman* v. *Middleton* (11), where the defendant failed to deliver a fire box, the plaintiff recovered the price and the extra cost of procuring a substitute but not the special damages of which the defendant had no notice. In *Smeed* v. *Foord* (12) the defendant who had failed to supply on the due date a threshing machine was held liable for the deterioration of the wheat owing to its being stacked and injured by rain, as that was a natural consequence of the delay in supplying the machine according to the contract. In *Gee* v. *Lancashire* and *Yorkshire Railway Co.* (13), as I read it, all that was ruled was that it could not be held as a matter of law that the stoppage of the buyer's mills was a natural consequence of the seller's delay in delivering cotton under his contract. In *Elbinger Actien-Gesellschaft* v. *Armstrong* (14) Blackburn, J., as he then was, delivering the judgment of the Court of Queen Bench observed that

" where, from the nature of the article, there is no market in which it can be obtained, the rule as to the difference of contract and market prices is inapplicable,"

and the plaintiffs were allowed to retain the damages awarded them as to the reasonable results of the delay in delivery. We have not been referred to any case in which a different test was applied in the case of non-delivery as distinguished from late delivery of goods intended for use.

As regards goods intended for re-sale where there is no market price at the place of delivery, in *O'Hanlan* v. *Great Western Railway Co.* (10) (which was a case of non-delivery by a carrier, but that appears to make no difference), the value of the goods was arrived at by taking into account the wholesale price at the place of manufacture and adding to it the cost of carriage to the place of delivery and the profit which a hypothetical importer at the place of delivery might be expected to charge. This hypothetical market price is by no means so satisfactory a measure of damages as the real market price where it exists, and is only applicable in the absence of other evidence of value such as the price at which the buyer had contracted to re-sell. It is especially unsatisfactory in cases like the present, where it takes nearly a month from the date of order to procure the goods at the place of delivery. Logically, the price at the date when the goods would have had to be ordered so as to reach the place of delivery on the contract date would seem to be the price to be regarded, rather than the price at the contract date which the learned Judge has adopted; but in the case of goods purchased for use, whichever date be taken, and whether in the present case the price be taken at Calcutta, or at Java, damages assessed on this basis bear no real relation to the buyer's actual loss, and as in the present case, give him heavy damages where he has sustained no real loss. I think therefore there is much to be said in favour of adopting Mr. Mayne's rule, and have felt considerable doubt on the question. In this Court however we are governed by the Contract Act and illus. (a) to S. 73 says that the measure of damages in this case is the sum by which the contract price falls short of the price for which the purchaser might have obtained goods of like quality at the time when they ought to be delivered.

On a careful consideration of the question, I have not found sufficient reason for refusing to follow the rule laid down in the illustration, which also appears from the latest edition of Sidgwick on Damages to be the accepted rule in America. In the present case the learned Judge finds, and I entirely agree with him, that the plaintiffs sustained no actual loss from the defendants' failure to ship the October consignment, as they were admittedly well stocked. They might therefore without any prejudice to

(11) [1858] 4 C. B. (n. s.) 322=27 L. J. C. P. 231.
(12) [1859] 1 E & E 602=28 L. J. Q. B. 178.
(13) [1860] 6 H. & N 211=30 L. J. Ex. 11.
(14) [1874] 9 Q. B. 473=43 L. J. Q. B. 211.

themselves have accepted the defendants' offers to ship the October consignment along with the November consignment, or their subsequent offer about 29th November to forward it by an early shipment in December. These considerations however are inapplicable if the rule in illus. (a) is to be strictly applied as I think it should be. In arriving at the price for which the goods might have been obtained on the date of delivery. I entirely agree with the learned Judge that we should look prima facie at the cost of obtaining them from Java, and not from Calcutta which gets its supplies from Java, especially as the evidence is that the goods can be obtained as quickly from Java as from Calcutta. Obviously, the market price at Java would ordinarily be less than at Calcutta.

It is quite clear that the shipping and insurance difficulties consequent on the outbreak of war in August 1914 must have caused an advance of the prices ruling in Java and Calcutta over those at which the plaintiffs purchased before the war. Ex. G shows that the defendants were asking Rs. 2-9-0 per cwt, ex-war risk on 29th October 1914, about the time when the hypothetical dealer in Madras might be expected to purchase the goods in Java to have them ready in Madras on 29th November, which the learned Judge has fixed as the date of delivery in Madras.

Though the plaintiffs have only tendered evidence as to the prices ruling in Calcutta, and the defendants have abstained from tendering any evidence on the subject, Mr. Chamier for the plaintiffs has put before us certain calculations from which he estimates the c.i.f. Java Madras price on 29th November at Rs. 2-8-7 per cwt. This figure he arrived at by deducting the freight to Calcutta, as spoken to in evidence, and adding the freight from Java to Madras, but these are not proved to have been the prevailing freights either at the end of October or of November 1914, and I agree with the learned Judge that the c.i.f. prices from Java are not accurately proved, I think therefore, that Mr. Chamier is not entitled to judgment as claimed by him for Rs. 8,800 as the difference on 800 tons between Rs. 2-8-7 per cwt., his estimated c.i.f. price from Java on 29th November, and the c.i.f. contract price of Rs. 1-15-6 plus Rs. 250 importer's profit and Rupees 33 lading charges, in all Rs. 9,083, On the other hand, looking at the evidence as a whole, and especially at Ex. G 1, I think there is evidence from which I am justified in concluding that the hypothetical value of 800 tons in Madras at the end of November must have exceeded the c.i.f. contract price by not less than Rs. 5,000. It is very likely that the figure would be higher if all the evidence were before us, but we are agreed that that sum may safely be awarded on the evidence before us. I would accordigly allow the appeal and increase the damages to Rs. 5,000. The respondents will pay the costs of the appeal. The Memorandum of objections is dismissed with costs.

Sadasiva Aiyar, J.—Plaintiffs are the appellants. The defendants under two contracts with the plaintiffs were bound to ship 800 tons of solid Java Molasses in October 1914 at Java to arrive in Madras in November 1914, the plaintiffs to take delivery at Madras paying Rupees 1-15-6 cwt. The defendants failed to make the October shipment and thus committed breach of the contract. The plaintiffs sue for recovery of (a) Rupees 23,000, alleged to be the difference "between the contract price and the market price" of the 800 tons of molasses in November 1914 when the molasses ought to have been delivered at Madras by the defendants, and (b) Rs. 2,725-15-6, being the sum paid under protest by the plaintiffs to the defendants owing to the illegal detention by the defendants of some other shipments under the contract till that sum was paid to the defendants.

The learned Judge on the Original Side gave a decree for the Rs. 2,725-15-6 claimed under the heading (b) on account of the sum paid under protest, but gave only Rs. 100 as nominal damages in respect of the Rs. 23,000, damages claimed under heading (a). Hence the plaintiffs have appealed under the Letters Patent, the appeal being valued at Rs. 21,000 evidently because the plaintiffs' contention in appeal is that the learned Judge on the Original Side ought to have given them Rs. 21,000 as damages instead of only Rs. 100 under the heading (a). As stated by my Lord in his judgment, the law as to this subject is to be found in the Indian Contract Act, S. 73, and in the illustrations thereto.

The plaintiffs are by the section entitled to have 'compensation for the loss or damaged caused" to them

"by the breach, the loss or damage being such as naturally arose in the usual course of things from such breach or which the parties knew when they made the contract to be likely to result from the breach of it."

Though there are 18 illustrations (a) to (r) appended to S. 73, none of them refers in terms to a case where there is no market for the goods at the place of delivery mentioned in the contract. [Three of the illustrations namely (e), (o) and (q) expressly refer to "market price" as one of the essential ingredients to be considered in arriving at the damages.] If there was no illustration at all which could be reasonably held to govern the facts of this case and if the body of the section alone remained for consideration on the question of the amount of damages which the plaintiffs are entitled to, there seems much to be said in favour of the view that as there is no market for the goods at the place of delivery, and as the pecuniary loss naturally flowing from such a breach cannot therefore be estimated with reference to the market price the plaintiffs ought to prove that "damage" capable of calculation in some other reasonable manner naturally flowed and was sustained by them from such breach, or prove (the second alternative mentioned in S. 73) that both themselves and the defendants knew that some other damage was likely to result from the breach of the contract and the amount of such damage. This latter alternative right is, in my opinion, given by the section only as an additional right to that given by the clause which gives compensation for "the loss or damage which naturally arose in the usual course of things" from such breach, such additional right to be availed of at the plaintiffs' option. Assuming, as I said before, that none of the illustrations to the section throws any light on the dispute in this case in which there is no market for the goods at the place of delivery, I agree with my Lord that the plaintiffs have not proved any loss or damage naturally arising in the usual course of things from the breach of that the plaintiffs' contract has been caused to them, nor (in the alternative) any loss or damage which both parties knew when they made the contract to be likely to result from its breach. The English cases see *Hinde* v. *Liddell* (8) and *Elbinger Actien Gesellschaft* v. *Armstrong* (14) no doubt decide that in such a case (which we might shortly call "no market case") the damages must be calculated on the basis of the value fixed by the price which would actually have to be paid for the best and nearest available substitute. Some of the English cases, if I may say so with respect, use the expression "market-value" in a loose manner and lay down that the market-value for the calculation of damages must be ascertained in particular modes where there is no market at all for the goods at the place of delivery. See *Wertheim* v. *Chicoutimi Pulp Company* (15).

I agree with Kumaraswami Sastri, J., that the English and Indian cases do not lay down any inflexible rule that in estimating damages in "no-market" cases that

"one has to go to the place which is nearest to the place where the breach occurred"

and where there is a market. I agree with him that

"it is not the nearest market that always governs but the place where having regard to all the facts of a particular case, the plaintiff would without any material inconvenience to himself procure the goods in a manner that would throw the least amount of hardship on the other party."

In the present case, it was to Java and not to Calcutta that the plaintiffs should have turned to if they really wanted to procure molasses as a substitute for the molasses contracted for. I further agree with Kumaraswami Sastri, J., that the fact that the plaintiffs did not make any purchase of molasses as a substitute for the molasses contracted for or that they have not proved that they suffered a pie of actual damages through the breach of contract does not disentitle them, if the English and American law applies to this case, from recovering the difference between the Java price in October 1914 plus the cost of carriage to Madras and the contract price. As I said already, it may be a question whether, if the body of S. 73 stood alone, such a difference in a "no-market" case could be treated as loss or damages arising naturally from the breach. I shall take an extreme case, to illustrate what is in my mind, as extreme cases sometimes bring out clearly the principle in dispute. Suppose *A* at Madras wishes to bring up a wild animal found in Australia as a household pet;

(15) [1911] A. C. 301=80 L. J. P. C. 91.

there being no market for such an animal at Madras, he enters into a contract with *B* of Australia through *B's* agent at Madras in March 1917 for delivery to him at Madras of the animal, the price to be Rs. 300 payable to *B's* agent at Madras on delivery in September 1917. *B* illegally repudiates the contract in July 1917 and thus commits a breach. If *A* had taken other steps in July or August 1917, he could have obtained a similar wild animal from Australia delivered at Madras in September at a cost of Rs. 500. *A* does not take any such steps but makes a demand for Rs. 200 as damages payable to him and he dies (say) three days after the date fixed for the delivery of the animal to him at Madras under the contract. *A's* son and heir *C* does not himself care to have any such animal as a pet. Is *C* entitled to recover Rs. 200 as damages from *B* for breach of the contract according to S. 73, Contract Act? S. 73, as I said before speaks of loss or damage which naturally arose from such breach, using the word "arose" in the past tense. Can we say that Rs. 200 was the damage which had naturally arisen to *A* by his not having had a pet wild animal by him during the three days between the date fixed for delivery of the same under the contract and *A's* death or to *A's* son and heir by not having inherited a wild animal which he does not want? If of course, he had tried to obtain a substitute and had obtained it at a cost of Rs. 500, the loss of Rs. 200 might be said to have naturally arisen. Apart from authority therefore and on the language of the body of the S. 73 alone, I would be inclined to think that no damages at all can be claimed. But I think Illus. (a), S. 73, authoritatively interprets what the legislature meant by the phrase

"loss or damage which naturally arose in the usual course of things from a breach of the contract."

in a "no market" case also. That illustration is as follows:

"(a) *A* contracts to sell and deliver 50 maunds of saltpetre to *B*, at a certain price to be paid on delivery. *A* breaks his promise. Is *B* entitled to receive from *A*, by way of compensation, the sum if any by which the contract price falls short of the price for which *B* might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered?"

It will be seen that the language of the illustration is absolutely general and wide and it makes no exception on account of special circumstances like the following: (a) a case where *B* could have used some other substitute for the saltpetre, (b) a case where *B* was made a gift of 50 maunds of saltpetre as substitute on the date fixed for delivery by *A*, (c) where there was no market at all for the saltpetre at the place of delivery. The law as stated in the illustration gives an unconditional right to *B* to get the difference between the contract price and the cost which he would have had to incur to obtain the like quantity of saltpetre with of course, the least amount of hardship to *A*. I think this illustration is fully consistent with the English law as laid down in the House of Lords case of *Wertheim* v. *Chicoutimi Pulp Co.* (15), though that case was a case of breach by late delivery and not a case of no delivery at all. So also in *Jugmohandas* v. *Nusserwanji* (16), Jenkins, C. J., and Chandavarkar, J., construe S. 73, Contract Act similarly;

"There was no ready market rate. We therefore must have recourse to some other test."

And then the learned Judges consider all the facts including a statement prepared by the plaintiff himself in that case as to what he considered reasonable compensation from another party who committed a similar breach of contract with plaintiff. Where there are absolutely no materials put forward by the plaintiff to indicate what it would have cost him to obtain similar goods in the cheapest manner it may be that only nominal damages would have to be allowed.' But where there are some materials, the Court should, I think, as a jury try to arrive at the cost at which the plaintiff could have got other similar goods for the contracted date of delivery and give him the difference, if any between that and the contracted price. In the present case, we have got the facts that the defendants themselves wrote the letter Ex. G in October 1914, wherein they offer to deliver molasses at Rs. 2-9-3 per cwt. in November. If we take that rate as the rate at which the plaintiffs would have been obliged to pay if they had attempted to obtain 800 tons or 16,000 cwts., as substitute for the molasses contracted for, then the damages which they would be entitled to would be 16,000 into Rs. 2-9-3 minus Rs. 1-15-6

(16) [1902] 26 Bom. 744.

(9 annas 9 pies) or Rs. 9,750. But it appears that the plaintiffs themselves considered the price Rs. 2-9-3 as too high a quotation and that the price of molasses was probably rising even between the beginning of October and the end of October at Java.

I might here remark that the plaintiffs might have let in evidence as to why they considered Rs. 2-9-3 as too high or what they considered as a fair price, and the defendants might also have let in evidence as to how they arrived at the figure Rs. 2-9 3 and what the real price was of molasses at Java and what with the freight and reasonable commission to importers, the costs per cwt. would have come to when deliverad at Madras. I therefore agree with my Lord that under the circumstances Rs. 5,000 must be taken as a reasonable amount to be awarded to the plaintiffs as damages in this case. I would in the result allow the appeal to the extent of this amount of Rs. 5,000 minus Rs. 100, nominal damages allowed under this head by the learned trial Judge, with the costs of the appeal. The memorandum of objections is dismissed with costs.

S N./R.K. *Appeal allowed.*

A I. R. 1919 Madras 1059
Full Bench

WALLIS, C. J. AND SADASIVA AIYAR AND SPENCER, JJ.

Swaminatha Aiyar—Plaintiff—Appellant.

v.

Govindasami Padayachi and *others*—Defendants—Respondents.

Second Appeal No 1465 of 1916, Decided on 13th March 1918, against decree of Temporary Sub-Judge, Tanjore, in Appeal Suit No. 25 of 1916.

(a) Madras Revenue Recovery Act. (2 of 1864), S. 59—S. 59 does not apply to case of sale of minor's property and also to cases protected by Madras Regulation (10 of 1831).

A sale of a minor s property under the Madras Revenue Recovery Act is not a proceeding to which S. 59 of the Act is applicable so as to compel the aggrieved parties to sue within 6 months of the sale. S. 59 is inapplicable to cases protected by Regulation 10 of 1831 [P 1062 C 1]

(b) Madras Regulation (10 of 1831),—It does not apply to estates likely to be taken up by the Court of Wards—Ryotwari lands of minor are protected.

Regulation 10 of 1831 does not only apply to such estates of minors as are ordinarily taken charge of by the Court of Wards; ryotwari lands owned by minors also come within the protection of the regulation. 10 *Mad.* 44; *Dist.* [P 1061 C 2]

(c) Madras Regulation (10 of 1831),—Patta erroneously in name of mother of minor is immaterial.

Where the patta erroneously stands in the name of the minor's mother, that fact does not preclude the minor from invoking the aid of Regulation 10 of 1831. 3 *I. C.* 621, *Dist.* [P 1061 C 2]

(d) Madras Regulation (10 of 1831)—S. 2—It does not apply to minor coparcener's under Mitakshara law.

Per *Spencer, J.*—Section 2, Regulation 10 of 1831 includes the estates of minor sole proprietors not under the charge of the Court of Wards. The section and the preamble to the regulation and the foot-note to S. 20. Regulation 5 of 1804 make it clear that the prohibition extends to minors' estates of every description not subject to the jurisdiction of the Court of Wards. The section does not apply to minor members of a joint Hindu family governed by the Mitakshara law, who have by birth merely an undivided interest in the estate. [P 1062 C 2]

S. Panchapakesa Sastri—for Applt.

S. Muthiah Mudaliar—for Resps.

Order of Reference.

Seshagiri Aiyar, & Bakewell, JJ.—The facts ofthe case are not in dispute. The appellant, plaintiff was taken in adoption by a ryotwari land holder. The patta for the lands in dispute stood in his name. After his death, the patta was transferred to the name of the adoptive mother. She did not pay the Government revenue, and the lands were brought to sale and purchased by defendant 2. The suit is to recover possession. The Subordinate Judge has found that there was no fraud on the part of defendant 1 in allowing the property to be sold for arrears of revenue. We accept that finding. He has furtner found that the suit is barred by limitation as it was brought more than six months after the plaintiff attained his majority; vide S. 59, Madras Revenue Recovery Act. The main argument before us was that S. 59 of the Act has no application to the facts of this case. The property was admittedly sold when the plaintiff was a minor. Regulation 10 of 1831, S. 2 enacts that no property of a minor shall be sold for arrears of revenue. S. 63 Act 2 of 1864 provides:

"Nothing in the Act should be held to bar the operation of the provisions of Regulation 5 of 1804 and of Regulation 10 of 1831, in respect to the sale of lands of minors and other disqualified land holders."

It seems therefore clear that the sale of the land was without jurisdiction.

S. 44 of the Act, which permits a sale for non-payment of revenue, must be read subject to S. 63 of the Act which in terms preserves to minors the rights they enjoyed under Regulation 10 of 1831. It was however held in *Raja Goundan* v. *Raja Goundan* (1) that a sale of a minor's property under Act 2 of 1864, is covered by S 59 of the Act. Reliance was placed in that judgment upon *Gobind Lal Ray* v. *Ramjanam Misser* (2). In this latter case the Judicial Committee had to deal with a case to which the provision of the Bengal Revenue Recovery Act, was applicable and they pointed out that irregular as well as illegal sales should be appealed against to the Commissioner. We do not think that pronouncement is any authority for the proposition that a sale which is prohibited by a legislative enactment should be regarded as a proceeding intra vires the powers of the Collector so as to invite the provision of S. 59 of the Act. The next point is whether the present sale is not against the provision of Regulation 10 of 1831. It was contended on the authority of *Krishna* v. *Mekamperuma* (3) that the estate of the minor referred to in the regulation must be of such magnitude and importance as can be managed by the Court of Wards. Regulation 5 of 1804, which was in force when Regulation 10 of 1831 was passed, makes no reference to the extent of the property which alone can be taken under the control of the Court of Wards. Ordinarily, no doubt, the Court will not interfere with private management where the estate is not considerable; but there is no ground for saying that regulation provides only for a particular class of estates. In our opinion, *Krishna* v. *Mekamperuma* (3) is not reconcilable with the language of either Regulation 5 of 1804 or of Regulation 10 of 1831.

Moreover, there is no evidence in this case that the authorities considered that the estate should not be taken up by the Court of Wards. It does not follow that because the Court did not take up the management it would not have done so if appealed to. Mr. Muthiah Mudaliar next argued that as the patta stood in the name of adoptive mother and as she was the defaulter, the property was rightly sold under the Act. S. 2, Regulation 10 of 1831 speaks of the estate having come to the minor by inheritance, and prohibits the sale of such an estate. The provision for sale where the pattadar makes default cannot be spelled out of this regulation. It is true that *Subramania Chetty* v. *Mahalingaswami Sivan* (4) holds that the revenue authorities are not bound to give notice to the real owner, so long as the patta stands in the name of some other person. That was a case of vendor and purchaser. There has been no similar decision in the case of father or mother and son. *Subramania Chetty* v. *Mahalingaswami Sivan* (4) refers specially to Reg. 26 of 1802, which relates to the case of a purchaser not taking steps to have the registry transferred to his name. Moreover, it is doubtful whether in the face of S. 2, Reg. 10 of 1831 the provision of Act 2 of 1864, which enables a sale where the person in whose name the patta stands makes default in the payment of revenue, are applicable to the sale of properties belonging to minors.

As there are earlier decisions of this Court which we think require reconsideration, we have resolved to refer the following questions for the opinion of the Full Bench: (1) Whether a sale of a minor's property under Act 2 of 1864 is a proceeding to which S. 59 of the Act is applicable so as to compel the aggrieved parties to sue within 6 months of the sale? (2) Whether Reg. 10 of 1831 only applies to such estates of the minors as are ordinarily taken charge of by the Court of Wards? (3) Whether the fact that the patta stood in the name of the mother of the minor, precludes the latter from invoking the aid of Reg. 10 of 1831?

Opinion.

Wallis, C. J.—I do not think that the decision in *Krishna* v. *Mekamperuma* (3) is any authority for the proposition mentioned in the Order of Reference. In that case, a sale of a permanently settled mitta at a time, and in respect of arrears which accrued due, when some but not all of the joint proprietors were minors, was held not to be prohibited by Reg. 10 of 1831. The learned Judges were of opinion that an estate so owned was not one of which the Court of Wards could have assumed management under Reg. 5 of 1804, and that Reg. 10 of 1831 only

(1) [1894] 17 Mad. 134.
(2) [1894] 21 Cal. 70=20 I. A. 165 (P.C.).
(3) [1897] 10 Mad. 44.
(4) [1909] 33 Mad. 41=3 I. C. 624.

applied to estates "which might have but had not been taken under the Court of Wards". Reg. 5 of 1804 imposed no restriction on the Court of Wards with reference to the nature of the minor's property, and consequently the reasoning of the learned Judges in *Krishna* v. *Mekamperuma* (3) has no bearing on the present ease where the sole owner of the land is a minor. It has however been strenuously contended before us that, as the minor's lands are raiyatwari, they are not an estate within the meaning of Reg. 10 of 1831, and that the sale of raiyatwari lands during minority is not prohibited by the regulation. The estates of minors under the management of the Court of Wards had been protected from sale for arrears of revenue by Reg. 5 of 1804, and Reg. 10 of 1831 recites that doubts had been entertained as to the liability of the estate of a minor not taken under the management of the Court of Wards to be sold for arrears of revenue.

The doubts must have arisen with reference to S. 5, Regulation 26 of 1802, which empowered the Collector "where lands may be attached for arrears of revenue" to cause the lands of the defaulting proprietor to be sold This Regulation must be read with Regulations 25 and 27 of 1802 which were passed on the same day. It is no doubt, true, as appears from Ss. 1 to 3, Regulation 25, that it was then the intention to fix a permanent assessment on all lands liable to pay revenue to Government but this was to be a gradual process, and the intention was soon abandoned. The provisions of Regulation 26, however are not limited to such cases. The preamble recites the necessity that the property of landed estates being Malguzari, or paying revenue to Government; should in the event of default be liable to sale for the purpose of making good the public revenue assessed on such lands, and shows that it was not intended to limit the power of sale to cases of permanently settled lands only. By S. 2 the Collectors are required to keep public registers for the purpose of registering the landed property paying revenue to Government; terms which are perfectly general, as are also the terms of the succeeding sections. S. 5 confers a power of sale where lands may be attached for arrears of revenue and the subject of attachment for arrears of revenue was dealt with by the succeeding Regulation 27 of 1802. In that Regulation again proprietor was defined so as to include

"all actual proprietors of land who pay the revenue assessed upon their estates immediately to Government."

Regulation 2 of 1806, which provided for the establishment of Zillah or District Courts in Districts in which the Permanent Settlement had not been introduced, enacted in Cl. 4 that

"in cases where the engagements may be contracted with the raiyats or individual occupiers of land they shall be regulated by the Regulations of A. D. 1802 and by such subsequent Regulations as may particularly apply to them."

Section 6 also provided that Regns 27 and 28 should be extended to all Districts in which Zillah Courts might be established under the Regulation and should be, observed by Collectors as well as Zamindars or farmers in their engagements with the raiyats or immediate occupiers of the soil. The necessity for this provision, so far as Collectors are concerned, is not apparent, but however this may be, this express extension of Regn. 27 cannot be construed as meaning that Regn. 26 was not to apply to Raiyatwari lands. It has always been treated as applicable to them. *Seshagiri* v. *Pichu* (5), *Secretary of State* v. *Ashtamurthi* (6), *Subramania Chetty* v. *Mahalingaswami Sivan* (4). It is no doubt true that sales of raiyatwari lands for default of payment of revenue were at first rare, and that the coercive process provided by Regn. 27 was usually resorted to, a procedure it may be observed, which might eventuate in sale. There is therefore no foundation for the contention that raiyatwari lands owned by minors do not come within the protection of Regn. 10 of 1831 and the answer to the second question is that there is no such distinction as suggested.

As regarde the third question, the answer must be in the negative. It was duty of the responsible officer under Regn. 26 of 1802 to register the plaintiff as the owner on his father's death, and the fact that he erroneously registered the widow of the deceased cannot affect the plaintiff's rights, and would of itself render the subsequent sale for arrears of revenue in question void as regards the minor apart altogether from the Regulation as held in *Secretary of State* v.

(5) [1888] 11 Mad. 452.
(6) [1890] 13 Mad. 89.

Ashtamurthi (6). In *Subramania Chetty* v. *Mahalingaswami Sivan* (4), the Bench of three Judges were dealing with a case where the registered proprietor had transferred his interest but the transfer had not been registered and was therefore void as against Government by the provisions of S. 3, Regn. 26, and the registered proprietor was therefore held to be the defaulter under the Revenue Recovery Act. That decision does not apply to the present case. The answer to the first question must also be in the negative. S. 63, Revenue Recovery Act 2 of 1864 provides that nothing therein shall be held to bar the operation of the provisions of Regu 10 of 1831 in respect to the sale of lands of minors and other disqualified proprietors. This clearly renders the provisions of S. 59 of that Act inapplicable to cases protected by Regn. 10 of 1831, and it is unnecessary to rely on the further ground that, even in the absence of S. 63, the provisions of S. 59, would not apply to lands exempted from sale by statute.

Sadasiva Aiyar, J.—I agree.

Spencer, J.—I agree as to the answers to be given to the questions in the Order of Reference. I must confess to having been a little puzzled by the form in which the second question has been put. It would indeed be strange if the scope of an enactment were to be limited by notions of what is a considerable estate or of what estates are ordinarily taken charge of by the Court of Wards, seeing that "ordinary" and "considerable" are relative terms. No doubt it is within the discretion of the Government, upon receiving the reports of Collectors, to decline to order the Court of Wards to superintend particular estates of incapacitated proprietors (vide Chapter 3' Madras Act 1 of 1902). But I can find no authority for the suggestion that an estate must be of any definite size or must not be an estate of raiyatwari lands in order to give the Court of Wards jurisdiction over it. In Regu. 5 of 1804 the only description given of the estates to which the Regulation applies is that they must be estates of land or other property paying revenue directly to Government. This would include the holding of a minor raiyatwari pattadar. The Regulation provided for the appointment of guardians by the Zillah Court to minors succeeding as heirs to the joint possession of estates; and Regn. 10 of 1831 extended this provision to the heirs of single as well as joint possessors of estates, but it was afterwards repealed in 1890 by the Guardians and Wards Act so far as it related to the property of minors not under the superintendence of the Court of Wards. This may have been in consequence of the decision *In the petition of Subramanyan* (7) as to the powers of the District Court over minors under Act 14 of 1858. The second section of Regn. 10 of 1831, which forbade the sale for arrears of revenue, accruing subsequently to his accession, of estates of minors not under the charge of the Court of Wards has remained ever since unrepealed. This includes the estates of minor sole proprietors not under the charge of the Court of Wards, like that of the plaintiff in this suit. This section and the preamble to the Regulation and the foot-note to S. 20, of Regn. 5 of 1804, make it clear that the prohibition extends to minors' estates of every description not subject to the jurisdiction of the Court of Wards, and this answers the second question referred to us.

But of course if a minor is a member of a joint Hindu family governed by the Mitakshara Law and as such has at birth merely an undivided interest in an estate, no guardian can be appointed by Court as the manager of the family represents the family and to such cases the Regulation will not apply.

S.N./R.K. *Reference answered in the negative.*

(7) [1883] 6 Mad. 187.

A. I. R. 1919 Madras 1062

OLDFIELD AND SADASIVA AIYAR, JJ.

P. Narayan Nair and *others*—Defendants—Petitioners.

v.

A. P. M. Cheria Kathiri Kutty—Plaintiff—Opposite Party.

Civil Revn. Petn. No. 519 of 1917, Decided on 1st February 1918, against order of Dist. Judge, North Malabar, in Civil Misc. Appeal No. 4 of 1917.

(a) Civil P. C. (1908), O. 7, R. 10—Plaint returned—Filing it in Court ordered does not amount to acquiescence to bar appeal.

A party who complies with an order of Court returning a plaint to be filed in the proper Court by filing it in the Court indicated in the order does not forfeit his right of appeal against the order returning the plaint. [P 1063 C 1]

(b) Court-Fees Act (1870), S. 7 (5)—Valuation of suit for pre-emption is to be fixed as

provided under S. 7 (5) according to Madras Civil Courts Act (3 of 1873), S. 14.

The proper valuation of a suit to enforce a right of pre-emption is, in accordance with S 14, Madras Civil Courts Act, that fixed in the manner provided by S. 7 (5), Court-Fees Act.

[P 1063 C 2]

K. P. M. Menon—for Petitioners.

C. Madhavan Nair and *P. Appu Nair*—for Opposite Party.

Judgment.—The plaintiff-respondent first filed his plaint in the District Munsif's Court. When it was returned he filed it in the Subordinate Court and it was returned again. He appealed to the lower appellate Court against the order of return by the District Munsif; and the first question is whether by electing to file his plaint in the Subordinate Court, he forfeited his right of appeal. It has been held that he could do so in *Boni Madhub Das* v. *Jotindra Mohan Tagore* (1). But that decision was doubted in *Biakuta Nath Dey* v. *Nawab Salimulla Bahadur* (2) and was dissented from by one of us and another learned Judge of this Court in A. A. O. No. 403 of 1914. We do not find in O. 41 or O. 43, Civil P. C., any recognition of the principle that any such election as may have taken place in the case before us affects the right of appeal. We therefore hold that an appeal lay to the lower appellate Court.

On the merits the question is whether a suit to enforce a right of pre-emption should be valued for the purpose of jurisdiction with reference to the gross value of the property or otherwise, the lower appellate Court having held that it should be valued with reference to the net value after the amount of encumbrances on it has been deducted. Under S. 3 (1), Suits Valuation Act (7 of 1887), Local Governments are empowered to make rules for determining the value of land for purposes of jurisdiction in the suits mentioned in the Court-Fees Act, S. 7 (6); and suits such as that before us are so mentioned. Under S. 6. when such rules are made S. 14, in Madras Civil Courts Act (3 of 1873) is to be deemed repealed. S. 14 no doubt refers to the subject-matter of suits for land etc. But it is not, in our opinion, possible to accept the argument that the subject-matter includes only immediate rights to possession and not such rights relating to lands as pre-emption, when the contary is indicated clearly by the last mentioned provision of the Suits Valuation Act. We therefore hold that the proper valuation is, in accordance with S. 14, Madras Civil Courts Act, that fixed in the manner provided by the Court Fees Act, S. 7 (5). It is not disputed that so valued the suit will be within the District Munsif's jurisdiction. We therefore agree with the District Judge's decision and dismiss the petition with costs.

S N./R.K. *Petition dismissed.*

(1) [1907] 5 C. L. J. 580.
(2) [1907] 6 C. L. J. 547.

A. I. R. 1919 Madras 1063

PHILLIPS AND KRISHNAN, JJ.

Chokkalingam Chettiar — Plaintiff — Appellant.

v.

Kurunthappan Chettiar and *others*—Defendants—Respondents.

Second Appeal No. 824 of 1917, Decided on 22nd March 1918, against decree of Temporary Sub-Judge, Ramnad in Appeal Suit No. 109 of 1916.

Civil P. C. (5 of 1908), S. 21—Objection not raised in Trial Court — Appellate Court cannot record finding as to jurisdiction

Where an objection to the jurisdiction of a Court to try a suit is not taken in this Court at the proper time, the appellate Court should not allow such objection to be raised before it and record a finding thereon.

M. D. Devadoss—for Appellant.

K. S. Ramabadhra Iyer and *T. A. Anantha Iyer*—for Respondents.

Judgment.—Objection is taken to the dismissal of plaintiff's suit on the ground that the Subordinate Judge, having found that the Sattur District Munsif had no jurisdiction, was bound to return the plaint to be presented in the proper Court and had no power to decide the case on the merits. S. 21, Civil P. C., however says that no appellate Court shall allow an objection to the place of suing to be taken unless it was taken before the settlement of issues and unless there has been a conseqent failure of justice. These conditions were not present, and so the Subordinate Judge should not have allowed the objection to be taken. We must, therefore set aside his finding as to jurisdiction and on the finding as to consideration the second appeal fails. As respondents 1 to 3 took the objection as to jurisdiction in the lower appellate Court we disallow their costs

here. Defendants 2 and 6 not having appealed against the decree to the lower appellate Court and here and not pleaded want of consideration, we are not prepared to interfere on their behalf. The second appeal is dismissed.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 1064

ABDUR RAHIM AND NAPIER, JJ.

Mahankali Lakshmiah and *others*—Plaintiffs—Appellants.

v.

Karnam Narayanappa and *others*—Defendants—Respondents.

Second Appeal No. 1278 of 1916. Decided on 11th January 1918, against decree of Temporary Sub-Judge, Bellary, in Appeal Suit No. 10 of 1916.

(a) Riparian Owners—Rights to Water—Raiyatwari landholder's right to get water from Government channel—Control remains with Government.

Raiyatwari landholders can only claim a supply of water for irrigation of their lands from a Government channel subject to the right of the Government to regulate the distribution and supply in such manner as they deem fit.

[P 1065 C 2]

(b) Easement—Right to Water—No easement to get water from channel is claimable against Government—No injunction to restrain threatened interference in such right can be claimed.

No easement or prescriptive right can be acquired by a person in water in a Government channel when that water has been supplied by Government for the purpose of irrigating lands and in fulfilment of the duty cast on them to supply water to lands which they classify as wet.

No person can claim possessory rights in a channel and ask for an injunction restraining threatened interference with such rights.

[P 1065 C 2]

(c) Easement—Incoporeal hereditaments—No possessory rights can be claimed—Easement not ripened into prescriptive right—No action for interference lies.

There can be no possessory rights in connexion with incorporeal hereditaments. Where a right to easement has not ripened by enjoyment for the prescribed period, the person who is in actual enjoyment would not get any remedy against any person interfering with such user and enjoyment: 6 *I. C.* 266, *Doubted* and 29 *I. C.* 255, *Foll.* [P 1066 C 1]

(d) Specific Relief Act (1 of 1877), Ss. 42 and 54—Suit against lessees for possession of some land and injunction to restrain interference with flow of water from Government channel and for declaration—Government not impleaded—No easement proved—Injunction claimed on ground that lessees in possession under some arrangement—Lessee's possession cannot help the plaintiff landlords—No declaration could be granted behind the back of Government.

Plaintiffs sued for recovery of certain lands from their lessees, the defendants. They also asked for an injunction restraining defendants from obstructing the flow of water into their lands from a Government channel called the Diguva channel and for a declaration of their rights. Plaintiffs did not establish any right of easement to the water in the channel, but they based their right to the injunction on the ground that, as the defendants, their lessees, were enjoying the water in the channel under some arrangement with Government, they must be deemed to have been in possession of the right to take water. The Secretary of State was not made a party to the suit:

Held: (1) that plaintiffs were not entitled to the injunction, as they could not be deemed to have had such possession as to entitle them to relief.

(2) that as the Government was not a party, the Court could not behind their back, give the plaintiffs the declaration asked for. [P 1066 C 2]

L. A. Govidaraghava Aiyar—for Appellant.

T. Prakasam—for Respondents.

Abdur Rahim, J.—The plaintiffs-appellants sued to recover possession of two plots of land, 12 A and 12 B, and asked for a declaration of their rights and sought to restrain the defendants from causing obstruction to the flow of water from a channel called Diguva Kalava to the lands in dispute. They got a decree for possession of the lands excepting an acre. There are two questions in this appeal — one is whether they are entitled to an injunction as prayed for or at least to a declaration that they are entitled to the use of the water in the Diguva channel for irrigating the lands 12-A and 12-B and the other whether the judgment of the lower appellate Court with respect to one acre disallowed to them is right.

The channel takes its rise in the bed of a river called Pennar. The land of the defendants is lower than the land of the plaintiffs. The channel is admittedly a Government channel and the lands of both parties are raiyatwari. It seems to be an admitted fact that the channel, which is shown in the Government Register as the source of supply to the land in dispute, is another channel called Yerraguntla Kalava and the Diguva Channel is shown in the register as the source of supply to the defendants' land. The defendants have been in possession of the disputed lands for a long time, about 30 years or so, as lessees of the plaintiffs. During that period they used the Diguva

Channel for irrigating the lands in suit. It would also appear from the evidence that for sometime Yerraguntla Channel was in disrepair. That might explain the fact why the water of the Diguva Channel was used by the defendants for irrigation while they were in possession of the plaint lands. The channel being a Government channel, neither the plaintiffs nor the defendants have any right to it. Both of them holding wet raiyatwari lands are entitled to the supply of water from the Government for the irrigation of their lands. But it is for the Government to distribute the water in any way it thinks fit. That proposition has not been disputed before us and cannot be disputed having regard to the rulings on the subject. The case of the plaintiffs, as put before us, was not that they had acquired any right of easement by prescription, which the lower Court has negatived, but that Government, having regard to the practice that has obtained within the last 20 or 30 years, would have no objection to their using the Diguva Channel for irrigating Survey Nos. 12-A and 12-B. It is then contended that the defendants have no right to interfere with their use of the water of the Diguva Channel as they have threatened to do. It is not alleged that the defendants have done any thing on the plaintiffs' land to interfere with their enjoyment of the water, nor even that they have in any way as yet interfered with the channel which belongs as already pointed out, to the Government.

The only ground for asking for an injunction or for a declaration is that the defendants have threatened interference and claim the right to do so. The important point in this connexion is that the Secretary of State, who is the owner of the channel and against whom alone the plaintiffs are entitled to claim a supply of water, has not been made a party. The plaintiffs have not only not established what was their original case, that the channel itself belonged to them; but also failed to establish that they had acquired any easement or right to take water from this channel by prescription. They undoubtedly have a right to a proper supply of water to be secured by the Government. But that is quite a different thing from any right in the channel itself or to the use of the water of this particular channel.

If, in a case of this nature, we were to give a declaration in favour of the plaintiffs in the absence of the Government, we should be really deciding the plaintiffs' right as against the Government without Government being represented in the suit. Indeed, Mr. Govindaraghava Aiyar for the appellants did not claim that they (appellants) were entitled to such a decree. What he says is that the plaintiffs must be held to be in possession of this right to take water, and as the possessory right has been threatened they are entitled, on the analogy of cases regarding possessory rights in land, to a prohibitory injunction. In this connexion our attention has been drawn to a ruling of Benson and Krishnaswami Aiyar, JJ., reported as *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1). That case has been considered in a recent decision of this Court reported as *Narasappayya* v. *Ganapathy Rao* (2), judgment in which was delivered by Miller and Sadasiva Aiyar, JJ. In that case, the learned Judges thought that the decision in *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1) might be right on its facts, but they held after a careful and elaborate discussion of the law, that it was not quite accurate to speak of possessory rights in connexion with incorporeal hereditaments, and laid down that where a right to easement has not ripened by enjoyment for the prescribed period, the person who is in actual enjoyment would not have any remedy against any person interfering with such user and enjoyment. They were therefore not prepared to endorse a proposition to the contrary, if any such proposition was laid down in *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1). I respectfully agree with the ruling in *Narasappayya* v. *Ganapathy Rao* (2), but it is not necessary to pronounce upon the soundness of the view propounded in *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1) as the facts of the present case are clearly distinguishable. Here it was the defendants that were, for 20 or 30 years before the suit, using the water of the channel in question for irrigating the land in dispute which was then in their possession.

They had lands lower down which, strictly according to custom and prac-

(1) [1910] 34 Mad. 178=6 I. C. 266.
(2) [1913] 38 Mad. 280=20 I. C. 255.

tice, should be irrigated by the Diguva Channel. We have no evidence here as to the arrangement by which the defendants obtained from the Government water from this channel for the irrigation of Survey Nos. 12 A and 12-B. But there can be no doubt that whatever the nature of that arrangement, it was made to suit their own convenience. It is impossible to see how the enjoyment of water under such an arrangement by the defendants would amount in law to possession of the channel by the plaintiffs. Whether the proposition laid down in *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1) is correct or not, has to be considered more fully when the point directly arises. In the present case the plaintiffs could not in any way be said to have been in possession of the channel or of any easement with reference to it. That being so, there is no authority for granting the injunction which they seek. The fact is, the plaintiffs have established no right as against anybody in the water of this particular channel, whatever rights they may have as against the Government for the supply of water to the land in dispute. Further I may add that so far as the question of declaration is concerned, it is a discretionary remedy and the facts of the case are certainly not such that we should be justified in granting a declaratory decree in the absence of the Secretary of State, the owner of the channel. On this ground therefore I shall hold that the Subordinate Judge was right in dismissing the plaintiffs' claim to an injunction, and that they are not entitled to any declaration with respect to this channel. As regards the one acre in Survey No. 12-B, it would appear that there was a dispute as to the right to this land sometime in 1878.

The land was obtained on darkhast by the plaintiffs, while the defendants claim that they had no right to the patta and that they themselves were entitled to it. The matter was compromised and the claim of the plaintiffs, to that land was given up. The defendants remained in possession in their own right. The question really is whether the defendants have not acquired title to the land by adverse possession. Mr. Govindaraghava Aiyar contends that, according to the defendants, they acquired title to the land under a document which has been marke as Ex. 2 in the case and he says that, as it is unregistered, it cannot give any right in the land to the defendant. But on the question of adverse possession, we have evidence apart from Ex. 2 that the defendants have been in possession of the land for more than 12 years in assertion of their own right and that is sufficient to dispose of the question. The appeal fails and must be dismissed with costs. The memorandum of objections is also dismissed with costs.

Napier, J.—I agree and would only add a few words. The lower Appellate Court has refused the injnnction asked for on grounds which my learned brother and myself think are not correct, and it is for that reason that I wish to state what I conceive to be the correct view to take. The lower appellate Court has held that as the plaintiffs could not claim against the Government the right to take water from this channel therefore the defendants were entitled to prevent the plaintiffs taking it. That statement of law is to be found at p. 35 of the judgment, where the learned Judge says,

"the defendants who hold land irrigated by the channel are entitled to prevent the plaintiffs from using the water, to which they have no right."

This statement of law is, in my opinion, entirely unsound and I agree with my learned brother in holding that the rights both of the plaintiffs and of the defendants to water in respect of the raiyatwari wet land which they hold are, as has been laid down by this Court time after time, the rights to their customary supply by whatever means the Government chose to put the water on their land. But it appears that, in the lower Courts, the claim by the plaintiffs for an injunction was put on the ground that they had acquired some sort of easement, probably by the user of the water by the defendants for 20 years when they were the plaintiffs' tenants. That contention I agree with the lower Appellate Court, is entirely unsound. It is impossible for a person to acquire an easement in water in a Government channel when that water has been supplied by Government for the purpose of irrigating land and in fulfilment of the duty cast upon them to supply water to lands which they classify as wet. Therefore no easement can possibly be acquired. Mr. Govindaraghava Aiyar in this Court has put his

case on an entirely different footing and has asked us to give an injunction limited to the time and period during which the Government is prepared to give the necessary water for this land down the channel. The answer to that claim is to be found in the judgment which has been delivered by my learned brother, in which he points out that there is no possession here and that there is no specific right in particular water in this particular channel; and in view of the fact that the Government is not a party to the suit it would be inadvisable to give any injunction which would necessarily be based on a declaration of right when such declaration of right can only be operative as long as the Government thinks it advisable to supply water by this channel. I therefore entirely agree that this is not a case in which an injunction should be granted and, on this ground, I would uphold the lower appellate Court's judgment. On the other points, I am in entire concurrence with the view expressed by my learned brother. The appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 1067

WALLIS, C. J. AND SADASIVA AIYAR, J.

Vinayaga Mudaliar—Defendant—Appellant.

v.

Parthasarathi Ayyangar—Plaintiff—Respondent.

Original Side Appeal No. 31 of 1917, Decided on 9th Jannary 1918, from the decree and judgment of Courts-Trotter, J., in Civil Suit No. 399 of 1916.

(a) Tort—Negligence—Damages—Measure—Compensation should be fair but not absolute—Annuity to extent of average income for rest of life cannot be granted.

In an action for damages for physical injuries caused to the plaintiff by defendant's negligence, the amount of compensation must be fair and reasonable, but an absolute compensation is not the true measure of damages. The Court should not give the value of an annuity of the same amount as the plaintiff's average income for the rest of the plaintiff's life. [P 1068 C 1, P 1069 C 2]

(b) Tort — Damages — Appellate Court should be slow to interfere in amount unless it is clearly excessive — Practice, Appellate Court.

An Appellate Court can form its own opinions on the reasons given by the lower Court for the award and measure of damages, but it should be slow to interfere unless in its opinion, the damages awarded are clearly excessive or inadequate. [P 1068 C 1]

(c) Civil P. C. (5 of 1908), O. 6, R. 17—Amendment to enhance claim for damages can be allowed if made at commencement of trial.

In an action for damages, the Court has the power to order amendment of the plaint at any stage of the suit so as to enhance the claim for damages, if the application for amendment was made at the commencement of the trial. [P 1067 C 2]

(d) Tort—Negligence—Damages—Measure of—Plaintiff dull student—Father pauper—Brother earning Rs. 30 p. m.—Rs. 12,000 held excessive damages for injury by fall of door and reduced to Rs. 6000

The plaintiff, a lad of 16 who was a student in one of the lower forms of a school, sustained severe injuries by the fall of the door of a temple of which defendant was trustee. It was proved that the boy was dull and not very intelligent and that his father was a pauper, while his brother was earning Rs. 30 a month. The Court awarded him Rs. 12,000 as damages:

Held: that the award was excessive and it was reduced to Rs. 6,000. [P 1069 C 1]

C. P. Ramaswamy Aiyar — for Appellant.

N. Grant—for Respondent.

Wallis, C. J.—I think there is no ground whatever for the objection taken to the action of the learned Judge in allowing an amendment of the plaint as regards the amount claimed as damages. The application was made at the beginning of the trial, when the learned Judge reserved his decision until he had heard more of the case. When he granted it at a later stage, it was not opposed though the order was not made by consent. The fact that it was not opposed goes to show that the general feeling of those who had heard the evidence was that an award of Rs. 5,000 would be inadequate. The only question then is whether the sum of Rs. 12,000 awarded by the learned Judge is excessive. The principles on which compensation should be awarded in these cases is fully discussed in the latest edition of Mr. Bewan's well-known book on Negligence. The observations of Parke, B,, in *Armsworth* v. *South Eastern Railway Co.* (1) and of Brett, J., in *Rowley* v. *London and North Western Railway Co.* (2) were approved generally by the Court of Queen's Bench in *Phillips* v. *London* and *South Western Railway Co.* (3) and by the Court of Appeal in *Phillips* v. *London* and *South Western Railway Co.* (4) giving effect to these rulings. Lord Coleridge,

(1) [1847] 11 Jur. 758=81 R. R. 918.
(2) [1873] 8 Ex. 221=42 L. J. Ex. 153.
(3) [1879] 4 Q. B. D. 406=48 L, J. Q. B. 593.
(4) [1880] 5 Q. B. D. 78=49 L. J. Q. B. 233.

C. J., when the case was retried before him told the Jury that the amount of compensation must be fair and reasonable but that an absolute compensation was not the true measure of damages, and in the Court of Appeal Bramwell, L. J., in *Phillips* v. *London* and *South Western Railway Co.* (5) stated that the direction was such as was usually given and was right. Pace M. R. Bewan, therefore I think that the proper ruling is that something fair and reasonable but less than an absolute compensation should be given in these cases. The later decision in *Johnston* v. *Great Western Railway* (6) was concerned with the question as to whether the Court of appeal should interfere with the finding of a Jury in a case of the kind and the rule laid down was that it would do so when it was clear that the Jury had disregarded the direction of the Court. When the damages are assessed by the Court, and the Court gives its reasons as in the present case the appellate Court can of course form its own opinion on the reasons given but should in my opinion be slow to interfere, unless in its opinion the damages awarded are clearly excessive or inadequate.

Coming now to the facts there can be no doubt that owing to the admitted negligence of the defendant the plaintiff sustained dreadful injuries and was reduced to the pitiable condition referred to by the learned Judge and that his prospects in life were completely ruined. He is therefore entitled to the largest compensation that could properly be awarded to any one of his position and prospects in life. As regards this part of the case I cannot help thinking that the learned Judge has taken rather too favourable a view. I accept the statement of the learned Counsel that the plaintiff impressed the Court as a bright and intelligent boy. Nonetheless he was a backward boy who would not have completed his school course and become eligible for admission to a college until three years after the average age. This may be assumed to have been due to his father's want of means, but that want of means would have been an even more fatal obstacle to his completing his college course and obtaining a degree in Arts, to say nothing of law so as to put him on an equality with other educated boys of his age and caste. No doubt he had a distant connection who was in a position to help him and such help is not infrequently but by no means invariably given. Help from this quarter appears to me to be too problematical to take into account in assessing damages. His father was practically without means. One brother is a failed "matriculate," who is now in the Government service and debarred by his failure from rising to better paid appointments. The other brother was unemployed at the date of the trial but had been a clerk in a mercantile firm.

On the whole the plaintiff's prospects were by no means so bright as those of any young Iyengar boy with parents in comfortable circumstances and able to afford him the best educational advantages. The learned Judge, as I understand him was of opinion that Rupees. 6,000 or Rs. 7,000 would not reproduce more as an annuity than an averagely successful person in the plaintiff's position would have earned, but he has felt entitled to double that sum having regard to the sufferings the plaintiff has undergone, the sufferings he will undergo and the permanent disabilities he has to suffer from. The plaintiff is no doubt, entitled to compensation for the pains and sufferings he has undergone and will have to undergo as well as for the loss of his career, but this award, in my opinion, is something more rather than something less than an indemnity as it ought to be according to the authorities to which I have referred. Rs. 6,000 represents an annuity starting at much more than the plaintiffs would have been likely to earn after many years of employment. I also think that having regard to the authorities I have referred to it is going too far to double the amount awarded under this head as compensation for pain and suffering. My learned brother sitting with me, who is in a better position than I am to judge of the prospects of the boy in the plaintiff's position, holds this view even more strongly than I do. In the result however we have agreed that the damages should be reduced to Rs. 6,000. Otherwise the appeal is dismissed with costs.

Sadasiva Aiyar, J.—The defendant is the appellant. He is trustee of a temple. The falling of the temple door through the negligence of the temple servants has injured the plaintiff, who was

(5) [1880] 5 C. P. D. 380=49 L. J. C. P. 233.
(6) [1904] 2 K. B. 250= 73 L. J. K. B. 568.

about 16 years old at the date of suit, in a very serious manner as spoken to by P. W. 4, Dr. Gibson. The plaintiff may "never be able to walk by himself without crutches or human aid," and has also "lost control of the muscles" controlling the excretion of the faeces and the discharge of urine. He sued through his vakil for recovery of damages estimated at Rs. 5,000. He afterwards changed his legal adviser, and the Counsel instructed by attorneys appeared for him at the trial. The plaint was allowed to be amended into a claim for Rs. 12,000 and the learned Judge gave a decree for damages for Rs. 12,000. It is clear from the evidence that the plaintiff's father is practically a pauper who earns nothing. The plaintiff's elder brother, who was unable to pass the Matriculation Examination, was earning Rs. 30 a month and was probably the support of his father and of the plaintiff. The plaintiff was studying in the 3rd form when he got his injuries, and I think he must be treated as a backward boy as, even if he continued to have his promotion regularly, he would have got his secondary school leaving certificate only in his 19th year. The learned Judge says:

"I am not going to give this boy annuity to compensate him for the loss of his career which would bring him more than an averagely successful person would have earned."

But I think in giving a judgment for Rs. 12,000, he has given him such an annuity and even an annuity giving a larger income than he could reasonably expect. Considering the plaintiff's previous scholastic career and the intelligence to be expected of a person born in the family to which he belongs, he might be expected to earn Rs. 20 to Rs. 30 a month after he became a major. Even in that view, he cannot be said to be entitled to a sum which would give him an annuity of Rs. 360 a year. The measure of damages in a suit like this is discussed in Mayne on Damages, Edn. 8, pp. 541 to 544. In one of the cases cited, *Phillips* v. *London and South Western Railway Co.* (3), confirmed in appeal in *Phillips* v. *London and South Western Railway* (5), a plaintiff, who was getting a secured income of £6,000 to £7,000 per annum in medical practice and who was supposed to have been permanently disabled from earning that income, was given only £7,000 as damages by Jury, that is, a sum giving an annuity of £350 at 5 per cent. The summing up of Field, J., in that case was approved of in appeal (though a new trial was ordered on the ground that the damages did not even cover actual expenses incurred by plaintiff). The rule in these cases is:

"You are not to give the value of annuity of the same amount as the plaintiff's average income for the rest of the plaintiff's life. If you gave that, you would be disregarding some of the contingencies . . . . . An accident might have taken the plaintiff off within a year. He might have lived on the other hand for the next 20 years and yet many things might have happened to prevent his continuing his practice."

So also in another case, Parke, B., said:

"It would be most unjust if, whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done . . . . Scarcely any sum could compensate a labouring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life."

Armsworth v. *South Eastern Ry. Co.* (1). Bearing these observations in mind, I think the sum of Rs. 5,000, which was demanded by the plaintiff's father in the lawyer's notice sent before the institution of the suit and which was also claimed as reasonable damages legally claimable in the plaint before its amendment, is the amount which a reasonable jury ought to have given to the plaintiff and I would therefore hold that there was no sufficient ground for the learned Judge to have allowed the plaintiff to amend the plaint by asking for higher damages or for allowing any portion of the additional amount claimed. I cannot however state that the amendment allowed was illegally granted. Mr. Grant for the respondent argued that Mr. C. P. Ramasami Aiyar in the lower Court said that provided that his client was not made personally liable and provided the damages are given against the temple, he would not object to the amendment of the plaint. Mr. Ramasami Aiyar on the other hand said that he remained silent as no formal application to amend was made. Anyhow, I think that the interests of the temple cannot be said to require less protection than the personal interests of the defendant trustee. In the words of Parke, B., "the unfortunate" temple ought not to be "visited" . . . . . "with the utmost amount which" a too compassionate jury might think "equivalent to the mischief done."

The question of the quantum of damages in these cases is not one that can be accurately and mathematically answered. I would have been inclined to assess it at only Rs. 5 000 or even less if I had tried the case as a single Judge exercising solely the functions of the jury. Where two Judges sitting as an appellate Bench have to decide on a question of this kind, it is clearly desirable that in exercising the functions of a jury, the Bench should come to an agreement on a matter in which there is room for the exercise of a large though not wholly arbitrary discretion. We have (as stated as the judgment of my Lord) agreed to the award of Rs. 6,000 as damages in this case. I would therefore modify the decree of the learned Judge by substituting Rs. 6,000 for Rs. 12,000. As however the defendant in his appeal memorandum contended that Rs. 2,000 was a sufficient compensation and considering also the nature of the case, I would, as regards costs, not interfere with the lower Court's award in favour of the plaintiff and I would also direct the appellant to bear the respondent's costs of this appeal.

S.N./R.K. *Decree modified.*

A. I. R. 1919 Madras 1070

OLDFIELD AND SADASIVA AIYAR, JJ.

Vythinathien—Plaintiff—Appellant.

v.

Padmanabha Pattar and *others*—Defendants—Respondents.

Second Appeal Nos. 290 and 292 of 1916, Decided on 1st February 1918, against decree of Sub-Judge, South Malabar, in Appeal Suits Nos. 1011 and 1012 of 1914.

(a) Malabar Law—Dewaswom—Melcharth is not unenforceable merely by executant describing his control over devaswom.

A Melcharth executed by the agent of a Devaswom is not unenforceable merely because the executant describes the nature of his control over the Devaswom. [P 1070 C 2]

(b) Malabar Law—Devaswom—Melcharth—Grant of by trustee is ordinary incident of management — Grantee need not inquire into necessity or application of consideration

The grant of a Melcharth by the trustee of a Devaswom is an ordinary incident of its management, the propriety of which the Melkanomdar is under no obligation to scrutinize, and the latter is not bound to inquire into the existence of any particular necessity for funds by the Devaswom or into the application of such funds by the trustee. [P 1070 C 2]

T. R. Ramachandra Aiyar—for Appellant.

K. P. M. Menon—for Respondents.

Judgment.—In these cases the question is of the validity of the two melcharths in plaintiff's favour, executed by some of defendants on behalf of the devaswom, of which they had control. The lower appellate Court's main ground of decision against plaintiff is that the melcharths are unenforceable, because their execution with recitals in them regarding the nature of the executant's control over the devaswom was a step towards carrying out a scheme for their aggrandisement by setting up the private nature of their trust and was, therefore a breach of that trust. We have not been shown authority, which would justify such a decision; and we cannot accept it especially as, in our opinion, defendants' further case also, that plaintiff acted in bad faith, is not supported by evidence. As regards the last mentioned point, the lower appellate Court found that consideration passed for the melcharths. But it held that such consideration

"was not utilized for the benefit of the devaswom and that plaintiff, therefore was not shown to have taken the document bona fide."

because the debt alleged as having been discharged with the money was not shown to have been binding on the devaswom. The lower appellate Court overlooked the facts that the terms of the kanoms, with which the melcharths were connected, had elapsed, and that therefore the grant of the latter was an ordinary incident of the management, the propriety of which the plaintiff was under no obligation to scrutinize further; and as was observed in the judgment in second Appeal No. 965 of 1903, 'persons dealing with the agent of a devaswom in such matters of everyday managment are not bound to inquire into the existent of any particular necessity for funds by the devaswom or into the application of such funds by the agent.' We therefore dissent from the lower Court's conclusion on this point also.

The lower Court's decrees must be set aside. Plaintiff is entitled to preliminary decrees for redemption with reference to the lower appellate Court's other findings, which have not been disputed, and to the amount which may be ascertained by the lower appellate Court

for future purapad. The appeals are remanded to the lower appellate Court, in order that it may pass preliminary redemption decrees in the light of the foregoing. Each party will pay his own costs in the lower Courts, except that plaintiff and defendants will respectively pay half the Commissioner's fee in the District Munsif's Court. Defendants 1 to 3 will pay plaintiff's costs in this Court. The receiver will have his costs from the estate.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 1071 (1)

OLDFIELD AND SADASIVA AIYAR, JJ.

Muthu Karan Vena Alagappa Chettiar and *others*—Defendants—Appellants.

v.

Kanakasabai Pillai and *others*—Plaintiffs—Respondents.

Appeal No. 273 of 1917, Decided on 10th January 1918, against decree of Temporary Sub-Judge, Tanjore, in Appeal Suit No. 74 of 1916.

(a) Compromise decree—No damages for failure to satisfy compromise decree can be claimed—Civil P. C., S. 47 and O. 21, R. 32.

A judgment-debtor, who does not voluntarily satisfy a decree, does not commit an actionable wrong for which the decree-holder can recover compensation by a separate suit. [P 1071 C 2]

(b) Civil P. C. (5 of 1908), O. 21, Rr. 32 and 34—Compromise decree — Promissory notes agreed to be assigned but not assigned — Notes barred — No damages could be claimed—Remedy was under Rr. 32 and 34.

When therefore the defendant, who was under an obligation under the terms of a compromise decree to endorse certain promissory notes in plaintiff's favour, failed to do so, with the result that the promissory notes became barred:

Held: that plaintiff's remedy was to proceed in execution under O. 21, R. 32 or R. 34, and not to seek compensation by a separate suit: 35 *Cal.* 1100; 31 *Mad.* 37 and 7 *I. C.* 248, *Dist.* [P 1071 C 2]

C. V. Anantakrishna Iyer—for Appellant.

T. Nalasivan Pillai—for Respondents.

Judgment.—This appeal can be disposed of with reference to only one of the grounds taken, that the lower appellate Court erred in its decision in favour of plaintiff's right to proceed by suit. Defendant 1 was under obligation, under Ex. A1, a compromise decree, to endorse certain promissory notes in plaintiff's favour and to execute a power-of-attorney and do other things within a fixed time. He did not comply with his obligation; and plaintiff, instead of compelling him to do so by process under O. 21, R. 34 or R. 32, has now sued him and the present appellants, certain trustees alleged to be in possession of his property, for damages on the ground that the notes are now time-barred and worthless.

The lower appellate Court has held that such a suit will lie on the strength of certain authorities, of which (to mention only those in which S. 47, Civil P. C. of 1908 was pleaded) *Saratmani Debee* v. *Bata Krishna* (1) was decided in special circumstances and *Kolintavitu Mama Amma* v. *Kolintavitu Haji Kandi* (2) and *Quamzal Huda* v. *Kumud Nath* (3) dealt with causes of action arising subsequently to and independently of the decree. Here the cause of action is not that the notes are barred, but that defendant 1 failed to comply with the decree and enable plaintiff to sue on them, before they became so barred; and the authorities referred to are not in point. In the absence of authority, we are not prepared to accept the proposition involved in plaintiff's contention that a judgment debtor, who does not voluntarily satisfy a decree, commits an actionable wrong, for which the decree-holder can recover compensation by separate suit. Taking this view, we must hold that the suit is not sustainable. We have been asked, in the alternative, to treat the plaint, as an execution petition and to allow the plaintiff to recover damages under O. 21, R. 32. But apart from any objections to such execution on its merits, we are not, in view of the delay, after which this relief has been claimed, and the course of the litigation, prepared to use our discretion to do so.

The result is that the appeal is allowed the suit being dismissed with costs throughout.

S N./R.K. *Appeal allowed.*

(1) [1908] 35 Cal. 1100.
(2) [1908] 31 Mad. 37.
(3) [1910] 7 I. C. 248.

A. I. R. 1919 Madras 1071 (2)

OLDFIELD AND SADASIVA AIYAR, JJ.

Kannusami Pillai and *another*—Appellants.

v.

Jagathambal — Petitioner — Respondent.

Letters Patent Appeal Nos. 157 and 158 of 1917, Decided on 30th January 1918

(a) Civil P. C. (1908), O. 23, R. 1—Suit grossly undervalued—Proper value exceeding jurisdiction—Permission to withdraw is improper.

Where the subject-matter of a suit is grossly undervalued, and the right valuation exceeds the pecuniary jurisdiction of the Court in which it is instituted, the Court exercises a wrong discretion if it sanctions the withdrawal of the suit with liberty to the plaintiff to bring a fresh suit. *A. I. R.* 1915 *Mad.* 480, *Foll.* [P 1072 C 1]

(b) Civil P. C. (1908), O. 23, R. 1—Other sufficient grounds' are not restricted to grounds anologous to formal defect.

Per *Sadasiva Aiyar, J.*—The words 'other sufficient grounds' in O. 23, R. 1, Civil P. C. do not bear the ejusdem generis interpretation and do not mean grounds analogous to formal defect. [P 1073 C 1,2 P 1074 C 1]

(c) Civil P. C. (1908), O. 23, R. 1—Discretion is judicial — Wrong exercise constitutes irregularity within S. 115.

Order 23, R. 1, gives full discretion to the Court, but the discretion should be judicially exercised and where it is not so exercised, it constitutes a material irregularity within the meaning of S. 115. [P 1074 C 2]

(d) Civil P. C. (1908), O. 7, R. 10 and O. 23, R. 1—Suit grossly undervalued—No withdrawal should be allowed but plaint should be returned under R. 10.

The Court has no jurisdiction, on discovering that the subject-matter of a suit is beyond its jurisdiction, to allow its withdrawal under O. 23, R. 1, but it should follow the provisions of O. 7, R. 10, and return the plaint for presentation to the proper Court. [P 1075 C 1]

(e) Civil P. C. (1908), O. 23, R. 1—Objection on ground of jurisdiction and Court fee are formal defects.

Objections to a suit on the ground of jurisdiction and insufficient Court-fees are formal defects. [P 1074 C 2]

G. S. Ramachandra Aiyar—for Appellants.

T. V. Muthukrishna Aiyar—for Respondent.

Oldfield, J.—I am not disposed to re-consider the principle referred to in *Aiya Gounden* v. *Jayan Mandalathipathi Gopanna Mauradiyar* (1) since, as my learned colleague has shown in the judgment which I had the advantage of reading, it has been accepted by this and other High Courts in cases in the authorized reports; and I do not think it necessary to decide whether the District Munsif had jurisdiction to pass his order. For I am clear that it was not one passed in the exercise of a judicial discretion, since in passing it he gave no weight to the fact that plaintiffs-appellants gave an undervaluation of one item of the suit property so gross that it can hardly have been honest and that they therefore deserved no consideration. In the circumstances the District Munsif had no right to use his powers to assist them; and on that ground I concur in dismissing the Letters Patent Appeals with costs.

Sadasiva Aiyar, J.—The plaintiffs are the appellants in these Letters Patent Appeals. They brought the suit in the Negapatam District Munsif's Court for possession of several items of property (including a house, item 76) alleged to have been inherited by plaintiff 2 as the adopted son of one Natesa Pillai whose widow is the defendant. The plaintiffs valued the other items at Rs. 1,917-10-0 and the house item 76 at Rs. 200, thus making the total value of the subject-matter of the suit Rs. 2,117-10-0. The defendant contended that item 76 was grossly undervalued and that the suit was beyond the jurisdiction of the District Munsif. A Commissioner was appointed to value item 76 and he valued it at Rs. 6,500, the result being that the total value of the plaint item for purposes of jurisdiction and Court-fees was more than Rs. 8,400. Then the plaintiffs put in a petition on 14th December 1916 for permission to withdraw the suit so far as the house, item 76, was concerned with liberty to bring a fresh suit in respect of the said property, on the ground that the plaintiffs had no objection whatever to the defendant, the adoptive mother of plaintiff 2, residing during her lifetime in that item, plaintiff 2 being bound to provide her with residence. The defendant, who denied plaintiff 2's alleged adoption, objected to the granting of the petition on the following grounds: (a) the plaintiff is not legally entitled without paying Court-fees thereon to apply for withdrawal with liberty to bring a fresh suit; (b) the Court has no jurisdiction to permit the withdrawal; (c) there are no legal grounds for allowing the withdrawal and (d) plaintiffs knew that the suit was not within the jurisdiction of the Court and they wanted to defraud the Government of a large amount of Court fees. The learned District Munsif granted the plaintiffs' petition, that is permitted plaintiff 2 to withdraw his claim as regards the plaint item 76 with liberty to bring a fresh suit. This order was passed on 17th January 1917. There was a connected petition for amendment of the plaint by striking out item 76

(1) A. I. R. 1915 Mad. 480=26 I. C. 57.

from the plaint schedule and by making consequent alterations; that petition was also allowed. The defendant thereupon filed two revision petitions under S. 115, Civil P. C., against the District Munsif's orders. They came on before Abdur Rahim, J. and he allowed the petitions by a single judgment. The grounds for the decision are thus set out:

"Rule 1 (2), O. 23, says that where the Court is satisfied (a) that a suit must fail by reason of some formal defect or (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may . . . . . grant the plaintiff permission to withdraw from such suit. It has been held by a Bench of this Court in *Aiya Gounden* v. *Mandalathipathi Gopanna Mauradiyar* (1) that the 'sufficient ground' mentioned in R. 1 (2) (b), O. 23, Civil P. C., must be interpreted as being ejusdem generis with the formal defect referred to in R. 1 (2) (a). That being so, can it be said that there was a defect of that character in this suit? If it were a mere question of general discretion, I should be prepared to hold that this discretion was rightly exercised by the first Court. But I am bound by a ruling of the Division Bench . . . above referred to. Therefore, unless it could be said that there was a defect in the suit of a character akin to a formal defect the order of the District Munsif must be held to be unauthorized by law."

This doctrine of ejusdem generis has, in my humble opinion, been pushed too far in some of the English cases, (a) where the general words follow specific words in the very same clause of a sentence, (b) where the specific words are all of the same genus and not of different genera and (c) where the general object of the Act is clearly expressed and the intention of the Statute is patently opposed to giving the wider meaning to the succeeding words, then alone, in my opinion, the meaning of the general words ought to be restricted, as coloured by the preceding specific terms. Now as regards the O. 23, R. 1 (old S. 373), I find that the expression "formal defect" occurs in clause (a), sub-S. (2), in a separate sentence relating to the whole suit failing, whereas the expression "other sufficient grounds" occurs in clause (b) which contemplates cases where the suit may not wholly fail but the plaintiff might be put to great inconvenience if he is not allowed to withdraw, which contemplates again cases where only a part of the claim may fail in that same suit if he is not allowed to withdraw with liberty to bring a fresh suit for that part and where, if he is not given such permission, he might be precluded also from brining a separate suit therefor. Further, clause (a) does not mention several things which could be brought under one genus, but it refers to a single class of things as "formal defect" while clause (b) refers to "other sufficient grounds;" there is nothing again clearly indicated in the section itself from which we could infer that the legislature intended to allow withdrawal with permission only in the cases where the suit was bad by reason of a formal defect or something analogous to a formal defect. Thus in *Reg* v. *Payne* (2) it was held that an Act which made it penal to convey to a prisoner in order to facilitate his escape any mask, dress or disguise or any letter or any other article or thing did not intend to restrict the meaning of the general terms "any other article or thing" by the particular words "disguise or letter" and that therefore a crow-bar was also included under the expression "other article or thing.": see also *Shillito* v. *Thompson* (3), *Reg* v. *Edmundson* (4) *Reg* v. *Spratley* (5) and *Lowther* v. *Bentic* (6).

In the case of *Robert Watson Co.* & v. *Collector of Zillah Rajshaye* (7) the first in suit which liberty to bring a fresh suit was given was instituted in 1856 and decided in 1857, even before the enactment of the first Civil Procedure Code of 1859 (see S. 97 of that Code where the provision as to withdrawal appears), the suit was again not allowed to be withdrawn, but it was dismissed for want of sufficient evidence and then the Judge said that his order dismissing the suit was

"not intended to bar the plaintiffs from proceeding again as if the action had not been brought."

The remarks of their Lordships of the Privy Council at page 170 mainly dealt with the procedure of the Courts of Equity in England as distinguished from other Courts even in England and could have no reference whatever to the powers of Indian Courts under the provisions of the Civil Procedure Code. I therefore, with the greatest respect, feel myself unable to agree with the dicta of Mookerjee, J., in *Kharda Co. Ltd.* v. *Durga Charan Chandra* (8) and *Mabulla Sardar* v.

(2) [1866] 1 C. C. 27= 35 L. J. M. C. 170.
(3) [1876] 1 Q. B. D. 12=45 L. J. M. C. 18.
(4) [1859] 2 El & El 77=8 Cox C. C. 212.
(5) [1856] 6 El. & Bl. 363=25 L. J. Q. B. 257.
(6) [1875] 19 Eq. 166= 44 L. J. Ch. 197.
(7) [1869-70] 13 M. I. A. 160=2 Sar. 500 (P.C.).
(8) [1910] 5 I. C. 167.

Hemangani Debi (9) that "other sufficient grounds" mean grounds analogous to a "formal defect." Suppose a case like this: *A* sues *B* on a mortgage bond for sale of *B's* family house within three years of its execution. It is found that it would ruin *B's* credit and health to have a decree for sale of his dwelling house passed just then and as the security is good and as *A* has 9 years more to sue and as he was paid up his costs, he applies at the request of *B* and of mutual friends to withdraw the suit with liberty to bring a fresh suit 5 years afterwards if the money be not paid up meanwhile. Even such an application would have to be refused, if the expression "other sufficient grounds" is to be restricted to "formal defect" or to something analogous to "formal defect." Again in *Lakshminarayana Tantri* v. *Ramachandra Tantri* (10), Abdur Rahim J., following *Lutawan* v. *Lachiya* (11) refused to apply the doctrine of ejusdem generis for interpreting the words "otherwise invalid" in R. 15 (c) of Sch. 2, Civil P. C., on the ground that the intention of the legislature was to allow an attachment on the validity of an award on all other grounds besides those mentioned in the earlier clauses. I think that similar reasons apply to give a wide meaning to "other sufficient grounds" in O. 23, R. (1) Cl. (b). The cases of *Kharda Co., Ltd.* v. *Durga Charan Chandra* (8), *Mabulla Sardar* v. *Hemangini Debi* (9) and the cases of *Burathogunta Pentadee* v. *Thurlapatti Rajamma* (12), *Mahipat Shamla* v. *Nathu Vithoba* (13). *Hriday Nath Parai* v. *Akshay Lal* (14), *Ram Chandra Das* v. *Hachunia Fakir* (15), and *Aiya Gounden* v. *Jayan Mandalathipathi Gopanna Mauradiyar* (3) might have been supported on other grounds and in fact, so far as the cases in this Court are concerned, namely, *Burathagunta Pentadee* v. *Thurlapatti Rajamma* (12) and *Aiya Gounden* v. *Jayan Mandalathipathi Gopanna Mauradiyar* (3), they were supported on such other grounds principally. Krishnasamy Ayyar J., says, for instance, in *Burathagunta Pentadee* v. *Thurlapatti Rajamma* (12), "but even apart from that" that is the interpretation of the word "other" in Cl. (b) of O. 23, R. 1,

> " the mere inability to prove her case does not appear to me to be a sufficient ground for giving her leave to institute a fresh suit."

So also Oldfield J., says in *Aiya Gounden* v. *Jayan Mandalathipathi Gopanna Mauradiyar* (3).

> " but whether or not this interpretation of the phrase 'sufficient grounds' " be adopted, we must hold that his discretion was not exercised judicially."

In the present case even if the other ground be analogous to formal defect, I think that objections to a suit on the ground of jurisdiction and insufficient court-fees are analogous to formal defects and hence, I think with great respect that the judgment of the learned Judge of this Court, against whose decision this Letters Patent Appeal has been filed cannot be supported on the ground on which he has decided. I might state that even where in the same clause of the same sentence in the Limitation Act, S. 14, the words "other cause" followed again by the express words "of a like nature" were inserted after the words "defect of jurisdiction," the Courts have given a very liberal interpretation to the words "other cause" as including cases where the suit failed for want of a prior notice under S. 80, Civil P. C., or where it was brought without proper leave of the Court or without production of the Collector's certificate required by S. 6, Pensions Act. I think however that the judgment of the learned Judge can be supported on the ground that the District Munsif acted with very material irregularity in allowing the petition under O. 23, R. 1, in this case. It seems to me very difficult to hold that a house found by the Commissioner to be worth Rs. 6,500 could have been valued at Rs. 200 by the plaintiffs with any shadow of good faith of their part. O. 23, R. 1, gives full discretion to the Court, but of course such a discretion should be judicially exercised. I do not think that the discretion was at all properly or rightly exercised in this case. I think that there was very material irregularity committed by the lower Court in the exercise of its jurisdiction (assuming that it had jurisdiction) in having allowed the portion of the claim relating to the house to be

(9) [1910] 6 I. C. 229.
(10) A. I. R. 1919 Mad. 1029=45 I. C. 763.
(11) A. I. R. 1914 All. 446=21 I. C. 989=36 All. 69.
(12) [1910] 8 I. C. 868.
(13) [1910] 4 I. C. 252=33 Bom. 722.
(14) [1917] 39 I. C. 963.
(15) [1916] 35 I. C. 843.

withdrawn with liberty to bring a fresh suit as regards that portion.

Lastly, I have, after anxious consideration, arrived at the opinion that the Court of first instance had no jurisdiction to pass any other judicial order in the suit after it had once arrived at the conclusion that the suit, as brought, was beyond its jurisdiction except to return it for presentation to the proper Court. S. 57 of the former Civil P. C., provided that the plaint should be returned to be presented to the proper Court in cases (a), (b) and (c), all involving questions of jurisdiction. But the section did not expressly state at what stage of the suit it was obligatory on the Court to return the plaint. As this section appeared before S. 64 which begings by saying: "When the plaint has been registered," it may be plausibly argued that under the old Code the return of the plaint directed in S. 57 related to the period before the registry of the plaint. The present O. 7, R. 10, imperativoly says that the plaint shall, at any stage of the suit, be returned to be presented to the Court in which the suit should be instituted. I think it is clear that the legislature intended that as soon as the Court arrives at the conclusion at any stage of the case that the suit should have been instituted in some other Court, the plaint should at once be returned to be presented to the proper Court. It also stands to reason and principle that a Court which has no jurisdiction over a suit cannot pass any valid orders in such a suit, except the orders which the statute expressly empowers it to pass such as the order returning the plaint to be presented to the proper Court, which it is specially empowered to pass by O. 7, R. 10, and the order as to costs incurred before it, as to which also there is a special provision in S. 35. The last sentence of S. 35 is very significant in this connexion. It is as follows:

"The fact that the Court has no jurisdiction to try the suit shall be no bar to exercise of such powers,"

that is, powers to determine by whom or out of what property and to what extent costs are to be paid. The clear implication therefore is that in the absence of such express statutory provision the Court which has no jurisdiction over the suit would have, under the general principles of jurisprudence, no power to award costs incurred before it in respect of such proceedings. The case of *Karumbar Pandrapandaram* v. *Audimula Ponnapandaram* (16) relied on the question now under consideration. In that case the plaint had been rightly returned by the District Munsif as soon as it was found that it was beyond its jurisdiction, and the District Munsif did not again take cognizance of the suit till the plaintiff struck out some of the properties from the plaint and properly amended the valuation so as to bring it within the cognizance of the District Munsif's Court. The fact that the plaintiff put in an unnecessary petition, stating that he relinquished his claim to the properties which he had struck out, was rightly held to be no bar to the District Munsif's accepting the amended plaint, which was confined to properties whose value was within the District Munsif's jurisdiction.

In the result, I would dismiss the Letters Patent Appeal with costs.

S.N./R.K. *Appeal dismissed.*

(16) [1909] 33 Mad. 262=3 I. C. 725.

A. I. R. 1919 Madras 1075

SADASIVA AIYAR AND NAPIER, JJ.

Emperor

v.

S. Varadachariar—Accused—Respondent.

Criminal Appeal No. 285 of 1918, Decided on 18th July 1918, against the order of Presy. Magistrate., Egmore, in Calendar Case No. 17776 of 1917.

(a) Madras City Municipal Act (1904), S. 420—"Whoever contravenes" covers owners as well as occupiers.

The words "whoever contravenes" in S. 420 cover owners as well as occupiers of the premises. [P 1076 C 1]

(b) Madras City Municipal Act (1904), Ss. 282 and 420—Construction or continuance of inflammable pandal is offence under S. 282 read with S. 420.

The construction of an inflammable pandal or the continuance of an existing one is an offence under S. 282 read with S. 420 of the Act. [P 1075 C 2 P 1076 C 1]

Crown Prosecutor—for the Crown.

K. S. Krishnaswami Ayyangar—for Accused.

Judgment.—We are quite clear that this S, 282 (Madras City Municipal Act, 1904) read with S. 420 (of the Act) was intended to reproduce S. 264 of the old Act (The City of Madras Municipal Act, 1884), which made the new construction

of an inflammable pandal, or the continuance of an existing pandal, etc., of that character an offence. The pandal in question is clearly unlawful and there is no written permission of the President to legalise it. We think that the langu- of S. 420 (the Madras City Municipal Act, 1904), "whoever contravenes" is wide enough to cover an owner and occupier of premises which offend against the section. We set aside the acquittal and impose a fine on defendant of Rs. 5.

S.N./R.K. *Acquittal set aside.*

A. I. R. 1919 Madras 1076

ABDUR RAHIM AND NAPIER, JJ.

Seetharama Ayyar and *another*—Defendants—Appellants.

v.

Narayanaswami Pillai and *another*—Plaintiffs—Respondents.

Second Appeal No, 128 of 1917, Decided on 8th March 1918, against the decree of Sub-Judge, Kumbakoram, D/- 31st August 1916, in Appeal Suit No. 5 of 1916.

(a) Transfer of Property Act (1882), S. 130—Assignment of actionable claim must be in writing but need not be in technical language or in any particular form.

The words "instrument in writing," in S. 130 T. P. Act, do not mean a document couched in technical language or in any particular form. What is intended is that the transfer should be made in writing and it is sufficient if the intention of the creditor to transfer the debt due to him to the transferee, can be gathered from the writing. [P 1076 C 2]

(b) Transfer of Property Act (1882), S. 130—After transfer, transferee alone can sue for debt.

After the date of the transfer, the transferee is the only person entitled to sue for the debt. [P 1076 C 2]

(c) Transfer of Property Act (1882), S. 130—Assignment effected by entry in accounts is valid.

An assignment made in a statement of accounts by way of an entry is an assignment within the section. [P 1076 C 2]

(d) Transfer of Property Act (1882), S. 130—No consent of original debtor on novation of contract is necessary for assignment.

An assignment does not become invalid for want of consent of the original debtor or by reason of the absence of a novation of contract. [P 1077 C 1]

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar*—for Appellants.

T. V. Gopalaswami Mudaliar—for Respondents.

Judgment.—There was a settlement of accounts between the plaintiff and the guardians defendants 1 and 2 and in that settlement a sum of Rs. 600 due from one Sambamoorthia Pillai, husband of defendant 3 is alleged to have been assigned to the plaintiff by the guardians of defendants 1 and 2. The first question that arises is, whether there was such an assignment as is contemplated by S. 130, T. P Act. There is no question but that the sum of Rs. 600 was in fact due from the defendant 3's husband to defendants 1 and 2. S. 130 (1), T. P. Act says:

"The transfer of an actionable claim shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent and shall be complete and effectual upon the exectution of such instrument and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not."

The instrument in writing which is put forward as an assignment in this case is in these words:

"By way of direction given to receive the principal of Rs. 600 and interest due by Kathoor Sambamoorathia Pillai Rs. 600."

It is an entry signed by the guardians of defendants 1 and 2 in a statement of accounts, and it is argued that this is not an instrument in writing within the meaning of S. 130, T. P. Act. The learned pleader for respondent 1 has not cited to us any authority in support of the contention. The words "instrument in writing" do not seem to us to mean a document couched in technical language or in any particular form. All that is apparently intended is that the transfer should be made in writing. It is well established law that assignment of a chose in action does not require any pasticular from of conveyance or words of transfer. It is sufficient if the intention of the creditor to transfer the debt due to him to the transferee can be gathered from the writing. The fact that the assignment is made in a statement of accounts by way of an entry, would not make any difference and, in the absence of authority, we are not prepared to uphold the contention of the pleader for respondent 1 on this point. There being an assignment within the meaning of S. 130, T. P. Act, the debt vested in the plaintiff from the date of the assignment and he would therefore be entitled to sue for it. The section itself expressly says that all the rights

and remedies of the transferor shall vest in the transferee even without any notice of the transfer being given to the debtor though, if no notice has been given and the debtor pays the debt to his original creditor, he will be absolved from liability to the transferee of the debt. This is made clear in a decision of this Court in *Gopalakrishna* v. *Gopalakrishna* (1). It was also ruled by a Full Bench of this Court in *Muthukrishna Aiyar* v. *Vera Raghava Aiyar* (2) that :

"the rights of the transferor being vested in the transferee by the express words of the section, the transferee is the only party entitled to sue."

In laying down this proposition, the learned Judge followed the ruling of the Privy Council in *Shyam Kumari* v. *Rameswar Singh* (3). We cannot therefore agree with the lower appellate Court in holding that defendants 1 and 2 are solely entitled to sue the husband of defendant 3 for the amount due to them; on the contrary they have no interest on which they can sue. The Subordinate Judge argues that, as there was no novation of the contract in the case inasmuch as defendant 3's husband was not a party to the arrangement between the plaintiffs and the guardians of defendants 1 and 2, there is no substitution of the original contract by any new contract. But S. 62, Contract Act, which deals with the effect of novation, is a general provision of law relating to substitution of the contract by another. To such a substitution, all the persons concerned must be parties. But S. 130, T. P. Act, providing for transfer of claims is a specific provision which cannot be affected by the general rule relating to novation of contracts as enacted in S. 62, Contract Act.

S. 62, Contract Act, covers cases in which the liability of a debtor to pay to his original creditor is extinguished because of a new contract by which he has made himself liable to a third person. But S. 130, T. P. Act, provides for transfer of choses-in-action by the person to whom the amount is due to a third person. It does not deal with cases of transfer of the liability of a debtor to somebody else. The debtor, it is well established, cannot transfer his liability without the consent of his creditor. We are therefore of opinion that the Subordinate Judge's judgment is wrong and liable to be set aside as it proceeds upon an erroneous view of the law. We set aside the judgment of the Subordinate Judge and restore the decree of the District Munsif with costs here and in the Court below.

S.N./R.K. *Appeal allowed.*

(1) [1909] 33 Mad. 123=4 I. C. 420.
(2) [1913] 38 Mad. 297=21 I. C. 316.
(3) [1905] 32 Cal, 27=31 I. A. 176 (P. C.).

A. I. R. 1919 Madras 1077

AYLING AND SESHAGIRI AIYAR, JJ.

Sunkru Suryanarayana and *another* —Plaintiffs—Appellants.

v.

Sunkuru Ramadoss and *others*—Defendants—Respondents.

First Appeal No. 327 of 1916, Decided on 29th August 1917, against decree of Dist Ganjam, in Original Suit No. 2 of 1916.

(a) Hindu Law — Adoption—Widow—Revocation of consent of sapinda on sufficient ground is legal.

A sapinda cannot arbitrarily withdraw the consent given by him to an adoption even before it is fully acted upon. It is permissible for him to re-consider his decision and to resile from it and the sufficiency of his reasons for doing so cannot be canvassed by the Courts if he acts honestly and puts forward grounds which would satisfy a person of ordinary prudence that he was acting to the best of his knowledge and belief. But where the revocation is capricious and no reasons are assigned for it the Courts should not find out justification for his conduct. 19 *I. C.* 663 and 26 *Mad.* 627, *Dist.*

[P 1079 C 2; P 1081 C 2]

(b) Hindu Law—Adoption — Effect of—Second adoption results in divesting mother of property of previous adopted son.

A Hindu mother succeeding as heir to her first adopted son would be divested by a subsequently adopted son of the inherited property whether it be ancestral or self-acquired: 1 *Mad.* 174, *Foll.*: 10 *M. I. A.* 279 (*P.C.*), *Dist.* [P1081 C2]

C. Sambasiva Rao and *V. Ramesam* —for Appellants.

B. N. Sarma and *H. Suryanarayana* and *D. S. Dakshinamurthi*—for Respondents.

Seshagiri Aiyar, J. — One Gurumoorthi Subudhi belonging to the Vaisya caste had four sons, three of whom were married and the other was unmarried. All the four sons died during his lifetime, the three married sons leaving behind them their widows. In this state of circumstances Gurumoorthi adopted a boy for himself defendant 1 in this suit, and made a will on 28th June 1909 by which he authorized his three daughters-in-law to adopt a son each. Plaintiff 2, in this case adopted a son under the authority given to her by Guru noorthi.

That boy died. Thereupon she attempted to adopt plaintiff 1, in this case in November 1911, but was temporarily prevented by injunction from doing so. She subsequently adopted him in November 1913. The present suit is brought by the adopted son as plaintiff 1 and by the adoptive mother as plaintiff 2 to recover the share of the property bequeathed to the latter's adopted son Gurumoorthi. Their allegation is that defendant 1 gave his consent for adopting plaintiff 1, that the boy was selected by defendant 1, that the secular ceremony of giving and taking was completed in the presence of defendant 1 in July 1909 and that the defendant 1 dishonestly prevented plaintiff 2 from performing the Dattahoman ceremony. The prayer of the plaintiffs is for a declaration that the adoption of plaintiff 1 is valid and in the alternative that in case the plaintiff's adoption is found to be invalid, plaintiff 2 is entitled to the share mentioned in the testament of Gurumoorthi as the mother and heir of her first adopted son.

The defence of defendant 1 is that he never gave his consent to the adoption and consequently the adoption is invalid. He raises also the plea that notwithstanding the will of Gurumoorthi, the family remained undivided and that consequently plaintiff 2 is not entitled to the share devised to her by his adoptive father. The District Judge found that defendant 1 did as a matter of fact consent to the adoption of plaintiff 1, that the allegation that the ceremony of giving and taking was completed in July 1909 is not made out, that it was competent to defendant 1 before the actual adoption took place to withdraw his consent, that the conduct of defendant 1 amounted to an implied withdrawal of the previous consent given by him, that consequently the adoption of plaintiff 1 was not valid, but that as the parties became divided in status by the provision of the will of Gurumoorthi, plaintiff 2 was entitled to the share allotted to her under the will. The plaintiffs have preferred the appeal for a declaration that the adoption of plaintiff 1 is valid. Defendant 1 has filed a memorandum of objections questioning the finding against him by the District Judge. I shall first deal with two questions of fact before dealing with the important question of law which was argued at some length before us. The first question is whether defendant 1 consented to the adoption of plaintiff 1. There can be no manner of doubt upon a perusal of the documentary and oral evidence in this case that the conclusion of the District Judge upon this point is fully supported. I do not propose to deal with the correspondence at any length as it has been fully set out by the District Judge. I shall only refer to some of the important documents. Exs. 13, G, 14 and 15, which are letters from the brother of plaintiff 2 to defendant 1, show that defendant 1 really suggested the adoption of plaintiff 1 in preference to other boys who were selected for the purpose. Ex. H, written by defendant 1 to his natural elder brother on 5th November 1909 refers to the boy's tonsure ceremony and says that the natural father of the boy may be asked to have it performed at Simmachalam and that Dattahoman will take place in March or April 1910.

There are letters from defendant 1 to the natural father of the boy, Exs. K and J, which prove that the boy was selected by defendant 1 for adoption. In the school leaving certificate Ex. R, the boy's family name is given as that of defendant 1's family and defendant 1 is referred to as guardian. Then follow Exs. 16 and 17 from plaintiff 2's brother to the defendant 1, in which referrence is made to the fixing of the date for the Dattahomam. Exs. M and L from defendant 1 to plaintiff 2's brother also refer to the same snbject. Matters seems to have gone on amicably until June 1910 when for reasons which have not been disclosed in evidence plaintiff 2 and defendant 1 fell out. We have no correspondence between June 1910 and November 1911 as to the cause of the ill-feeling. Then we come to the litigation which was started by defendant 1. Exs. 1, 2, 4, U and W show that he brought a suit for an injunction to restrain plaintiff 2 from adopting plaintiff 1. The litigation ended unsuccessfully to defendant 1. The various documents to which I have referred leave no room for doubt that defendant 1 actually participated in the selection of plaintiff 1 for adoption and that he was prepared to have the Dattahoman performed in March or April 1910 and that this ceremony was put off owing to the intervention of inauspicious events. Further there is the oral evidence of

P. W. 12, the adoptive mother which is clear and consistent. This is what she says:

"About four or five years after the death of my father-in-law my adopted son Ramamurthi died. I then asked defendant 1 to get me another boy for adoption and he promised to get me a boy having given his consent for a fresh adoption."

She then refers to the selection of other boys and says :

"Defendant 1 then said that he would get the son of his sister's daughter from Garabanda of the Parlakimidi Taluk. I, my brother Audinarayana and defendant 1 went to Palasa and the boy's father brought the boy to Palasa on the receipt of the letter from defendant. I saw the boy and liked him."

This evidence is corroborated by the evidence of P. W. 1, who took a prominent part in carrying on correspondence on behalf of his sister, plaintiff 2, with defendant 1 and P. W. 3, the natural father of the adopted boy. There is no reason for discrediting the testimony of these witnesses, and I therefore agree with the District Judge that defendant 1 gave his consent for a second adoption by plaintiff 2 and that he selected plaintiff 1 for that purpose. Excepting the bare denial of defendant 1, there is no evidence worth the name as against the oral and documentary evidence adduced on behalf of the plaintiffs. The second question of fact which was argued by Mr. Ramesam for the appellants relates to the giving and taking of the boy in July 1909. I felt considerable doubts during the course of the argument whether the finding of the District Judge that there was no giving and taking is correct. On fuller consideration I have come to the conclusion that we must uphold his finding. The District Judge himself says that but for the fact that in the previous litigation this theory of giving and taking was not set up he would have come to a different conclusion. The oral evidence is strong on the point, and it was not seriously shaken in cross-examination. There is however one document which is entirely inconsistent with the theory of giving and taking in July 1909. Ex. 15 is a letter written to defendant 1 by plaintiff 2's brother dated 30th October 1909. The writer says :

" As we are all satisfied as to Chiranjeevi Laxminarayana you would consider well whether you would send word to his father's house."

If the giving and taking had been completed in July 1909 such a letter would be meaningless. Apparently the boy was taken on trial, and was kept in the house of defendant 1, as had been done in the case of other boys who were rejected. This document coupled with the omission to state this point in Ex. 2, the written statement filed by plaintiff 2 in the suit of 1911, throws doubt upon the oral testimony given in the case. On the whole, though not without hesitation, I have come to the conclusion that there was no giving and taking in 1909. The conclusion on facts is that plaintiff 2 had the consent of defendant 1 to take plaintiff 1 in adoption, plaintiff 1 was taken to the family house of the parties with a view to the religious ceremony of Dattahomam being performed, and that defendant 1 subsequently prevented the adoption taking place and that plaintiff 2 took the boy in adoption in spite of this opposition in 1913. The question of the sufficiency of the consent was not seriously argued by Mr. Sarma. Even granting for the sake of argument that the family was undivided, defendant 1 as the managing member would be the only person whose assent need be sought for. Further the other members of the family were all minors in 1909. If the family were divided, defendant 1 as the nearest reversioner to the estate of plaintiff 2's husband was alone competent to authorize the adoption. On the question whether a consent once given can be arbitrarily withdrawn before it was acted upon, there is no direct authority. There is nothing in the Hindu law texts on the subject. Therefore before considering the few cases which were quoted as containing pronouncements which logically conclude the question against the plaintiff, I shall endeavour to examine the reason of the rule.

As a widow in a Mitakshara family is generally incompetent to act sui juris, she can make an adoption only if she is authorized to do so by her husband. To this an exception has been engrafted, to the effect that the absence of this authority can be made good by the assent of sapindas; this power has been given to the sapindas, as they are interested in the property and are expected to see that the spiritual welfare of the deceased kinsman is not jeopardized. Their consent is equivalent to an expression of opinion that the adoption is necessary for the spiritual benefit of the deceased and for securing the secular management of his properties.

In *Sri Virada Pratapa Raghunada Deo* v. *Sir Brozo Kishore Deo* (1) the Judicial Committee speak of these sapindas as "councillors and protectors" of the widow. An analogy for this may be found in the consent of the nearest reversioner being regarded as evidence that the alienation was for justifiable purposes. In the one case the assent is evidence that the widow is not acting capriciously to serve her own ends and in the other that she is not illegally disposing of property solely to benefit herself. In both the cases the assent is presumptive evidence of the goodness of the act. It is open in either case to rebut the presumption. It can be shown that the assent to the adoption was obtained by fraud, misrepresentation, etc., or that it was given from interested or corrupt motives: *Sri Virada Pratapa Raghuada Deo* v. *Sri Brozo Kishore Deo* (1), as it can be shown that the consent of the reversioner to an alienation was not given bona fide. This train of thought precludes me from acceding to the proposition that mere lapse of time without more, or the death of the consenting sapinda would put an end to the authorization freely and bona fide granted. It is settled that the fact that a consent to an alienation was given by a reversioner who is dead would not by itself be sufficient to enable the reversioner entitled to succeed to the property to impeach that consent. In my opinion the same reasoning should govern the assent to an adoption.

I can understand the party granting the permission deliberately revoking it for justifiable reason. Sir James Colville says in the case already referred to: "To authorize an act implies the exercise of some discretion whether the act ought or ought not to be done." Sir Lawrence Jenkins in *Bhimappa* v. *Basawa* (2) says that "the consent required is a matter not of form but of substance" and that "it implies an intelligent concurrence on due consideration." Some learned Judges go the length of holding that the assenting sapinda stands in a fiduciary position to the widow. *Ramchandra Bhagavan* v. *Mulji Nanabhai* (3) is apparently based on this view. In *Narasimha Appa Row* v. *Parthasarathy Appa Row* (4) Lord Moulton speaks of the authority given to the widow by the husband as being equivalent to a power of appointment. It will not be an undue stretch of this analogy to characterise the authority vested in the sapindas as a power to consent to the exercise of the power of adoption. In any view the consent should be given not capriciously or from corrupt motives but on a fair consideration of the circumstances which would justify the exercise of the prerogative. In *Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* (5) their Lordships of the Judicial Committee pointed out that an assent of a sapinda procured by misrepresentation was not sufficient to validate an adoption. This principle would apply mutatis mutandis to the power of revocation which a sapinda may exercise. I am willing to concede that it is open to a party to revoke a consent before it is acted upon. Further if a Court can pronounce on the validity of the consent I fail to see why the party himself should not be allowed to re-consider his decision. He can review his opinion just in the same way as Tribunals can their decisions. It may be, as argued by Mr. Sarma, that the sufficiency of the reason should not be convassed by Courts. If he acts honestly and puts forward grounds which would satisfy a person of ordinary prudence that he was acting to the best of his knowledge and belief it is open to argument that Courts should not scrutinize his reasons. At the same time I am unable to assent to the contention of the learned vakil for the respondents that where the party professing to revoke the consent assigns no reasons his legal advisers can draw attention to materials on which his conclusions might have been based. What the Courts are concerned with is not what might have operated on the mind of the revoking party but what did influence him. The judgment of his legal advisers should not be substituted for the party's.

For the above reasons I am of opinion that a sapinda cannot arbitrarily withdraw his consent, and that the question is not whether the Courts should find out a justification for the revocation but whether a justification was offered. In the pre-

(1) [1876] 1 Mad. 69=3 I. A. 154 (P. C.).
(2) [1905] 29 Bom. 400.
(3) [1898] 22 Bom. 558.
(4) [1914] 37 Mad. 199=23 I. C. 166=41 I. A. 51 (P. C.).
(5) [1878] 2 Mad. 270=7 I. A. 173 (P. C.).

sent case, defendant 1 strenuously denied that he gave his consent and he has not set forward any grounds in the written statement or in his evidence to justify the withdrawal of the consent. It would therefore be wrong to permit any speculation regarding what might have led the defendant 1 to act in the way he did. I must hold that he acted arbitrarily in refusing his assent to the factum of adoption, and that this conduct on his part is not enough to nullify the consent which was voluntarily and bona fide given by him. I shall now proceed to deal with the few cases that were cited in the argument. *Mani* v. *Subbarayar* (6) was strongly relied on for the respondents. In that case the learned Judges inclined to the view that a consent lapses with the death of the consentor. The reasoning which I have pursued is not quite in accordance with this proposition. I am not saying that it is not open to the sapindas who are alive at the time of the adoption to prove that the assent of the dead man was not obtained honestly. If that was so obtained, I would hesitate to hold that the death of the consentor puts an end to the consent. But I do not want to pursue the matter further. Reliance was placed upon the sentence:

"It must we think be conceded that if a sapinda who has given his consent withdraws it afterwards, the widow would not be entitled to act upon such consent, and it seems to us to be unreasonable to hold that a consent once given should become irrevocable by the death of the sapinda giving the consent so as to override the opinion of the sapindas who subsequently became entitled to be heard."

I do not think the learned Judges intended to lay down that the withdrawal can be arbitrary. They had not that aspect of the question before them. The observations in *Subrahmanyam* v. *Venkamma* (7) on which the learned Judges in *Mani* v. *Subbarayar* (6) rely were purely obiter. No question of revocation was considered in the earlier case. Attention may also be drawn to *Nagarampalli Kanesam* v. *Nagarampalli Batchamma* (8), where attempts seem to have been made to explain away the pronouncement in *Mani* v. *Subbarayar* (6). See also *Krishnayya* v. *Lakshmipathi* (9). There is no pronouncement of the Judicial Committee or of the other High Courts on this question. In my opinion it would be opposed to all notions of fair play and justice that the party who is clothed with the authority to consent to an act should after giving his deliberate vote in its favour be permitted arbitrarily and capriciously to resile from it. I therefore hold that plaintiff 2 was justified in taking plaintiff 1 in adoption notwithstanding the demur of defendant 1. In this view it is unnecessary to consider whether the will of Subudhi brought about a severance of the co-parcenary interest among the members of his family. On a minor point argued by Mr. Sarma, in the memorandum of objections, namely, ground No. 11 I agree with the conclusion of the District Judge.

After we reserved judgment Mr. Sarma asked permission to argue a new point of law. Although this was not raised in the Court below we heard him as the question did not involve the consideration of any fresh evidence. The contention was that as according to the plaintiff, the share taken by plaintiff 2's first adopted son was self-acquired property and as on the death of that adopted son the property was inherited by plaintiff 2 as mother, the second adoption was incapable of divesting her of that inheritance. Mr. Ramesam repudiated the suggested interpretation of the plaintiffs case. It is needless to go into the question; granting for arguments's sake, that the share taken by the first adopted son was his self-acquisition, there is no warrant for the contention that the inheriting mother could not be divested of that property by the adoption which she made subsequently. The Guntur case: *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (10) is authority for the proposition that a mother succeeding as heir to her son would be divested by her adopted son of the inherited property. There can be no distinction in principle between property owned as ancestral or which is taken as self-acquisition. The case of *Mt. Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhury* (11) related to the property which vested in the widow of the adopted son. In the present case, the first adopted son died unmarried. We must therefore overrule this contention. For the above reasons the decision of the District Judge, in so

(6) [1913] 36 Mad. 145=19 I. C. 663.
(7) [1903] 26 Mad. 627.
(8) A. I. R. 1914 Mad. 77=24 I. C. 257.
(9) [1916] 32 I. C. 253.

(10) [1876] 1 Mad. 174=4 I. A. 1 (P.C.).
(11) [1863] 10 M. I. A. 279=3 W. R. 15 (P.C.).

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far as it dismisses the suit of plaintiff 1, must be reversed and his decree should be modified by declaring that plaintiff 1 as adopted son is entitled to the share decreed to plaintiff 2. The memorandum of objections must be dismissed with costs. The appellants are entitled to their costs in this and in the Court below and the costs will be taxed on the value of the property decreed to plaintiff 1.

Ayling, J.—I agree.

S.N./R.K. *Decree varied.*

A. I. R. 1919 Madras 1082

WALLIS, C. J. AND NAPIER, J.

Papala Chakrapani—Plaintiff—Appellant.

v.

Lachimiachi — Defendant — Respondent.

Second Appeal No. 2592 of 1914, Decided on 9th January 1918, against the decree of Temporary Sub-Judge, Tanjore, in Appeal Suit No. 40 of 1916.

(a) Transfer of Property Act (4 of 1882), Ss. 67 and 101—Assignment of mortgage—Notice to mortgagor is not essential—Absence of notice makes it subject to accounts between original parties.

There is no necessity to give notice of an assignment of a mortgage to the mortgagor, and such want of notice will not render the sub-mortgage invalid, save in so far as the assignee holds subject to the accounts between him and the original mortgagee. [P 1082 C 2]

(b) Mortgage—Rights of mortgagor—Substitution of mortgage by another mortgage does not affect rights of sub-mortgagee to bring property to sale covered by earlier mortgage—Mortgagor's only remedy is redemption.

The substitution of one mortgage by another mortgage will not affect the rights of a sub-mortgagee from the original mortgagee to bring the mortgagee's rights under the earlier mortgage to sale. [P 1083 C 1]

A sub-mortgagee has the right to sell the mortgagee's rights against the particular properties sub-mortgaged to him for the whole amount due to him and the mortgagor's remedy against him is just what he would have against the orignal mortgagee if the latter sought to enforce his debt against those particular properties, viz., to redeem by paying the amount due. [P 1083 C 1]

T. R. Ramachandra Aiyar, *T. R. Krishnaswami Aiyar* and *N. A. Krishna Aiyar*—for Appellant.

K. N. Aiyar—for Respondent.

Judgment.—This second appeal comes before us for re-hearing so far as respondent 12 is concerned, our judgment in Second Appeal No. 2592 of 1914 and the decree being to that extent set aside. The points arising have now been re-argued on behalf of that respondent. With regard to the question of proof of the sub-mortgage sued on we do not think it necessary to say more than that we consider the proof sufficient. The point most strongly pressed on us was that the plaintiff's sub-mortgage does not now legally affect the property covered by the original mortgage which it purported to charge, that mortgage having beed discharged by the substitution of two mortgages, Ex. C and D, covering distinct portions of the property and executed by two different branches of the family, both documents being executed in ignorance of the existence of the sub-mortgage in favour of the plaintiff's predecessor-in-title. We have asked the learned vakil for authority for the proposition that a sub-mortgage executed without notice to the mortgagor was invalid or that such a sub-mortgage could be rendered inoperative except by redemption of the mortaged property, and he has been unable to to give us any such authority. He has contended, however that substitution must have the same operation as redemption, the interest affected having been destroyed.

This proposition is clearly unsound in principle and has been negatived by authority of that Court. It was laid down in *Jones* v. *Gibbons* (1) that there is no necessity to give notice of an assignment to the mortgagor: vide Fisher on Mortgages, p. 631, and White and Tudor's Leading Cases in Equity, Edn. 7, Vol. 2, p. 38, [Edn. 8, p. 43] where the cases are collected. In *Matthews* v. *Wallwyn* (2) it was held that the only rights of a mortgagor without notice of the assignment are that the assignee holds subject to the account between him and the original mortgagee. This latter proposition was re-affirmed in *Chambers* v. *Goldwin* (3). This principle applies both to payments made prior to the assignment and to those subsequent to it: vide Halsbury's Laws of England, Vol. 21, p. 179, and *Dixon* v. *Winch* (4), where the limits of the doctrine were considered. As pointed out in our previous judgment the case in

(1) [1804] 9 Ves. (Jun.) 407=32 E. R. 659.
(2) [1798] 4 Ves. (Jun.) 118=31 E. R. 62.
(3) [1804] 9 Ves. Jur. 254=32 E. R. 600.
(4) [1900] 1 Ch. 736=69 L. J. Ch. 465.

Narayana Mudali v. *Raghavammal* (5) is a direct authority on the point argued before us. It was there held that a subsequent mortgage in consideration of further advances to the mortgagor although it might operate as a merger of the earlier mortgage as between the original mortgagor and the mortgagee:

"could not prejudice the rights of the submortgagee, or affect his rights to bring the mortgagee's rights under the earlier mortgage, to sale."

The right to the state of account between the original parties was also recognized, but in that case as in this it was found that the mortgagor had paid nothing. The next point taken was that the submortgagee could not bring a suit for sale of some of the items covered by the original mortgage which items alone were sub-mortgaged to him by Ex. B. There is nothing in this objection. The rights of a sub-mortgagee are stated in a decision of a Full Bench of the Allahabad High Court, *Ram Shankar Lal* v. *Ganesh Prasad* (6), as follows:

"A sub-mortgagee is entitled to a decree for sale of the mortgagee rights of his mortgagor subject to the right of redemption by the original mortgagor."

In this case the right of the original mortgagee was to bring any one of the properties to sale for the amount of his debt. His right with regard to some of those properties he has assigned by way of sub-mortgage for a sum less than the amount covered by the original mortgage and it is now vested in the plaintiff. The plaintiff has therefore the right to sell the mortgagee's rights against those particular properties for the whole amount due to him, and the mortgagor's remedy against him is just what he would have against the original mortgagee if the latter sought to enforce his debt against those particular properties, namely, to redeem by paying the amount due and sued for. We must therefore set aside the decree of the lower appellate Court with costs payable by respondent 12 both here and in the lower appellate Court, and restore the decree of the District Munsif. Time for redemption is extended for three months from this date.

S.N./R.K *Appeal allowed.*

(5) [1908] 18 M. L. J. 462.
(6) [1907] 29 All. 385.

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* A. I. R. 1919 Madras 1083
Full Bench

ABDUR RAHIM, SADASIVA AIYAR AND NAPIER, JJ.

Ramanathan Chetty and *others*—Plaintiffs—Appellants.

v.

Ranganathan Chetty and *others*—Defendants—Respondents.

Letters Patent Appeal No. 219 of 1915, Decided on 4th May 1917, against judgment of Wallis, C. J., D/- 4th November 1915.

*** (a) Transfer of Property Act (1882), Ss. 51, 54 and 118—Unregistered deed of exchange — Possession given — Buildings erected by transferee with knowledge of transferor—Transferee can recover land on payment of compensation.**

Plaintiffs and defendants exchanged two plots of land worth more than Rs. 100 each by an unregistered deed, both of them believing that the exchange did not require registration. Possession was taken by each party of the plot received by him under the exchange. Defendants thereupon erected a huge building costing about Rs. 40,000, placing the wall of the building on one side on the land obtained by them under the exchange. During the time the building was in progress plaintiffs demanded and obtained a sum of Rs. 525, alleging that the land they had parted with was larger than the land they had received. Long after the completion of the building plaintiffs brought a suit for the recovery of the land parted with by them under the exchange, on the ground that the deed of exchange, not having been registered, conveyed no interest in the immovable property. Defendants contended that the transfer had been acted upon and considerable money spent in erecting valuable buildings on the land, with the knowledge of and encouraged by the plaintiffs and that it was, thereafter, not open to the plaintiffs to claim recovery of the land:

Held: (*Abdur Rahim, J.*, dissenting) that the plaintiffs were entitled to recover possession of the land on payment of compensation to the defendants and that the latter could not resist the plaintiffs' claim on the ground of part performance, acquiescence or estoppel.

Per *Abdur Rahim, J.*—That the conduct of the plaintiffs, in obtaining from the defendants Rs. 525 on account of the excess land while construction of the building was in progress amounted to a representstion that the transaction of exchange was valid, and that the defendants were actively encouraged thereby to go on spending money on the faith of the representation, and that this was sufficient to estop the plaintiffs from contending that the title did not pass to the defendants, even if no estoppel arose from their previous conduct. *Case law discussed.* [P 1088 C 2; P 1089 C 1]

(b) Fraud—Insisting on rights fraudulent —Other party can be relived against.

In cases where owing to his own conduct it would be clearly inequitable or fraudulent for a party to insist upon his legal rights, it is the

duty of a Court of Equity to give relief to the other party who has suffered by such conduct.

[P 1086 C 1]

(c) Transfer of Property Act (1882), S. 54—Instrument unregistered—Suit for possession—Ingredients for defence of part-performance indicated.

What are the circumstances which should be sufficient to raise an equity that would be an answer to a suit for possession by a person who purported to convey the property by an unregistered instrument, must depend on the facts of a particular case. But they must be such as should have altered, though not irretrievably the position of the defendant acting on the faith of the bargain sought to be resiled from.

[P 1086 C 1, 2]

(d) Acquiescence—Essentials of.

Per *Napier, J.*—The essence of the doctrine of estoppel by acquiescence is that the acquiescence should occur in a party who knows that his right is being infringed. [P 1092 C 1]

*** (e) Transfer of Property Act (1882), S. 51—Transferee includes transfer under invalid sale.**

A wide meaning should be given to the word "transfer" in S. 51 and it should be read as including a person to whom land is purported to be transferred. [P 1095 C 2]

Per *Sadasiva Aiyar, J.*—The word "transferee" in S. 51 includes also a transferee under an invalid transaction of transfer, and the words "the person causing the eviction" include also the transferor under an invalid transaction of transfer. [P 1090 C 2]

(f) Transfer of Property Act (1882), S. 51—Person believing in good faith that he is owner and building cannot be allowed larger rights than are mentioned in S. 51.

Section 51 indicates that a person believing in good faith that he is absolutely entitled to property and building on it cannot be allowed to claim larger rights than are mentioned in that section, namly, either to have the value of the improvements made by him estimated and paid by the evictor or to require the evictor to sell his interest in the property at the then market value irrespective of the building. But the option is with the perons entitled to evict.

[P 1090 C 2]

S. Srinivasa Aiyangar and *K. Rajah Aiyar*—for Appellants.

T. R. Venkatarama Sastri and *A. Krishnswami Aiyar*—for Respondents.

Abdur Rahim, J. — The question raised by this Letters Patent Appeal is one of considerable importance and difficulty. It is, to put it shortiy, how far it is open to the Court to refuse to recognize the title of the plaintiffs-appellants suing to recover immovable property of the value of more than Rs. 100, which they purported to convey to the defendants-respondents by an unregistered document, on the ground that the transfer has been acted upon by the latter who spent considerable money in erecting valuable buildings on the land, with the knowledge of and encouraged by the appellants. The facts are sufficiently set forth in the judgments* of the learned Chief Justice and Seshagiri Aiyar, J., who took different views, and it is unnecessary to repeat them in detail. The result of the finding is that at the time of the transaction in question, which was an exchange of two plots of land between the appellants and the respondents, both the parties believed that the document evidencing the exchange did not require registration. Possession was taken by each party of the plot received by him under the exchange. The respondents erected a building which cost about Rs. 40,000, placing the wall of this building on one side on the land which they had got in exchange, and the appellants during the time the building was in progress also demanded and obtained a sum of Rs. 525 from the respondents as compensation, on the allegation that the land which they had parted with was larger in quantity than the land which they had received from the respondents. It is further found that the object of the appellants, in instituting the suit to recover the land which belonged to them before the exchange and which they say still belongs to them notwithstanding the attempted transfer, is not so much to benefit themselves as to injure the respondents. The question for decision, however, is one purely of law, viz., whether, under the circumstances the equities in favour of the defendants are a sufficient answer to the plaintiffs' suit fo rejectment.

The effect of Ss. 54 and 118, T. P. Act, on what has taken place in this case is, that Ex. B which is described as an agreement of exchange is ineffectual to create a valid transfer of the plaintiffs' land, and by reason of S. 49 read with S. 17, Registration Act, that document cannot be held to affect the right of the appellants to the property in dispute. On behalf of the appellants it is argued that their title to the property remains and as the suit is within time, to refuse their claim for recovery of the land will be virtually nullifying the enactment of the legislature, the effect of which is to preserve the title in them in spite of what has taken place. The answer to this argument on behalf of the respondents is that in none of the enactments

[*Ramanathan Chetty* v. *Ramasami Chetty*, (1916) 32 *I. C.* 5.]

referred to, does the legislature purport to deal with the question of rights based on equities arising from the actings and conduct of the parties. It is argued that it is open to the Court to say to the appellants :

"It is true that your rights in the property have not been transferred to the respondents by the instrument in question, but having regard to what has taken place it will be fraudulent on your part to set up your legal title against the respondents and the Court will not help you to perpetrate the fraud."

Such an answer to the suit is, in my opinion, in accord with well-recognized equitable principles, of the application of which there are many instances in the law. One of them is the doctrine of part performance by which the operation of the Statute of Frauds in England is prevented from being used for purposes of committing fraud. The Statute of Frauds provides that

"no action shall be brought whereby to charge any person upon any contract or sale of land . . . . . unless the argument . . . . . shall be in writting . . . . . .etc."

No doubt it has been held that this provision relates to procedure, but as it has been pointed out by Fry, L. J., in his book on Specific Performance, it really goes to the solemnities of the contract. (See para. 47, p. 254). It is not necessary for the application of this equitable doctrine that there should have been a fraudulent conception from the beginning. It is sufficient if the circumstances render it a fraud on the part of the party relying on the Statute to take advantage of the fact that the bargain was not recorded as required.

I fail to understand why this equitable rule should not be applied to a transaction purporting to be a transfer in pursuance of a valid contract. On the other hand, there would seem to be less difficulty in ayplying the doctrine in such cases than where its aid is sought to compel the defendant to carry out a parol contract, in spite of a Statute which says that no action shall be brought to enforce such a contract. Further if a defendant can be debarred because of his conduct from setting up a statutory defence, it should be easier to uphold the defence to such a suit at this on the ground that although the transfer which the appellants purported to make to the respondents was invalid, it would be inequitable on their part, having regard to the fact that the latter have acted upon it in such a way as to alter their position, than to resile from the bargain to the prejudice of the respondents.

The question, how far the actings of parties can be allowed to affect the application of S. 54, T. P. Act, to cases of this class was discussed by a Full Bench of this Court in *Kurri Veerareddi* v. *Kurri Bapireddi* (1), where the previous rulings on the subject were considered in detail. The law as laid down there would undoubtedly be binding on us unless, as suggested by the learned Chief Justice, the pronouncement of the Privy Council in a latter case in *Mahomed Mussa* v. *Aghore Kumar Ganguli* (2) make it necessary that we should reconsider that ruling. It was held by the Full Bench that

"a contract of sale followed by delivery of possession does not, when there is no registered sale, create any interest in the property agreed to be sold and cannot, even if enforceable at date of suit or decree, be pleaded in defence to an action for ejectment by one having a legal title to recover."

Then there are general observations in the judgments delivered by the learned Judges in which the duty and expediency of giving full effect to the words of the Statute is emphasised as against recognition of equities modifying the application of the Statute Law. So far as it holds that delivery of possession under an unregistered instrument of sale is not a sufficient answer to a suit by the vendor to recover possession, I am not prepared to express any doubt on the correctness of the ruling. The Transfer of Property Act contemplates sales being effected in some cases by delivery of possession and in others only by a registered instrument, and to hold that in cases of the latter class, where the legislature insists on a registered instrument, mere delivery of possession would be sufficient would be going directly against the wishes of the legislature: see *Lalchand Motiram* v. *Lakshman Sahadu* (3) and *Jagadbandu Saha* v. *Radha Krishna Pal* (4). Even with reference to the rulings under the Statute of Frauds, Lord Blackburn said in *Maddison* v. *Alderson* (5) that if the matter were res integra, he would not go

(1) [1906] 29 Mad. 336.
(2) A. I. R. 1914 P. C. 27=28 I. C. 930=42 Cal. 801=42 I. A. 1 (P. C.).
(3) [1904] 28 Bom. 466.
(4) [1909] 36 Cal. 920=4 I. C. 414.
(5) [1883] 8 A. C. 467.

so far as to hold that delivery of possession of the land would take the case out of the Statute. And it is possible that too many exceptions have been allowed to the operation of the Statute of Frauds (See Story's Equity Jurisprudence, Ss. 765 and 766). However that may be in cases where owing to his own conduct it would be clearly inequitable or fraudulent for a party to insist upon his legal rights, it is the duty of the Court of Equity to give relief to the other party who has suffered by such conduct. So far Lord Blackburn entertained no doubt. He says:

"The conduct of the parties may be such as to make it inequitable to refuse to complete a contract partly performed. Wherever that is the case, I agree that the contract may be enforced on the ground of an equity arising from the conduct of the party."

That seems to be in accord with what is laid down by the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli* (2). *Lakshmi Venkayyamma* v. *Venkatanarasimha* (6) and in an earlier case in *Immudipatam Thirugnana Kondama Naik* v. *Periya Durasami* (7). Before dealing with the Privy Council decisions, however I shall mention the case, *Young & Co.* v, *Mayor of Royal Leamington Spa* (8), where it was held that a contract entered into by an urban authority but not under seal as required by a Statute did not bind the Corporation, and therefore the plaintiff who had carried out certain works in pursuance of such an agreement could not recover the value of what he had done. But the basis of this decision was that the Corporation could exercise its statutory power to enter into contracts only by the observance of certain solemnities, that is the affixing of the seal, intended for the protection of rate-payers and there was no room, therefore in such a case for the operation of the equitable doctrine of the part performance. What are the circumstances which should be sufficient to raise an equity that would be an answer to a suit for possession by a person who purported to convey the property by an unregistered instrument, must depend on the facts of a particular case. But they must be such as should have altered though not irretrievably, the position of the defendant acting on the faith of the bargain sought to be resiled from. If the effect of *Immudipatam Thirugnana Kondama Naik* v. *Periya Durasami* (7) be that even in such cases the plaintiff is entitled to eject the defendant, I venture to think, as I shall show presently, that it is no longer good law after the pronouncements of the Judicial Committee in *Mahomed Musa* v. *Aghore Kumar Ganguli* (2) and *Lakshmi Venkayyamma* v. *Venkatanarasimha* (6). Nor is the proposition laid down in the Full Bench case, namely, that even where a valid contract of sale in favour of the defendant is proved, that would not be a sufficient defence to a suit in ejectment in such cases any longer tenable.

The case of *Mahomed Musa* v. *Aghore Kumar Ganguli* (2) related to transactions which took place before the passing of the Transfer of Property Act there is thus no question of the actual decision in that case being applicable here. But their Lordships of the Judicial Committee, while pointing out the fact that no written conveyance was necessary by the law of India, considered it desirable to lay down certain principles of general application which, as I understand their judgment, would not be affected by any such enactment as the provision of the Transfer of Property Act requiring certain classes of transfer to be in a particular form. They observe:

"To use language common from very early times in Scotland, and highly approved in the case of *Maddison* v. *Alderson* (5) in the House of Lords, it is no doubt true that there is a locus poenitentiae, that is, 'a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writting is requisite, and has not yet been adhibited in an authentic. shape"

This is the situation where the parties stand upon nothing but an engagement which is not final or complete. But where actings and conduct of parties are founded on, then in all such cases, to use the language of Professor Bell in his principles, S. 26

"rei interventus raises a personal exception, which excludes the plea of locus poenitentiate. It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, and if it were perfect; provided they are unequivocably referable to the contract and productive of alteration of circumstances, loss or incovenience, though not irretrievable."

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(6) A. I. R, 1916 P. C. 9=34 I. C. 921=39 Mad. 509=43 I. A. 138 (P. C.).
(7) [1901] 24 Mad. 377=28 I. A. 46. (P. C.).
(8) [1883] 8 A. C. 517.

Then they say that there is nothing in the law of India inconsistent with it but that upon the contrary, the law of India follows the same rule. They further quote with approval the statement of Lord Selborne, in *Maddison* v. *Alderson* (5) that the defendant in such a case is really " charged " upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were execluded, injustice of a kind which the State could not be thought to have had in contemplation would follow. It seems to me that the reasoning would apply with all the greater force to the present case, where it is the plaintiffs that are faced with equities resulting from the acts done by the defendants not merely on the faith of the contract, but also on the basis of further acts of the plaintiffs purporting to be done in perfecting the contract. It is observed by the Board that

"many authorities are cited in support of these propositions from English and Scotch law, and no countenance is given to the proposition that equity will fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon."

In my opinion the proposition laid down in such clear and emphatic language entirely covers this case. Their Lordships were, of course, aware that in India there was no Statute of Frauds and the Statute to which their observations were most applicable was the Transfer of Property Act. In a more recent appeal from the decision of this Court, *Lakshmi Venkayyamma*. v. *Venkatanarasimha* (6) their Lordships took occasion to repeat that the equitable principle enunciated by Lord Selborne in *Maddison* v. *Alderson* (5) was as pointed out by them in *Mahomed Musa* v. *Aghore Kumar Ganguli* (2), as much applicable in India as in England. That was a suit to recover possession of land on the strength of a contract, and the propositions which have been referred to above were cited in order to show that even if the acceptance of the proposal to convey the village in dispute might be considered to be defective, the defect must be taken to have been cured in view of the actings of the plaintiff. The case affords another illustration of the principle that equities may support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon.'

In an earlier case, *Immudipatam Thirugnana Kondama Naik* v. *Periya Durasami* (7), the Privy Council had expressed the same view in a case in which the provisions of the Transfer of Property Act made the mortgage in question in that suit invalid as not being made by a registered instrument. There it was contended that though the mortgage might fall short of an actual transfer, it showed a good contract for one and that the defendant might now call upon the heir of the mortgagor to implement that contract. Their Lordships said that if such a contract were proved, it would have been an answer to the plaintiff's claim and the exact form in which it could be enforced was not material. As pointed out by the learned Chief Justice, if the defendant in that case had sought to enforce the alleged contract by a suit, he would have been time-barred. Here there can be little doubt that there was a valid contract for transfer of the land in dispute by way of exchange, and it seems to me that *Immudipatam Thirugnana Kondama Naik* v. *Periya Durasami* (7) is authority for the proposition that it is a sufficient answer to the plaintiff's suit. No doubt the observation of the Judicial Committee, in *Immudipatam Thirugnana Kondama Naik* v. *Periya Durasami* (7) was considered by the Full Bench in *Kurri Veerareddi* v. *Kurri Bapireddi* (1) and put aside as an obiter. But now that the principle on which the dictum of the Privy Council was based has been so clearly explained and developed in *Mahomed Musa* v. *Aghore Kumar Ganguli* (2) and *Lakshmi Venkayyamma* v. *Venkatanarasimha* (6), we should no longer be justified in disregarding the principle itself because embodied in a statement not necessary for the decision of the case.

Another group of cases in which the operation of equity founded on the conduct of parties is exemplified is represented by *Gregory* v. *Mighell* (9), the rule of which is explained by Lord Kingsdown in the leading case of *Ramsden* v. *Dyson* (10) in these words:

"If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation, created or encouraged by the landlord that

(9) [1811] 18 Ves. (Jun.) 328.
(10) [1866] 1 H. L. 129.

he shall have a certain interest, takes possession of such land with the consent of the landlord and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory* v. *Mighell* (9), and, as I conceive, is open to no doubt."

Other well known cases illustrative of the same doctrine are *Plimmer* v. *Mayor of Wellington* (11) and *Attorney-General of Southern Nigeria* v. *Holt & Co.*, (12), where an irrevocable license from the Crown to erect jetties and buildings on the foreshore was presumed. The Judiciai Committee, while adverting in the latter case to the remark of Willes, J., in *Rogers* v. *Brooks* (13), that after so long a possession (i. e., of 36 years) he would presume anything in favour of the plaintiff and to the comment thereon of Lord Herschell, observes:

"in the opinion of the Board this passage does not support the proposition that a transfer of the dominium of lands can be effected without the presumption of a lost grant, or without possession during the full requisite period of prescription. But the case does bear upon a question of maintenance of possession considered apart from declaration of ownership."

The italics are mine. It is worthy of note that the facts of the case in *Anonymous* (14) referred to by the Chief Justice and which was cited with approval by Kay, J., in *McManus* v. *Cooke* (15), as laying down that if a man builds a house partly on his neighbour's land and the neighbour acquiesces in this being done, Courts of Equity will interfere to prevent him from disturbing it, very closely resemble the facts of the present case. Rulings of the above categories, which are really illustrations of the same principle on which the doctrine of part performance is founded, are based on grounds of acquiescence and Fry, J., in *Willmot* v. *Barber* (16), expressed the limitations of this rule in these words:

"In the first place, the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

The third condition mentioned in the above proposition must however be understood as subject to exceptions as Story, J. states in his Equity Jurisprudence, Second English Edition, S. 387:

"There are, indeed, cases where even ignorance of title will not excuse a party: for, if he actually misleads the purchaser by his own representations, although innocently, the maxim is probably applied to him that, where one of the two innocent persons must suffer, he shall suffer who by his own acts occasioned the confidence and the loss."

That is also the effect of S. 115, Evidence Act, as interpreted by the Judicial Committee in *Sarat Chunder Dey* v. *Gopal Chunder Laha* (17). The existence of estoppel does not depend on the motive or the knowledge of the matter on the part of the person making the representation. It is not essential that the intention of the person whose declaration, act or omission has induced another to act or to abstain from acting should have been fraudulent or that he shall not have been under a mistake or misapprehension. No doubt as observed by Lord Selbourne, the doctrine of estoppel by representation is applicable only to representation as to some state of facts alleged to be at the time actually in existence and not to promises de futuro which, if binding at all, must be binding as contracts. But representations as to the legal act of a party being valid, as was the case in *Sarat Chunder Dey* v. *Gopal Chunder Laha* (17), is within the meaning of S. 115, Evidence Act, and in the present case the conduct of the appellants in obtaining from the respondents Rs. 525 on account of this land while construction of the building was in progress amounted to a representation that the transaction of exchange was valid and the respondents were actively encouraged thereby to go on spending money on the faith of the

(11) [1884] 9 A. C. 699.
(12) [1915] A. C. 599.
(13) [1783]1 T. R. 431n.
(14) [1718] 2 Eq. C. Ab. 522.
(15) [1887] 35 Ch. D. 68.
(16) [1880] 15 Ch. D. 96.
(17) [1893] 20 Cal. 296=19 I. A. 203

representation. This at least is sufficient to estop the appellants from contending that the title did not pass to the respondents, even if no estoppel arose from what had happened previously.

The recognition of equities arising from the conduct of parties is not confined to transactions with respect to land, as held by Kay, J., in *McManus* v. *Cooke* (15) and as will also be seen from *Wilson, In re* (18) and the cases cited there by Horridge, J. In *Wilson, In re* (18) the question was as to the effect of actings on a deed of arrangement admittedly void for want of registration and an observation of Honyman, J., which had the approval of Lord Esher, M. R., is quoted:

"A man cannot say at one time that the transaction is valid and thereby obtain the advantage to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage."

Horridge, J., on the authority of that and other cases held that the appellant could not roly upon the invalidity of the deed of arrangement, observing:

"The view that I have taken does not make the registration of the deed good but prevents the appellant from relying on its invalidity."

The Indian cases before *Kurri Veerareddi* v. *Kurri Bapireddi* (1), as reviewed there show a conflict of decisions and it is unnecessary to discuss them again. The ruling in the Full Bench case has been followed in *Katkari Narasimha Raju* v. *Bhupati Raju Raghunadha Raju* (19). In *Thiruvenkata Chariar* v. *Seshadri Iyengar* (20), however, the Chief Justice and Shrinivasa Aiyangar, J., held that it did not apply to a suit in which the defendant was sought to be ejected by the plaintiffs who had brought the land from the owner by a registerd sale-deed but with the notice of a prior contract of sale in favour of the defendants, on the ground that the latter obtained a registered conveyance afterwards. In neither of these cases however the effect of the pronouncements of the Judicial Committee was taken into consideration. The only case brought to our notice in which it was considered is *Khagendra Nath* v. *Sonatan Guha* (21), and there the learned Judges expressed their dissent from *Kurri Veerareddi* v. *Kurri Bapireddi* (1) and gave effect to equitable considerations arising from the conduct and actings of parties in the light of the propositions laid down by the Judicial Committee. Agreeing with the learned Chief Justice, I would dismiss the appeal with costs. As my learned brothers Sadasiva Aiyar and Napier,, JJ., have taken a different view of the case, the order shall be as proposed by them.

Sadasiva Aiyar, J.—I had the great advantage, before I began to write this judgment, of a perusal of the opinion which my brother, Napier, J., has prepared in this case and which he is about to deliver. I agree with that judgment, except on one or two very minor points which will be mentioned in the course of the following judgment of my own. The estoppel in *Ramsden* v. *Dyson* (10) and *MacManus* v. *Cooke* (15) is based on what is called "a duty" on *A*, the owner of a land, to actively assert his title to that land and set up his adverse title when he sees *B* building upon his land, when (*B*) was supposing by mistake that he (*B*) was the owner of the land and not *A*. I am myself (with the greatest respect) inclined to doubt very much whether there is any such legal duty upon *A's* part to actively correct the mistake made by *B*. Especially where *B's* mistake was a very foolish and reckless mistake, why should not *B* suffer for it? However, as my learned brother has pointed out, there is nothing to show in the present case that the plaintiff knew his own subsisting title to the site when the building in question was being raised hy the defendant. In *Russell* v. *Watts* (22) Cotten, L. J., speaks of *A* letting *B* "run into a trap" by *A's* failure in his duty to undeceive *B*.

The learned Lord Justice was evidently not satisfied that the mere doctrine of estoppel by omission was sufficient to support the decisions and attempts to press into service the doctrine of "lying traps" which had been till then utilized only as a part of the law of torts. That doctrine of "trap" seems to have been once pushed too far in English Courts: see Crompton, J.'s dictum in an old case of *Gallagher* v. *Humphrey* (23), and I do not feel inclined to introduce all the refinements and uncertainties found in the subsequent English Case-law on this point into India. Under that doctrine, trespassers

(18) [1916] 1 K. B. 382.
(19) [1915] 31 I. C. 52.
(20) [1916] 34 I. C. 488.
(21) [1915] 31 I. C. 987.
(22) [1884] 25 Ch. D. 559.
(23) [1862] 10 W. R. 664=6 L. T. 684.

were sometimes converted into licensees, invitations to trespass by good-natured negligent owners of land were implied on most slender grounds and a man was made civilly liable in damages to trespassers because he was too indolent to fence his lands not even closely bordering on a highway. In short, moral and social duties were sought to be converted into legal duties. The rather too wide language (if I may say so with respect) used by some of the Law Lords in *Cooke* v. *Midland Great Western Railway* (24) was sometimes sought to be availed of for even extending the doctrine. In that case, however there was a statutory duty cast upon the Railway Company to fence their land and to keep the fencing in proper repair : and we also know that Railway Companies guilty of negligence are treated much less indulgently in England than in India. In the more recent case of *Latham* v. *Johnson* (25) this doctrine of trap has been however now confined within strict limits. Because some English decisions have established a legal duty on the negligent owner of the land for not looking after it and not preventing the public from trespassing upon it, I am not inclined to hold that Indian Courts ought to create a legal duty in *A*, the owner of a land, to actively take the trouble to warn a reckless person, *B*, who chooses to build on *A*'s land and to impose upon *A* the disability of losing his right to recover the possession of his land from a trespasser, because he did not give the warning to *B*.

As regards the cases like *Plimmer* v. *Mayor of Wellington* (11) and the *Attorney-General of Southern Nigeria* v. *Holt and Company* (12), these are not cases where *B* who built on *A*'s land was ignorant of *A*'s right. He knew it full well and yet built upon *A*'s land, believing that *A* was assenting to such building and would give him (*B*) a perpetual lease-right (or other similar right), *A* having conducted himself in such a manner as to induce *B* to entertain a reasonable belief that *A* assented to the building. These cases also do not apply to the facts of the present case, as the defendant did not believe that the plaintiffs continued to be the owners of the plaint site or that the defendant could build only with the plaintiffs' implied or express consent and had no power to build without such consent. He did not care for or expect plaintiffs' consent at all. The plaintiffs' conduct in not objecting had nothing to do with the defendant's activities in the building operations and the defendant did not expect from any such conduct that the plaintiffs as the then owners were going to give the defendant license to build with permanent right over the site and the building.

I am also of opinion that S. 51, T. P. Act indicates that the person *B*, believing in good faith that he is absolutely entitled to property and building on it, cannot be allowed to claim larger rights than are mentioned in that section namely either to have the value of the improvements made by him estimated and paid by *A* (the evictor) or to require the evictor *A* to sell his interests in the property at the then market value irrespective of the building. I agree with Seshagiri Aiyar, J., that the opinion is with *A*, the person entitled to evict, in this case the plaintiffs. I think the word 'transferee' in S. 51 includes also a transferee under an invalid transaction of transfer and the words "the person causing the eviction" include also the transferor under an invalid transaction of transfer. As regards the Privy Council decision in *Lakshmi Venkayyamma* v. *Venkatanarasimha* (6) I am clear that the language of their Lordships at p. 143 (of 20 *M. L. T.*) clearly implies that their Lordships were aware that the decree should be strictly (a) for execution of a conveyance in plaintiff's favour, and (b) for possession of the plaint lands, these being the two reliefs ordinarily claimed and decreed in a successful suit for specific performance of a contract of sale, but their Lordships thought that as a receiver had been appointed in the suit and such receiver (as an officer of the Court) would act upon their Lordships' judgment (as he was bound to do) without the necessity of the plaintiffs applying for execution of the decree, the shape of their Lordships' decree need not include a direction for the execution of a conveyance and that the decree for delivery of possession alone "in the terms of the contract affirmed" as valid by the Privy Council would be sufficient give to the plaintiff full relief, especially in view of the declaration of the plaintiff's title as owner and her being given possession through the officer

(24) [1909] A. C. 229.
(25) [1913] 1 K. B. 398.

of the Court. I am unable however to agree with the contention of the learned Advocate-General (and I regret that on this point I differ from my learned brother, Napier, J.) that the contract relied on by the plaintiff in the above Privy Council case is not a contract to convey, falling under S. 54, T. P. Act but is governed by S. 9 of that Act.

I would allow the appeal and pass an order for return of a finding on the issue in terms of the last paragraph of the judgment of Seshagiri Aiyar, J. The parties will bear their respective costs throughout. Three months for return of finding and ten days for objections.

Napier, J.—The question raised in this appeal is, whether in the circumstances, the defendant is entitled to resist the suit brought by the plaintiff to recover possession of land which he, the defendant, received from the plaintiff in exchange for other land, the exchange not having been made in accordance with the provisions of S. 118, T. P. Act. The first ground on which the claim is resisted is that of estoppel. Mr. T.R, Venkatarama Sastri relies on the fact that one year after the exchange purported to have been made and the parties took possession of the respective plots, the plaintiff claimed a sum of money by way of compensation for the difference in size of the two plots and that he received it knowing at the time that the defendant was building on the land. He has strenuously urged that this receipt of the money intentionally caused the defendant to believe that the property was his. I am however unable to see how this argument arises on the facts. The money was claimed and received by the plaintiff in the full belief that he had no longer any title to the land which he had parted with and in compensation for deficiency in area. It had nothing to do with the fact that the defendant was building, and would have been claimed by him whether the defendant built or not. It represented nothing more than the full completion of the contract to change. It is impossible to argue that the facts of this case can be brought within the doctrine of estoppel as laid down in the well-known case of *Willmot* v. *Barber* (16), where the requirements for estoppel by reprssentation under English law are set out and it has been expressly held by the Privy Council that S. 115, Evidence Act reproduces the English law on this point. It is however argued that there is a doctrine of equitable estoppel which is more favourable to persons in the position of this defendant. This doctrine is referred to by Lord Justice Bowen in *Proctor* v. *Bennis* (26) as the equitable doctrine of acquiescence, authority for which is to be found in the case of *Ramsden* v. *Dyson* (10). It is important to ascertain exactly the limits of this doctrine as it has been expressly applied to this country by the Privy Council in *Beni Ram* v. *Kundan Lal* (27). I gather from the language used by the learned Chief Justice in this case under appeal that he relies on *Ramsden* v. *Dyson* (10) and a later case, *Mac Manus* v. *Cooke* (15). The doctrine in *Ramsden* v. *Dyson* (10) is as follows:

> "If a stranger begins to build on my land, supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money. It considers that when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title."

It is however clearly stated in a later passage that to raise the equity the real owner should at the time know that the land belongs to him (vide p. 141). This condition is insisted on in *Proctor* v. *Bennis* (26), where Cotton, L. J., says that

> "the party who has suffered, should have been acting in ignorance of the title of the other man and that the other man should have known that ignorance and not mentioned his own title."

and Bowen, L. J., says,

> "in order to make out such acquiescence it is necessary for them to establish that the plaintiff stood by and knowingly allowed the defendant to proceed and expend money in ignorance of the fact that he, that is the person setting up his claim had rights and meant to assert such rights."

In an earlier case, *Russell* v. *Watts* (22), the same learned Lord Justice Cotton, L. J., states as follows:

> "The knowledge by *A* of *B's* mistake imposes on *A* the duty to undeceive him, If he knows facts which are unknown to the other persons and does not inform them about it but lies by and lets them run into a trap."

The whole subject is considered in White and Tudor's Leading Cases in Equity under the heading "Equitable Estoppel," where a large number of cases are collected and the proposition is thus

(26) [1887] 36 Ch. D. 740.
(27) [1899] 21 All. 496=26 I. A. 58 (P. C.).

stated by the learned editor from the language of the Court of Appeal in a case in *DeBussche* v. *Alt* (28):

"If a person having a right and seeing another . . .committing an act infringing upon that right stands by in such a manner as really to induce the person committing the act. . . . to believe that he assents to its being committed he cannot afterwards be heard to complain of the act."

The proposition put in this form seems rather to narrow the doctrine as enunciated in some of the cases; but it is clear that the essence of the doctrine of estoppel by acquiescence is that the acquiescence should occur in a party who knows that his right is being infringed. It may be that this goes a little beyond the doctrine laid down in *Willmott* v. *Barber* (16), where estoppel requires that the possessor of the legal right must have encouraged the plaintiff in his expenditure of the money, and it is possible that it also goes beyond the doctrine as stated in S. 115, Evidence Act; but whether this be so or not, it is clear that the facts of this case do not come within the doctrine for there is no evidence that at the time the defendant was expending his money, the plaintiff knew that the exchange was bad in law by reason of the want of registration. With the greatest deference therefore to the learned Chief Justice, I cannot think that this defence can prevail.

The next point argued by Mr. T. R. Venkatrama Sastry was that a licence by the plaintiff to the defendant must be implied, and reliance is placed on two cases. *Plimmer* v. *Mayor of Wellington* (11) and *Attorney General of Southern Nigeria* v. *Holt and Company* (12), but in both those cases the Crown being naturally the owner for the foreshore knew that the land on which the other parties were building was the property of the Crown and the cases come with the doctrine above stated. It is impossible to say that a person can give another licence to build on his land, when he does not know that the land belongs to him. The next point taken for the respondents is that there having been part performance of the exchange, the law will treat it as complete, although admittedly there is no valid exchange under the Transfer of Property Act. The authorities relied on for this proposition are two recent cases in the Privy Council reported as *Muhomed Musa* v. *Aghore Kumar Ganguli* (2) and *Lakshmi Venkayyamma* v. *Venkatanarasimha* (6). Before examining these csses it is advisable to understand how the law has been regarded in this country. The language of the Transfer of Property Act admits of no misconstruction. S. 54:

"Sale is a transfer of ownership," etc. 'Such transfer in the case of tangible immovable property of the value of Rs. 100, can be made only by a registered instrument.' 'In the case of tangible immovable property of a value less than Rs. 100 such transfer may be made either by a registered instrument or by delivery of the property."

It has definitely been laid down by a Full Bench of this Court that the words "can be made only" make it impossible for any person to acquire title to property of that description by transfer "inter partes" otherwise than by a registered instrument. *Vide Kurri Veerareddi* v. *Kurri Bapireddi* (1), where the whole question was exhaustively considered. The learned Chief Justice points out how important it is from the point of view of public policy to maintain the requirements of registration and how dangerous it is to allow cases of hardship to affect these requirements and thus induce a system of uncertainty and give opportunities for claims to be founded on perjured evidence. Subramania Aiyar, J., quotes some very strong observations by the House of Lords on the danger of modifying imperative statutory provisions on the ground of equity from *Young & Co.* v. *Mayor of Royal Leamington Spa* (8), from which I extract the following:

"It is however for the Legislature to determine whether the benefits derived by enforcing a general rule are or are not too dearly purchased by occasional hardships. A Court of law has only to inquire what has the legislature thought fit to enact."

Bearing in mind that it has been the effort of the legislature of this country to codify the law so as to make it easily applicable by judges of inferior Courts not so highly trained as those in Courts in England, I have no doubt that this is the true principle to apply in ascertaining the law of this country. We have not here, as there has been in England, an equity jurisdiction that has grown up side by side with the common law of the country, and I think that we should refrain from engrafting equitable doctrines on the plain words of our codes This is the view that I have expressed in

(28) [1875) 8 Ch. 286.

other cases and it is founded on decisions of their Lordships of the Privy Council in several cases. But it is said that we have no alternative since the two decisions above referred to. Before dealing with the observations of the Board relied on, it is advisable to ascertain exactly what was decided in each case. In *Mahomed Musa* v. *Aghore Kumar Ganguli* (2) the suit was to redeem two mortgages, dated 22nd July 1848 and 4th April 1871. The defendants pleaded that in 1873 a suit to enforce the latter agreement was brought by the mortgagee and settled by a compromise under which the mortgage debts were to be paid off and the property to be divided into specific shares, the mortgagor to convey those shares to the parties respectively entitled, and that a decree was made by the Court that the suit be decided in pursuance of the terms of the compromise and be struck off from the list. No conveyance was executed by the mortgagor nor was the agreement registered; but it was acted upon and carried out by all the parties and their successors-in-title up to the date of the suit as if the conveyance had in fact been made. The High Court of Calcutta held that the mortgages of 1848 and 1871 were extinguished by the compromise and that, therefore the right to redeem was lost. The Privy Council, accepting the view of the facts taken by the learned Judges, "concurred with the legal result arrived at." That is the actual decision. Their Lordships say on p. 815 (of 42 *Cal.*)

"the point which is made against giving effect to this compromise is that a conveyance was not made. This is true, but no written conveyance by law of India was at the date of that transaction necessary, the Transfer of Property Act not having been passed until the year 1882."

The judgment of the High Court is not reported, but it is clear from the arguments that the Court relied on the fact that at the date of the compromise agreement, registration of such an agreement was optional under S. 18, Registration Act 9 of 1871 and held that oral evidence was admissible to prove that the equity of redemption was released by the mortgagor. It cannot be argued that the actual decision in the case is any authority for the proposition that the requirements of the Transfer of Property Act can be ignored; but it is suggested that the obiter dicta of the Board carry the case a great deal further. Dealing with these dicta with the very greatest respect, as I am bound to do I think it proper to apply the rule laid down by Lord Halsbury in *Quinn* v. *Leathem* (29) in discussing the decison in *Allen* v. *Flood* (30):

"There are two observations of a general character which I wish to make and one is to repeat what I have every often said before, that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed and qualified by the paticular facts of the case in which such expressions are to be found."

Applyingthis principle of construction of judgments, I feel myself entitled to say that general expressions as to the effect of equity or statutory requirements must be confined to the statute under consideration, and secondly, that where as in that case, no statutory requirement was violated, general expressions of the effect of equity on the acts of the parties are no authority for ignoring statutory requirements. That the acts of the parties or their intended acts were alone under consideration is clear from the language used on page 150.

"but even if a transfer in writing had from a conveyancing point of view been omitted or if some other formal defect had occurred, their Lordships are of opinion that this would have been unavailing to the appellants in the attempt made in the present suit to redeem the mortgages for the points against opening up the transactions are manifold and their Lordships' opinion conclusive."

The compromise has been acted upon by all the parties to it and by their successors-in-title "from that date to this." It is to my mind perfectly clear that their Lordships are here referring to the failure by the mortgagor to execute a conveyance in accordance with this agreement, and not with any reference to statutory requirement of a conveyance which, as their Lordships have pointed out in the previous sentence, did not at that time exist. It is with reference to this state of affairs that their Lordships apply the case of *Maddison* v. *Alderson* (5) and the language of Professor Bell in his Principles, S. 26, and therefore when their Lordships in the next words say that

"they do not think there is anything in the law of India inconsistent with it, but that on the contrary these laws follow the same rule",

(29) [1901] A. C. 495.
(30) [1898] A. C. 1.

this dictum has reference to the effect of long-continued acts of parties in rendering unnecessary a conveyance which was required by the terms of the agreement, and not the effect of such acts on statutory requirements. I will now deal with *Lakshmi Venkayyamma* v. *Venkatanarasimha* (6). The facts are as follows: The suit was brought by a lady for a declaration that she was entitled to a certain village for possession. She based her case on an alleged contract with the last holder and on a subsequent oral bequest to her. The District Judge held that the village had been purchased under the alleged contract and had been held in trust for the appellant. He also upheld the oral devise. The High Court found neither contract nor devise proved and dismissed the suit (except against a party who had not appealed). Before the Privy Council it was contended that there was a valid contract which could be enforced by specific performance. It was not contended that anything had occurred which operated as a transfer. The contract as found by the board was as follows: The deceased lady had induced the plaintiff, her niece, to live with her by promises of a general character and had actually conveyed to her two small properties which she purchased. In 1893 she purchased the suit village. She made no concealment that she had done it for the plaintiff, but she refused permission for the title being taken in the plaintiff's name. A quarrel arose and the plaintiff and her husband left the deceased. Then the deceased wrote a letter which the Privy Council held to be a promise. By the letter she undertook to convey the property to the plaintiff on her death. The plaintiff returned to live with the deceased, and their Lordships held that constituted acceptance of the promise and consideration for a good contract (vide p. 144 of 20 *M. L. T.* Having found the contract their Lordships say that the citation of *Maddison* v. *Alderson* (5) and *Maunsell* v. *Hedges* (31) is beside the mark:

"The true issue is, is a contract proved? Had a contract been proved in either of the examples cited, there is nothing to suggest that the law would have refused to give effect to it by way of specific performance."

Their Lordships then go on to consider the facts on a narrower basis

"Suppose the proof of acceptance in terms by the Rani was considered to be defective, what is the situation in view of the actings of the plaintiff"?

and continue

"their actings took place on the footing of a proposal so made and were known by Papamma to have taken place on that footing. In these circumstances the objection that the contract was inchoate or incomplete cannot be maintained."

For this proposition their Lordships referred to *Maddison* v. *Alderson* (5) and the case in *Mahomed Musa* v. *Aghore Kumar Ganguli* (2), and say that the power of resiling is barred by the rei interventus excluding the plea of locus poenetentiae, and once more their Lordships say that there is nothing in the law of India inconsistent with it. With great respect to my learned brother who takes a different view, I am at a loss to understand what bearing this latter observation has on the supposed efficacy of part performance to effect a transfer of immovable property contrary to the Transfer of Property Act. If any Act is referred to, it can only be the Contract Act or the Specific Relief Act, for the existence of a valid and enforceable contract was the sole question under consideration, and if I may say so with respect, neither do I know anything in either Act which would prevent a Court finding a contract proved in the circumstances suggested by their Lordships. Neither the decision nor the dicta nor indeed the argument of Counsel had anything whatever to do with part performance operating as transfer. An argument is however founded on the form of the decree in that case, it being a direction to the receiver to put the plaintiff in possession. Their Lordships say that the fact there is a receiver saves any complexity in carrying out the judgment. The plaintiff had, on the footing of a contract and an oral devise, asked for a declaration of title and possession. Undoubtedly, if the oral devise was proved, there would have been a valid transfer and the decree asked for would have been proper. Counsel before the Privy Council however based his case on contract only and asked for specific performance. The Privy Council found the contract proved and did not deal with the devise, so naturally did not give a declaration of title. The only question is, why did not the Board put its decree for specific performance in the form of a direction to

(31) [1854] 4 H. L. C. 1039.

the receiver to convey? The report is silent on this matter, but I am inclined to think that the suggestion of the learned Advocate-General is the true explanation. He points out that the transaction is not a sale because there was no price, and not a gift because there was consideration, and clearly not an exchange; so none of Ss. 54, 123 or S. 118, T. P. Act applies, with the result that S. 9 applies and the transfer can be made without writing.

The simplest form of transfer is by putting a person in possession. Vide S. 54, T. P. Act. No registered instrument was necessary and it follows therefore that the form of the decree in this case does not give any assistance to the doctrines sought to be established. I would like also to point out that the application of the doctrine of part performance in England and the use sought to be made of it in this case are not in pari materia. In England it belongs to the share of contract and operates, where applicable, to allow a party to prove a contract in an action in spite of a statutory prohibition. Here there is no contract part performed. The contract is executed. What is sought is to make total performance of an executed contract operate to create legal rights in violation of a Statute. Even if there had only been part performance by one party, there would have been no statutory difficulty in getting a decree for specific performance, for there is no statutory provision in the Transfer of Property Act or the Contract Act requiring the contract to be proved by writing. There is therefore no room for the application of the English doctrine of part performance in this country. What the respondents are really seeking to do is to apply another entirely different equitable rule inherited from the Courts of Chancery, "equity will treat that as done which ought to be done," and to apply it against the statute. For the above reasons, I am clear that nothing in either of the two cases relied on has any bearing on the point and that the authority of the decision of the Full Bench in *Kurri Veerareddi* v. *Kurri Bapireddi* (1) remains unshaken. I would add that apart from principle and authority I should find great difficulty in accepting the Statute where it indicates that placing in possession will not be a valid transfer, and ignoring it where it uses the definite words "a transfer of ownership can be made only by a registered instrument."

We are next asked to make a decree for specific performance. I have the greatest difficulty in seeing how such a decree can be given to a defendant vide observations of Subramania Aiyar, J. in *Kurri Veerareddi* v. *Kurri Bapireddi* (1) and I am clear that we cannot do it in this case when the defendant did not ask for it in his written statement, and no issue was settled on the point. I therefore express no opinion on the questions whether Ex. B can be used to prove an agreement or what agreement would be proved by it. The sole question that remains is whether the defendant is entitled to the benefit of S. 51, T. P. Act or the principle underlying it. In my opinion a wide meaning must be given to the word "transferee" in this section and it should be read as including a person to whom land is purported to be transferred. The provision in the Mesne Profits and Improvements Act 11 of 1855, which is still in force in India where English Law is applicable is:

> "If any person shall erect any building, etc., upon any lands held by him bona fide in the belief that he had an estate in fee-simple," etc., "and such person be evicted by any person having a better title,"

and the rest of the section is reproduced in S. 54, T. P. Act. It has been held in *Ramalinga* v. *Sami Appa* (32) that S. 51 only declared the pre-existing law on the subject and there is no doubt that the Act of 1855 embodied the English Law. I would therefore adopt the course suggested by Seshagiri Aiyar, J., and call for a finding on issue 4. I agree with Sadasiva Aiyar, J., as to costs.

(In compliance with the order contained in the above judgment, the Subordinate Judge of Ramnad at Madura submitted the following.)

Finding.—Another proposal the Commissioner has considered is the effecting of minimum modifications required to make the part affected, i. e., the back portion of the house, serve a useful purpose and conform with the adjacent part on point of workmanship though not symmetrical with it. He has prepared plan No. 4 and estimate No. 6 for Rupees 2,150 with reference to this proposal. As per this proposal, the compensation awardable would amount to Rs. 2,150

(32) [1890] 13 Mad. 15.

plus Rs. 1,355 or Rs. 3,505. But having regard to the observations of the Commissioner to which exception has not been taken, viz., that the building is a well-constructed house of considerable magnitude, that the severance at the back interferes seriously with some of the important parts of it, particularly with the dining hall, and that symmetry of the main building is an invariable feature in Chetti houses and well worth preserving, I think the last proposal, i. e., to reconstruct the building without regard to symmetry must be rejected, and compensation should be calculated on the basis of symmetrical reconstruction.

(This Letter Patent Appeal coming on for final hearing after the return of the above finding of the lower Court upon the issue referred by this Court for trial, the Court delivered the following.)

Judgment.—We think that Rs. 3,505 will be a sufficient compensation in the circumstances of the case on the basis on which the amount is calculated in para. 12 of the Subordinate Judge's finding. The decree will be modified accordingly. The mandatory injunction will not be issued until this amount has been deposited in Court. The money will be deposited by the plaintiffs within a fortnight of the re-opening of the Court and the defendants will remove so much of the building as stands on the land of the plaintiffs within two months from the date of the deposit. There will be no order as to costs.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 1096

OLDFIELD AND SADASIVA AIYAR, JJ.

R. Rajachari—Defendant—Appellant.

v.

Thirumugoor Devastanam—Plaintiffs—Respondents.

Letters Patent Appeal No. 156 of 1917, Decided on 5th February 1918, against judgment and decree of Seshagiri Aiyar, J., D/. 9th October 1917, in Civil Revn. Petn. No. 1195 of 1916.

(a) Madras Estates Land Act (1 of 1908), Ss. 3 (2)(d)—Rent suit by cosharer, acquiring kudivaram interest in entire village, in respect of lease of portion of village is cognizable by Revenue Court.

A suit for rent by a fractional sharer in an inam village who has acquired the Kudivaram interest in the entire village in respect of a lease of a portion of the village after such acquisition, is cognizable by the Revenue and not by the civil Court, the holding not having ceased to be part of the estate. [P 1096 C 2]

(b) Madras Estates Land Act (1 of 1908), S. 8 (1) (2)—Term inamdar in exception to S. 8 refers only to owner of entire inam.

The expression the "inamdar" in the exception to S. 8 must be read in its strict sense as equivalent only to the owner of the entire interest in the inam and the exception is applicable only to sub-S. (1). [P 1097 C 1]

R. V. Sesha Aiyangar for *K. N. Aiyar*—for Appellant.

N. Chandrasekhara Aiyar for *A. Krishnasawmy Iyer*—for Respondent argued contra.

Oldfield, J.—The only question argued is whether the learned Judge was right in holding that the civil Court had jurisdiction. The facts, as now agreed on differ from those stated by the learned Judge. For they are that plaintiff, one of the fractional share-holders of the melvaram right in an Inam village, that is one of the Inamdars, acquired by gift the kudivaram right in the whole village not in a portion of it, and that in 1897 he leased 50 cents of the whole to the defendant, the appellant before us. The suit is on that lease for rent. Ordinarily S. 8 (2), Estates Land Act would apply, the defendant would be deemed an occupancy raiyat and the suit would lie in a Revenue Court. But it is admitted that the land is comprised in an estate falling under S. 3 (2) (*d*) and argued that the exception to section 8 is applicable and the land has ceased to the part of an estate. In effect, therefore, the question is whether the exception governs sub-S. (2) or only sub-S. (1) that is, whether the expression "the Inamdar" in the exception can be read as equivalent also to "an Inamdar" or "any of the Inamdars."

The point is not, so far as we have been shown, covered by authority. On the one hand the exception stands at the end of the section consistently with its application to both sub-Ss. (1) and (2) instead of only to the former; and, as the definition of 'land holder in S. 3 (5) includes a direct reference to joint land-holders, all references to the "land-holder" and, therefore, that to "the inamdar" which the exception contains, should, it may be argued, be read in the manner proposed by plaintiff. But, on the other hand, although it is not clear that a distinction is drawn between the land-holder' and 'a land-holder' or can be implied regarding 'the Inamdar' except

in provisions in respect of which such distinction would be material I think that it would be in that under construction and that the strict reading of the expression 'the Inamdar' is necessary in the interests of convenience and reasonable interpretation. For otherwise the anomalies involved in the application of sub-S.(2) to the Inam villages referred to in the exception are excessive. If the exception is applicable to acquisitions of the kudivaram by a fractional Inamdar, the land in question ceases to be part of the estate; and it can only be regarded as doing so, either (1) as between the acquiring Inamdar and his lessee (if any) and not between the former and the other Inamdars, or (2) absolutely. The first alternative is untenable, since it is not consistent with the general language used in the exception or with the fact that sub-S. (2) does not refer to the acquiring Inamdar's right in the phraseology of the Act as that of an occupancy raiyat, but simply as being to hold payment, in accordance presumably with the ordinary law. The second deprives the other Inamdars without their consent and perhaps against their will of the security for their share of the rent, which the provisions of the Act relating to distraint, sale of the holding and summary procedure afford. These anomalies can be avoided, only if the Inamdar' in the exception is read in its strict sense as equivalent only to 'the owner of the entire interest in the Inam' and the exception is treated as applicable only to sub-S. (1). On this interpretation the decision must be that the suit holding has not ceased to be part of the estate and that the suit should have been filed in a Revenue Court.

The Letters Patent Appeal is allowed, the decisions of the learned Judge and the Subordinate Judge being set aside and the plaint being returned for presentation to the Revenue Court having jurisdiction. Plaintiff will pay defendant's costs to date.

Sadasiva Aiyar, J.—I entirely agree.

S.N./R.K. *Appeal allowed.*

1919 M/138 & 139

A. I. R. 1919 Madras 1097

SESHAGIRI AIYAR AND BAKEWELL, JJ.

Muthaya Shetti—Plaintiff—Appellant.

v.

Kanthappa Shetti — Defendant—Respondent.

Second Appeal No. 1301 of 1915, Decided on 17th December 1917, against decree of Dist. Judge, South Kanara, in Appeal Suit No. 326 of 1914.

(a) Limitation Act (9 of 1908), Art. 134—Art. 134 applies only where mortgagee's assigneee acquires full title to property transfered—Intention is real test to determine what was acquired.

Article 134, governs only those cases where the transferee from the mortgagee acquired an absolute title to and interest in the property transferred. [P 1100 C 2]

Per *Seshagiri Aiyar, J.*—Article 134 is only a branch of the law of prescription, and the question to be determined in cases governed by that article is, what it is that the purchaser prescribed for. If the transferee bargained for and believed he was bargaining only for the interests of the mortgagee, he cannot acquire title as the absolute owner of the property. The fact that he knew his vendor had only mortgagee rights would not be conclusive on the question. The real test would be, did he ask for and obtain an absolute interest in the property and believed himself that he was acquiring an absolute interest in it. [P 1100 C 1]

(b) Civil P. C. (5 of 1908), S. 11—Decision binds as res judicata whether right to appeal existed or not—No res judicata where decision was not necessary—Unnecessary finding embodied in decree operates as res judicata—Judgment based on what findings doubtful—All findings are binding — Unnecessary issue decided—Decree in favour of party still finding is binding—Party adversely affected should apply that finding be recorded in decree.

The fact that a party against whom an issue is decided has no right of appeal does not affect the rule of res judicata. [P 1099 C 1]

Where the decision on an issue is not necessary for the disposal of the case, it will not operate as res judicata. [P 1099 C 2]

Where an unnecessary decision on an issue is embodied in the decree itself, the matter becomes res judicata. [P 1099 C 2]

Where a judgment decides more issues than one and it is doubtful on which of those issues the final conclusion was based, the decision on all the issues will be res judicata. [P 1099 C 2]

Where the decision on an issue is unnecessary and the party against whom it is given cannot appeal as the final decree is in his favour the decision on the issue would be res judicata. The proper procedure for the party adversely affected by the issue is to ask the Court to embody it in the decree. [P 1099 C 2]

(c) Limitation Act (9 of 1908) Art, 134—Party claiming benefit of Art. 134, must prove that absolute title was acquired.

Per *Bakewell, J.*—A transferee who claims the benefit of Art. 134, must adduce evidence that he intended to purchase an absolute title, which

will be, in the first place, the deed of transfer but may also consist of the contract of sale and the negotiations which preceded it. Evidence as to the documents of title produced by the vendor and the steps taken by the purchaser to ascertain the former's title to the property will be important as showing the interest to be transferred. If the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest, the burden will lie on the plaintiff to show that the circumstances of the transfer negative such an intention. [P 1101 C 1, 2]

B. Sitarama Row—for Appellant.

C. V. Anathakrishna Aiyar—for Respondent.

Seshagiri Aiyar, J.—The predecessors-in-title of the plaintiff executed Ex. A, to one Shankaranaranappaya in 1872. Shankaranappayya sold the property comprised thereunder to Venkappayya under Ex. 1 in 1879. Venkappayya's widow sold it in 1897 to Puttappayya and Puttappayya's sons sold the same in 1912 to the defendant. The present suit is brought by the plaintiff to redeem the mortgage of 1872. The answer of the defendant is that the suit is barred by Art. 134 Lim. Act, as more than twelve years have elapsed since the date of the transfer by the original mortgagee. Both the Courts have come to the conclusion that the suit is barred by limitation. The judgment of the District Judge is so meagre that we were obliged to hear this case as a first appeal. Mr. Sitarama Row contended before us that under Art. 134 the burden of proving the that transferee from the mortgagee had acquired an absolute right in the property lay on the defendant.

Before considering this question, I shall dispose of a preliminary point suggested by Mr. Ananthakrishna Aiyar for the respondent, namely, that Ex. A is an absolute conveyance with an option to re-purchase, and that consequently his client is the absolute owner of the property. In answer to this suggestion. the learned vakil for the appellant pointed out that the construction of Ex. A is res judicata by virtue of a decision of the District Conrt of Scuth Kanara in the year 1886. The decision was given under the following circumstances. A member of the plaintiff's family sued his brothers for partition, and claimed a share in the property in dispute alleging that the alienation of it was not for necessary purposes. The District Munsif held that the plaintiff was entitled to recover a third share of the property on paying a third of the mortgage amount. There was an appeal by the alleged mortgagee, defendant 9 in that case. His contention was that the transaction was not a mortgage but an absolute sale with an option to re-purchase. Mr. Best, the District Judge, held that it was a mortgage and not a sale. He further held that it was not open to the plaintiff to sue for the redemption of a portion of the property by offering to pay only a portion of the mortgage debt, and that moreover as the suit was not one for redemption, it should be dismissed qua this property.

The question is whether this conclusion of the then District Judge of South Kanara is res judicata. Mr. Ananthakrishna Aiyar strenuously argued that as the suit was dismissed and as the mortgagee could not have appealed against the decision of the District Judge although the finding on the construction of Ex. A was against him, the matter is not res judicata. Upon the question whether a bare finding upon an issue when the final conclusion is in favour of the party against whom the decision on the issue is given, gives a right of appeal to the party, there have been differences of opinion. In *Yusuf Sahib* v. *Durgi* (1) it was apparently held that an appeal lies under the circumstances. In *Ranganatham Chetty* v. *Lakshmu Ummal* (2) the same view was taken. Both these cases follow *Krishna Chandra Goldar* v. *Mohesh Chandra Saha* (3). In *Achanta Venkatasuryanarayana* v. *Yellaparagada Sivasankaranarayana* (4) the question was left open. There is a decision of Ayling and Spencer, JJ., in *Secy. of State* v. *Swaminatha Koundan* (5) which is inconsistent with *Yusuf Sahib* v. *Durgi* (1) and *Ranganatham Chetty* v. *Lakshmiammal* (2). See also *Brij Behari Lal* v. *Shevanath Prasad* (6). Having regard to the language of Ss. 96 and 100, Civil P. C., which gives a right of appeal only against decrees, it seems doubtful whether the two earlier Madras decisions are correct. If the decision in this case depended solely upon that question, I would have felt bound to refer the matter to a

(1) [1907] 30 Mad. 447.
(2) [1913] 21 I. C. 15.
(3) [1905] 9 C. W. N. 584.
(4) [1915] 27 I. C. 861.
(5) [1911] 37 Mad. 25=12 I. C. 167.
(6) [1916] 35 I. C. 837.

Full Bench; but I think that this case can be disposed of upon other grounds. I agree with Mr. Sitarama Row that the fact that a party against whom an issue is decided has no right of appeal does not affect the rule of res judicata.

There is nothing in the language of S. 11 to suggest such a test. The language of Expl. 2 to that section implies that the competence of a Court for the purposes of res judicata is not affected by the fact that its decision is not appealable. It is true that this explanation was introduced to put an end to a controversy which existed as to whether when a decree is not appealable to the same Tribunal the Court which decided the earlier claim can be held to have been competent to adjudicate upon the subsequent claim litigated in a superior Court. Nonetheless, the wide language of the explanation shows that the legislature did not intend that the test of res judicata should depend on the right of appeal. I therefore overrule the first contention. Mr. Ananthakrishna Aiyar then argued that the decision on Ex. A was not necessary for the conclusion which was come to in the suit and that consequently the matter is not res judicata. The cases on this point may be grouped under four heads: the first class of cases relates to the decision on issues which are altogether unnecessary for the disposal of the case. For instance decisions on the character of the defendant's holding where the suit is dismissed on the ground that there has been no notice to quit or that there had been no exchange of pattas and muchilikas. *Devarakonda Narasamma* v. *Devara Kondakannaya* (7) and *Muttukumarappa Reddi* v. *Arumuga Pillai* (8) represent this class of cases. In these cases as the pronouncement upon the tenure of the defendant was not necessary for the disposal of the case, the decision upon that issue was held not to be res judicata.

It is to this class of cases the observation of Sir R. Collier in *Run Bahadur Singh* v. *Lacho Koer* (9), that "as the decree was not based upon it, but in spite of it," there can be no res judicata applies. See also *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (10), *Thakur Magundeo* v. *Thakur Mahadeo Singh* (11) and *Shib Charan Lal* v. *Raghu Nath* (12). The second class deals with cases where although the decision of an issue is unnecessary for disposal of the case, still for some reasons the Court embodies that decision in the decree itself. Then the matter becomes res judicata not on the ground that there has been a decision on the issue, but because there is a decree of the Court which is binding upon the parties: *Kaveri Ammall* v. *Sastri Ramier* (13) and *Mota Holiappa* v. *Vithal Gopal Habbu* (14). The third class relates to judgments which decide more than one issue, but it is doubtful from those judgments on which of these issues the final conclusion was based. In such a case the decision on both the issues will be res judicata: see *Peary Mohun Mukerjee* v. *Ambica Charan Bandopadhya* (15) and the recent decision of the learned Chief Justice and Phillips, J., in Appeal No. 62 of 1913. *Secy. of State* v. *Rajah of Venkatagiri* (16). Now I come to the fourth class. In the fourth class, the decision upon the issue is necessary, but unfortunately the party against whom that decision is given could not appeal against it as the final decree is in his favour.

In such a case it seems to me that the decision on the issue would be res judicata. The proper procedure where the defendant is affected by a decision on an issue which he has not the opportunity of contesting in appeal may be as suggested by Petheram, C. J., in *Jamaitunnissa* v. *Lutfunissa* (17), that is to say, he can ask the Court which has given an adverse decision on a material issue to embody it in the decree so that he may have a right of appeal against such a decision. But if he neglects the opportunity and the decision itself is necessary for the disposal of the case, there seems to be no escape from the bar of res judicata On the whole I have come to the conclusion that the decision of Mr. Best in 1886, which was absolutely necessary for the decision of the case and which has stood unchallenged for 30 years, is binding on the parties,

(7) [1882] 4 Mad. 134.
(8) [1884] 7 Mad. 145.
(9) [1885] 11 Cal. 301=12 I. A. 23.
(10) [1886] 13 Cal. 17.
(11) [1891] 18 Cal. 647.
(12) [1895] 17 All. 174.
(13) [1903] 26 Mad. 104.
(14) [1916] 40 Bom. 662=36 I. C. 74.
(15) [1897] 24 Cal. 900.
(16) [1916] 35 I. C. 266.
(17) [1885] 7 All. 606.

and that Ex. A should be construed as a mortgage by conditional sale and not as a sale with an option to re-purchase.

This conclusion throws me back upon the question whether the suit is barred by limitation. Art. 134 has given rise to conflicting decisions. I do not propose to examine them at any length in the present case. In *Radhanath Doss* v. *Gisborne and Co* (18), at a time when the corresponding Article of the Act of 1859 contained the words "in good faith," Lord Cairns delivering the judgment of the Judicial Committee held that the burden of proving that the purchaser acquired an absolute interest in the property lay upon such purchaser. In the Acts of 1877 and 1908, in addition to the other changes, the words "in good faith" were omitted. It is unnecessary to canvass the reasons which led the legislature to omit these words. In *Radhanath Doss* v. *Gisborne and Co.* (18) the Judicial Committee pointed out that it must be shown that the purchaser honestly believed that he was acquiring an absolute right to the property. This deduction we made not because of the existence of the words "in good faith" but because of the use of the expression "purchaser." I do not think that the changes introduced by the Act of 1877 and of 1908 have absolved the Court from the necessity of coming to a conclusion upon this question. If the transferee bargained for and believed he was bargaining only for the interests of the mortgagee, he cannot acquire title as the absolute owner of the property. After all, Art. 134 is only a branch of the law of prescription, and the question to be determined would be, what it is that the purchaser prescribed for. The fact that he knew that his vendor had only a mortgagee right would not be conclusive on this question. The real test would be, did he ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it? In *Pandu* v. *Vithu* (19) that is the test that was suggested: *Kannusami Thonjiraya* v. *Mathusami Pillai* (20) to which Mr. Ananthakrishna Aiyar drew our attention quotes that case with approval. I do not think that *Subbaiya Sandaram* v. *Mahamad Mustapha Maracayar* (21) decides anything to the contrary. *Singaram Chettiar* v. *Kalayanasundaram Pillai* (22) is in favour of this view: see also *Baluswami Aiyer* v. *Venkitaswamy Naicken* (23). The language of the Article is not opposed to this proposition. In the present case this question has not been considered by either of the Courts below. I express no opinion on the question of the burden of proof, bearing in mind the observations of Lord Parker of Waddington that the Courts in this country are too prone to base their decisions on the abstract theory as to onus. But seeing that the plaintiff seeks to disturb a possession which has been with the defendant for a considerable period, prima facie, he must be called upon to prove his case. There must be a finding on the following issue:

Did the executant of Ex. 1 intend to transfer absolute interest in the property? and was it the intention of the parties that there should be an absolute transfer of title to the property? Finding on the evidence on the record within a month from the date of the re-opening of the Court. Seven days for objections.

Bakewell, J.—I agree that the document which forms the root of the respondent's title must as between the parties be held to be a mortgage, and I propose to deal only with the question of limitation. It is, I think, clear from the wording of Art. 148, Lim. Act 1908, that it deals with suits in which the cause of action arises upon the contract of mortgage, and the article applies to a transferee of the mortgagee's interest under that contract: Art. 134, therefore provides for cases where the transfer of mortgaged property by the mortgagee gives rise to a cause of action apart from the mortgage contract. The condition of good faith on the part of the transferee which was contained in S. 5, Act 14 of 1859 has been eliminated from Art. 134, but otherwise the article substantially corresponds with that section read with Cl. 12, S. 1. In *Radhanath Doss* v. *Gisborne and Co.* (18) their Lordships of the Privy Council in discussing S. 5 of the Act of 1859 considered separately each of the three conditions prescribed

(18) [1870-72] 14 M. I. A. 1 (P.C.).
(19) [1895] 19 Bom. 140.
(20) [1917] 38 I. C. 194.
(21) [1917] 40 I. C. 50.
(22) [1915] 26 I. C. 1.
(23) [1917] 40 Mad. 745=40 I. C. 531.

thereby, and defined "purchaser" as meaning

"some person who purchases that which de facto is a mortgage upon a representation made to him and in the full belief that it is not a mortgage but an absolute title."

They held that the pleadings did not allege, and that there was no evidence of, any negotiation for such a purchase, and

"no evidence of any allegation on the part of the vendor which would lead Messrs. Gisborne and Company (the transferees) to believe that this was an absolute title which they held to the property in qustion. The only evidence that they were purchasers at all is the production of the purchase deed,"

which their Lordships held contained

"no evidence of a statement on the part of the vendor or of any belief on the part of the purchasers that the property of the Maheeauwan Estate was a property which the vendor claimed to hold by what we should call in this country a fee simple title."

The word "transfer" includes a purchase: see Transfer of Property Act, S. 5 and the transaction in the present case is alleged to be a purchase, and I think that their Lordships' observations apply to Art. 134. It follows that a transferee who claims the benefit of the article must adduce evidence that he intended to purchase an absolute title, which will be in the first place the deed of transfer but may also consist of the contract of sale and the negotiations which preceded it. An important preliminary to a sale of immovable property, which seems, however, to be frequently neglected, is a careful investigation of the vendor's title, and I think that their Lordships had this in mind when in the passage first quoted; they refer to a representation made to the purchaser and to his full belief that he was acquiring an absolute title. Evidence as to the documents of title produced by the vendor, and the steps taken by the purchaser to ascertain the former's title to the property, will be important as showing the interest intended to be transferred. If, for instance, it should appear that the purchaser refrained from calling for and examining the title-deeds, and from examining the register of assurances, or from inquiry as to who was in possession of the property, or otherwise abstained from means available to him of ascertaining the title, or that he in fact inspected the mortgage document under which the vendor claimed the property, there would be evidence upon which the Court might hold that the parties did not intend to transfer an absolute property but such interest only as was vested in the transferor, or possibly that the mortgagee intended to commit a fraud upon the mortgagor and that the transferee was accessory thereto or did not act in good faith: see S. 18, Lim. Act. If, on the other hand, the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest, the burden will lie upon the plaintiff to show that the circumstances of the transfer negative such an intention. This view appears to me to be supported by the decisions of this Court reported as *Kannusami Thanjirayan* v. *Muthusami Pillai* (20) and *Baluswami Aiyar* v. *Venkitaswamy Naicken* (23) and *Subbaiya Pandaram* v. *Mahamad Mustapha Maracayar* (21). The lower appellate Court has dealt with the case in a very summary manner and I would remand it to that Court for a finding on the issue framed by my learned brother.

(In compliance with the order contained in the above judgment, the District Judge of South Kanara submitted the following):

Finding.—I have been directed to return a finding on the issue

"Did the executant of Ex. 1 intend to transfer an absolute interest in the property, and was it the intention of the parties that there should be an absolute transfer of title to the property?"

Exhibit 1 was executed on 10th January 1879, and of course at this distance of time it is impossible to obtain positive evidence as to what the intention of the parties was. The wording of the sale-deed undoubtedly indicates that the vendor purported to sell the property as his absolute property. Ex. 1 is styled "an absolute sale-deed" and the executant says, "I have this day sold you absolutely without a condition." It is urged however on behalf of the plaintiff (appellant) that there were no allegations in the written statement that there were any negotiations prior to this sale evidenced by Ex. 1 or that there were any representations made by the vendor that he had an absolute title and that the vendee believed he was acquiring an absolute title. I do not think that the omission to make such definite allegations is of much importance. It is said that the conduct of the vendee under Ex. 1 shows that he had not purchased an absolute right. The consideration for Ex. A, it is pointed out, was only Rs. 1,000, whereas

the consideration for the absolute sale-deed was only Rs. 1,500 and this included certain rent decrees which had been transferred. Again eighteen years afterwards in 1897 when the property must have increased in value, the vendee's widow sold it for Rs. 1,500 under Ex. 2. There is undoubtedly some force in these contentions, but we do not know what the reasons were which led the vendee's widow to sell the property for what was apparently less than its value. On the other hand, Ex. A, which was handed over with Ex. I, is styled a sale-deed (the word absolutely in line 16 at p. 1 of the select documents does not appear in the original), though it is now found that the document was a mortgage by conditional sale. The period for redemption fixed in Ex. A (30th May 1876) had expired when Ex. 1 was executed and the vendee would naturally suppose that he was purchasing an absolute title. I do not think that the plaintiff on whom the burden apparently lies has proved his case. I would accordingly return a finding that the executant of Ex. 1 intended to transfer an absolute interest, and that the intention of the parties was that there should be an absolute transfer of title of the property.

(The second appeal coming on for final hearing after the return of the finding of the lower appellate Court upon the issue referred by this Court for trial, the Court delivered the following:)

Judgment.—We accept the finding and dismiss the second appeal with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 1102

SESHAGIRI AIYAR AND NAPIER, JJ.

Tirumalai Muthuveera Paramasiva Venkitasami Naicker — Defendant—Appellant.

v.

Muthusami Pillai and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 1135 of 1916, Decided on 25th October 1917, against decree of Temporary Sub-Judge, Madura.

(a) Transfer of property Act (4 of 1882), S. 72—Expensive criminal litigation against persons removing crops—Expense whether recoverable by usufructuary mortgagee is doubtful—When mortgagee is acting at instance of mortgagor, he can add amount to his principle—S. 72 does not restrict remedy for recovery of expenses—Separate suit lies.

It is open to doubt whether an expensive criminal litigation, conducted by a usufructuary mortgagee for the purpose of securing the conviction of persons who have reaped and carried away the crops on the mortgaged land, can be regarded as a proceeding necessary to support the mortgagor's title. [P 403 C 1]

Where however the mortgagee acts as a prudent owner and at the request of the mortgagor and the proceedings are rendered necessary, he is entitled to be indemnified in respect of such expenses. [P 1103 C 2]

In such an event the mortgagee has the right to add the amount so expended to the principal money and insist on its payment before redemption or sue separately for its recovery. [P 1103 C 2 P 1104 C 1]

Section 72 does not restrict the mortgagee's remedy to what is stated there. There is an independent cause of action for expenses incurred under any of the clauses of the section 9 *M. L. J.* 177, *Diss. from*; *Mc Ewan* v. *Crombie.* (1884), 25 *Ch. D.* 175, *Expl.* and *Dist.* [P1104 C 1]

(b) Hindu Law—Minority — Guardianship —Stepmother—In absence of nearer relation she can act as guardian—Guardian cannot make minor personally liable after majority.

In the absence of nearer relations, a stepmother is, under the Hindu law, entitled to act as the guardian of her step-son. 7 *W. R.* 321, *not Appr.* [P 1104 C 2]

A Hindu guardian cannot enter into a transaction so as to charge the minor on attaining age with personal liability. 11 *Bom.* 551, *Foll.* [P 1104 C 2]

(c) Hindu Law — Guardian — Personal liability—Decree made personal can be corrected in appeal though not contented—Minor's estate is liable for proper debts.

Where a decree makes the minor personally liable on a contract by his guardian the appellate Court has jurisdiction to amend and rectify it even in the absence of a memorandam of objections or cross-appeal on behalf of the minor. [P 1104 C 2]

The minor's liability however for debts properly incurred on his behalf by his guardian can be charged against his estate. P 1105 C 2]

Jagannadha Aiyar and *K. Balamukunda Aiyar*—for Appellant.

A. Krishnasami Aiyar—for Respondent.

Seshagiri Aiyar, J.—The plaintiff obtained a usufructuary mortgage from the father of the defendant 1 in 1906. He was in possession for three years. After that period, the tenants whom he had let into possession colluded with one Sekhomoni Ammal, a neighbouring zamindarini, and carried away the crops on the land without paying the landlord's share. Thereupon, the plaintiff instituted criminal proceedings against the tenants and they were convicted. For the expenses incurred in conducting the criminal proceedings, defendant 2, who is the stepmother of defendant 1 executed a document, which is styled a Varthamanam, in December 1909. The present suit is brought against both the defendants on that document. Defendant 1 denied the right of

defendant 2 to be his guardian and contended that the criminal litigation was not conducted bona fide and that he is not liable for the expenses incurred. The District Munsif came to the conclusion that the criminal prosecution was not necessary for protecting the interest of either the mortgagor or the mortgagee, that the expenses incurred were not covered by any of the provisions of S. 72, T. P. Act, and that, under any circumstances, the plaintiff is not entitled to any decree against defendant 1 who was a minor at the time of Ex.-A. He dismissied the suit. In appeal the Subordinate Judge differed from the District Munsif upon the question whether the criminal proceedings were necessary to protect the estate. His finding is that as Sekhomoni Ammal disputed the ownership of the defendants it was necessary to have conducted criminal proceedings in order to protect the estate. He also held that the document executed by defendant 2 was binding upon defendant 1. He gave a decree to the plaintiff for Rs. 800. The decree is personal and does not charge the property of defendant 1.

No serious attempt was made before us to impeach the finding of the Subordinate Judge that the expenses of the criminal prosecution were necessary. If we heard the case on the facts, we may not have come to the same conclusion as the lower appellate Court has done. Under S. 72, Cl. (c), T. P. Act, the mortgagee in possession may add any moneys spent in supporting the mortgagor's title to the property. It is open to doubt whether an expensive criminal litigation carried on for the purpose of getting convicted certain persons who had reaped and carried away the crops on the land can be regarded as a proceeding necessary to support the title of the mortgagor. But, apparently the accused were set up by a rival claimant, and it appears from the evidence that defendant 2 requested the plaintiff to take criminal proceedings to protect defendant 1's title to the property. As we said before, the matter has not been seriously argued before us, and we are not prepared to differ from the Subordinate Judge on this point.

The further question is whether the expenses incurred were reasonable. The mortgagee in possession must act as a prudent owner. That is a question of fact, on which the Subordinate Judge has given a finding which has not been seriously attacked in this Court. We are bound by that finding. On these two findings there can be no doubt that the mortgagee is entitled to be indemnified in respect of the expenses incurred by him. The cases of *Godfrey* v. *Watson* (1), *Sandon* v. *Hooper* (2) and *Fenton* v. *Blackwood* (3) lay down this proposition in clear terms.

The next question is whether a separate suit is maintainable in respect of the expenses. Mr. Jagannadha Ayyar contended that the only remedy open to the mortgagee, who has spent money, under Cls. (a) to (e), S. 72, is to add them to the moneys due under the mortgage and to insist upon being paid those sums before redemption, and not bring a separate suit. The langnage of S. 72 is against this contention. The words are, "the mortgagee may, in the absence of a contract to the contrary, add such money to the principal money." It is a permissive provision and not an obligation imposed upon the mortgagee. As we read the section, it seems to us that the legislature intended to give larger rights to the mortgagee than he would otherwise have. Every person who spends money for the benefit of another is entitled to sue for that money. The ordinary rules of contract would secure him that right. In the case of a mortgagee the legislature apparently intended to put him on a higher footing. He is given the liberty of adding the expended moneys to the amount of the mortgage, thereby securing to the moneys a charge upon the property. The use of the word "may" shows that it is an additional remedy conferred upon the mortgagee and that it is not the sole remedy. The learned vakil for the appellant has been able to find a case which certainly supports him in his contention. In *Bavanna* v. *Balagurivi* (4) it was held by Subramania Aiyar, J. and Boddam J., that the only right secured under S. 72 is to add the amount to the mortgage money. This judgment has not been referred to or followed in any of the subsequent cases in this or any other High Court. With all respect to the learned Judges, we are unable to agree with their conclusions.

(1) [1747] 3 Atk. 517.
(2) [1843] 6 Beav. 246.
(3) [1874] 5 P. C. 167.
(4) [1899] 9 M. L. J. 177.

There is no discussion of the section of the Act nor is there any citation of authorities in support of the proposition laid down by the learned Judges. Mr. Jagannatha Ayyar, referred us to *McEwan* v. *Crombie* (5). One preliminary observation may be made as regards that case, and that is the learned Lord Justices had not to construe any Act of parliament as we have to do. Cotton, L. J., points out that the right of redemption is itself an indulgence granted to the mortgagor, and that he would not be allowed to exercise that right except on condition of paying mortgagee any expenses which have been properly incurred. He adds that the mortgagee's right to bring actions for the debt is not permissible, because the condition imposed by a Court of equity is not in the nature of a contract which can be independently enforced. As we understand the learned Lord Justice, he seems to have laid down that the Common Law Courts should not entertain an action for the debt due in a matter which is purely within the jurisdiction of the Chancery Court and which liability the Chancery Court is alone competent to impose as a condition of redemption. This principle can have no application to India. Having regard, as we said before, to the language of S. 72, T. P. Act, we are unable to agree with the contention that the only remedy open to the mortgagee is to insist upon being paid at the time of redemption. Moreover in the present case, it cannot be said that there was no consideration for the bond given by defendant 2 to the plaintiff. Undoubtedly money has been spent on her behalf and apparently alter request and I see no reason for holding that the bond sued on is not supported by consideration. The decision of the Allahabad High Court in *Imdad Hasan Khan* v. *Badri Prasad* (6) impliedely holds that there is an independent cause of action for expenses incurred under any of the clauses of S. 72. We must therefore overrule this contention. One other minor contention may be disposed of before dealing with the principal point argued in the case.

The learned vakil for the appellant argued that as defendant 2 is only the stepmother, she was not the natural guardian of defendant 1 and therefore the bond will not bind him. The question was not very fully argued, and therefore we do not propose to express any definite opinion upon the question whether the stepmother is a guardian under the Hindu law. There is one case of *Lukmee* v. *Umur Chund Deo Chund* (7) and another in the North Western Provinces in *Nunkoolal* v. *Shoodra* (8) cited in Trevelyan on Minors, Edn., 5 p. 51, in which it was held that a stepmother is entitled to be the guardian of her step-son. On the other hand we have *Maharanee Ram Bunsee Konwaree* v. *Maharanee Soobh Koonwaree* (9), where it was held that she is not. I do not think the fact that she is not the heir to her step-son is conclusive on the question. As at present advised, we are unable to think that in the absence of nearer relations she is not entitled to act as the guardian of her step-son. In *Sundar Moni Dai* v. *Bangsidhar Pathnaik* (10) Mookerjee and Beachcroft, JJ., appointed the step-mother of the minor to be his guardian. In the present case the step-mother was the sister of defendant's own mother. We therefore think that no valid objection can be raised on the ground that she is not entitled to act as guardian.

The main question is whether on a contract by the guardian of a Hindu the minor's person or his property can be charged with liability. We feel no doubt that the decree against defendant 1 personally is wrong. It was pointed out by the Judicial Committee in *Waghela Rajsanji* v. *Shekh Masludin* (11) that a guardian cannot enter into a transaction so as to charge the minor, on attaining majority, with personal liability. Therefore the decree is wrong in so far as it makes defendant 1 personally liable. But we have jurisdiction to see that a proper decree is passed, although there is no memorandum of objections or cross-appeal before us. Now the question is whether the property of the minor should be held liable. Mr. Jagannadha Ayyar laid emphasis upon the decision of the Privy Council in *Indur Chunder Singh* v. *Radhakrishore Ghose* (12) and argued that unless the guardian created a charge upon the property, no decree should be passed against

(5) [1894] 25 Ch. D. 175.
(6) [1898] 20 All. 401.
(7) 2 Bom. Sud. C. Rep. 144.
(8) [1847] 7 N. W. Sud. C. Rep. 115.
(9) [1867] 7 W. R. 321.
(10) [1912] 16 I. C. 900.
(11) [1887] 11 Bom. 551=14 I. A. 89 (P. C.).
(12) [1892] 19 Cal. 507=19 I. A. 90 (P. C.).

the estate of the minor. It is necessary to examine this decision very carefully to see what it is that was actually decided by the Judicial Committee in that case. In the first place, the contract, although by the guardian of the minor, was not entered into in that capacity. A renewal of a lease was taken in the name of the mother and grandmother of the infant. The description in the document is that they were the mother and grandmother of the boy. The document does not purport to have been executed as guardians. Further it was a fresh contract entered into by the ladies and in the litigation that ensued, the minor was sought to be charged with liability for this contract. Lord Hannen delivering the judgment of the Board points out in more than one place that the transaction was not entered into as guardians of the minor. On p. 512 it is said:

"The lessess (referring to the mother and the grandmother) undertook themselves to pay the rent."

on p. 513 it is stated that the plaintiff was asking the minor "to fulfil the obligations entered into by the lessees in their own name." Referring to the earlier case of *Hanoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (13), His Lordship observes:

"Further the managers of an infant's estate were actually dealing by way of mortgage with a portion of that estate."

The view taken in *Indur Chunder Singh* v. *Radhakishore Ghose* (12), comes to this, that, with reference to transactions entered into personally by the guardian of the minor, his estate, on his attaining age, should not be held liable. We do not think this decision should be extended to cases which are not covered by the facts proved in that case. After *Indur Chunder Singh* v. *Radhakishore Ghose* (12) this Court had to deal with question in a number of cases. In *Subramania Ayyar* v. *Arumuga Chetty* (14) it was held that on a bond executed by the guardian the minor's estate can be made liable. *Duraisami Reddi* v. *Muthial Reddi* (15) decides the very question we have now to decide. *Regulla Jogayya* v. *Vencatarathnamma* (16), though it is not a case of minor, enunciates the same principle. In *Sanka Krishnamurthi* v. *Bank of Burma* (17), the present Chief Justice points out that, by applying the principle of subrogation, the estate of the minor can be proceeded against for a proper debt incurred on behalf of the minor. Lastly we have *Padma Krishna Chettiar* v. *Nagamani Ammal* (18). It lays down that a minor's estate can be made liable for a debt contracted by the guardian.

Although a great deal may be said in favour of the position that the Hindu law liability should not be extended to cases under the Negotiable Instruments Act, there can be no question that in case of bonds like the present one, the liability of the minor for debts properly incurred on his behalf can be charged against the estate. We see no reason for not following this catena of decisions in this Presidency and for referring the case to a Full Bench. In a very recent case reported as *Swaminatha Aiyar* v. *Srinivasa Aiyar* (19) Abdur Rahim J. and Spencer J. held that on a personal contract entered into by a trustee the minor's estate should not be held liable. This decision has been dissented from by Kumarasami Sastri, J., in *Ammalu Ammal* v. *Namagiri Ammal* (20), but Sadasiva Aiyar, J., is inclined to agree with it. It is not necessary for us to express any opinion one way or the other upon the actual conclusion come to in the case. The learned Judges point out that the case of a guardian of an infant stands on a different footing from the case of a trustee. As Mr. Krishnasami Aiyar suggested, the trustee has a legal estate in him and consequently any contract entered into by him must prima facie be taken to be chargeable only against him personally or against the estate in his hands. The guardian of a minor occupies a different position, for, as he enters into a contract on behalf of the minor who is the legal owner of the property, he must be deemed to have intended to charge the estate of the minor with liability. In this view *Swaminatha Aiyar* v. *Srinivasa Aiyar* (19) does not affect the present case. We are therefore of opinion that the estate of the minor is liable for the debt sued on. The decree of the

(13) [1854-57] 6 M. I. A. 393 (P. C.).
(14) [1903] 26 Mad. 330.
(15) [1908] 31 Mad. 458.
(16) [1910] 33 Mad. 492=5 I. C. 271.
(17) [1911] 35 Mad. 692=11 I. C. 79.
(18) [1915] 39 Mad 915=30 I. C. 574.
(19) [1917] 38 I. C. 172.
(20) [1918] 43 I. C. 760.

Subordinate Judge must be modified by stating that the minor is not personally liable but only his property. With this modification the second appeal must be dismissed with costs.

Napier, J.—I agree.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1919 Madras 1106

SESHAGIRI AIYAR AND NAPIER, JJ.

Avaran Marakarakath Kizhekkekath Komalukutti and *another* — Plaintiffs—Appellants.

v.

Pulikalakath Puthiakath Muhamad and *others*—Defendants—Respondents.

Second Appeal No. 686 of 1917, Decided on 5th December 1917, against decree of Sub Judge, South Malabar, in Appeal Suit No. 130 of 1916.

(a) Transfer of Property Act (1882), S. 111 (g) — Principles of, apply to agricultural leases— Allegation not amounting to repudiation of title does not incur forfeiture— What is not repudiation is explained.

The principles of S. 111, (g), T. P. Act, apply to agricultural leases, though they are not covered by the enactment. A mere allegation of title by a tenant which does not amount to repudiation of the landlord's title, cannot work forfeiture of the tenancy. Where the defendant, who was plaintiff's tenant for life, in a document whereunder he assigned certain properties which belonged to him in jenm, described certain other properties as his jenm, and the landlord sought to recover these latter properties which were comprised in his lease on the ground that his title was repudiated:

Held: that as the assertion was not addressed to the landlord or followed up by a transfer of that particular property to a third party, but was only an incidental reference in a document intended to convey some other property, it was not enough to constitute a disclaimer of title.

Per *Seshagiri Aiyar, J.*— Where there is a disclaimer of the landlord's title by the tenant, it will work a forfeiture of the tenancy even though the lease is for life or for a term: 25 *I. C.* 944, *Doubted.* [P 1107 C 1]

*** (b) Transfer of Property Act (1882), S. 111 (g)— Denial of title — Forfeiture is effected whether lease is for life or term — Courts cannot relieve unless tenant proves fraud, mistake or accident—"Renounce" explained.**

If there is a denial of title, Courts have no power to relieve against forfeiture. In such a case, the tenant must prove, in order to obtain relief from Court, that the denial was occasioned by the fraud, mistake or accident of the landlord and that the tenant himself was neither careless nor negligent. [P 1107 C 2]

The expression 'renounce' connotes that some act is done to the knowledge of the landlord which is calculated to convey to him the impression that the tenant repudiates his title. [P 1107 C 2]

(c) Land lord and Tenant— Relationship —In absence of specific provisions English law of real property applies — T. P. Act S. 111 (g).

Per *Napier J.*—Where there is no statutory provision determining particular relations between landlords and tenants in India, resort may be had to the principles of the English Law of Real Property, bearing in mind the difference in the origin of tenures and the conditions peculiar to land tenures in India. [P 1108 C 2]

*** (d) Transfer of Property Act (1882), S 111 (g) — Words 'Repudiation' and 'Renounce' imply something more than mere assertion behind back of landlord — Test to determine whether assertion amounts to repudiation is whether possession becomes adverse.**

The words 'repudiation' and 'renunciation' require something a great deal stronger than a mere assertion not communicated to the landlord. Though a hard and fast rule cannot be laid down, a very good test to apply would be, whether the assertion would operate as a starting point for adverse possession against the landlord. [P 1109 C 2]

T. Kuttikrishna Menon— for Appellants.

K. P. Govinda Menon— for Respondents.

Seshagiri Aiyar, J.—This is a suit for ejectment by a landlord, on the ground that the tenant has forfeited his right by his denying the title of the plaintiff. The District Munsif held that the act complained of did amount to a disclaimer of the landlord's title and decreed possession. On appeal the Subordinate Judge agreed with the District Munsif that there was a disclaimer but held that as the lease was granted for the lifetime of the lessee, the disclaimer had not the effect of putting an end to the tenancy and that the suit was premature. He dismissed the suit upon that ground.

There are two questions for consideration in this second appeal. The first is was there a disclaimer of title, secondly, whether the tenant has not forfeited the tenancy, as the lease was for the lifetime of the tenant although he did deny the landlord's title. I shall dispose of the second point first. The cases quoted by the Subordinate Judge have not much bearing upon this second question. I fail to see why the denial of title during the continuance of the period of tenancy should not work a forfeiture of the right. The Transfer of Property Act no doubt has no application in terms to this tenancy, which is an agricultural one. But the principle of S. 111, Cl. (g), is applicable to this case. Under the second sub-section of that clause it is enacted

that the lessee renounces his character as such by setting up the title of a third person or by claiming title for himself. Sadasiva Aiyar, J., in *Abbakka Shetthi* v. *Seshamma* (1) points out that under the Common Law of India, a favourable construction should be placed upon the conduct of the tenant before he is adjudged to have forfeited his tenancy. I am prepared to accept this view in dealing with agricultural leases, but I can see no justification for the view taken by the Subordinate Judge that leases for a term will enure for the full length of it notwithstanding the denial of title by the tenant. Therefore if I come to the conclusion that there has been a disclaimer of title by the tenant, I would take a different view of the case. I suggested in the course of the argument that even if there was a disclaimer, Courts may have power to relieve tenants from forfeiture. Many authorities were not cited on the question at the bar, but, on considering the matter fully, I am not satisfied that, if there is a denial of title, there is power in the Courts to relieve against forfeiture. Under the English Law there are at present still classes of cases which can be relieved against (a) for non-payment of rent; the Common Law Procedure Acts of '52 and '60 and S. 4, Conveyancing Act of '92 provide for relief, (b) in cases of breaches of other conditions and covenants the Conveyancing Acts of '91 and '92 declare principles on which relief can be granted. No doubt it is pointed out in *Barrow* v. *Isaacs* (2) that these various enactments have not exhausted the equitable jurisdiction of the High Court to relieve a defaulting tenant from forfeiture. Lord Esher in that case says that in cases which are not provided for by the legislature, equity will come to the aid of the party only in three cases, viz., fraud, accident or mistake.

Then he proceeds to say that even if any of these elements are found, there will be no relief if the tenant had acted with great carelessness or negligently. The learned Master of the Rolls does not refer to the case of denial of title as one of the relievable cases, and I have not been able to find any authority in which relief was granted by Courts where the tenant had denied the landlord's title. Sadasiva Aiyar, J., in the case to which I already referred seems inclined to the view that all cases of forfeiture can be relieved against. Even accepting this broad proposition as being especially applicable to Indian conditions I would require that, where there has been a denial of title, the tenant must prove, in the language of Lord Esher that the denial was occasioned by the fraud, mistake or accident of the landlord and that the tenant himself was neither careless nor negligent. In the present case no attempt has been made to prove that the tenant has been misled. Therefore, I am driven to the conclusion that, if there had been a disclaimer of title, I would have decreed possession.

But I am not satisfied that the Courts below are right in holding that there is a disclaimer of title. The disclaimer is said to be contained in Ex. J. That is an assignment of jenm right by the defendant to a third party in respect of properties which undoubtedly belong in jenm to the defendant. In the course of describing the properties assigned and in excluding certain properties from the deed of assignment, the defendant says that the excluded property belongs to him in jenm. It is true there is in this case an assertion of jenm right in respect of property now sought to be recovered, but the assertion is not addressed to the landlord, nor is that assertion followed up by transferring the particular property to a third party. There is no surrender of possession to a person claiming adversely to the jenm. It is only an incidental statement in a document which was intended to convey some other property. The question is now whether this incidental reference can amount to a denial of title. In the Transfer of Property Act the language is

> " in case the lessee renounces his character as such by setting up title of a third person or by claiming title in himself."

In this case he did not set up the title of a third person nor did he renounce his character as tenant. In ordinary parlance the expression "renounce" would connote that some act is done to the knowledge of the landlord which was calculated to convey to him the impression that the tenant repudiated his title.

The English authorities to which I shall presently refer seem to bear out the

(1) A. I. R. 1915 Mad. 85=25 I. C. 914.
(2) [1891] 1 Q. B. 417.

view that a casual reference like the present one will not have the effect of renunciation of title. As was pointed out in *Prag Narain* v. *Kadir Baksh* (3), the denial must be unequivocal and same act tending to the giving up of the relationship of tenant must have been committed. The authorities in England are to the same effect. In *Doe d. Graves* v. *Wells* (4) Lord Denman, C. J., seems to suggest that there must be a betrayal of the landlord's interest and that the landlord should be placed in a worse condition, before he can insist upon forfeiting the tenant's lease. In *Doe d. Dillon* v. *Parker* (5) it was held that a payment to a third person was not sufficient to put an end to the tenant's lease. *Doe d. Gray Stanion* (6), *Doe d. Pittman* v. *Sutton* (7), *Doe d. Williams* v. *Cooper* (8) may be quoted in support of the same view. In Mr. Williams' Book on Ejectment (Edn. 2), p. 56, the law is thus stated:

"In order to constitute a disclaimer something must be done by the tenant which amounts to a direct repudiation of the relationship of landlord and is necessarily inconsistent with that relationship."

In Woodfall on Landlord and Tenant. the statement is:

"In order to make either a verbal or written disclaimer sufficient it must amount to a direct repudiation of the relationship of landlord and tenant or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with that relation, which by necessary implication is a repudiation of it."

The same proposition is stated in Cole on Ejectment also, p. 41. In my opinion the collateral reference in a document intended to convey some other property is not enough to constitute a disclaimer of title. The principle is well settled that a tenant cannot acquire title by prescription against his landlord so long as he does not, to the knowledge of the landlord, repudiate the tenancy under which he held possession. Consequently the statement in a document executed to a third party cannot ordinarily have the effect of starting adverse possession in favour of the tenant. The landlord therefore is not put in a worse position than he was when he let the property to the defendant. I therefore hold that there has been no denial of title. I would dismiss the second appeal. But having regard to the conduct of the defendant I do not think he is entitled to any costs in this Court.

(3) [1913] 35 All. 145=18 I. C. 728.
(4) [1839] 10 Ad. & E. 427.
(5) [1820] Gow. 180.
(6) [1836] 1 M. & W. 695.
(7) [1841] 9 Car. & P. 706.
(8) [1840] 1 Man. & G. 135.

Napier, J.—Two questions have been raised in this second appeal, the first, whether the alleged denial of title by the defendant operates to terminate his interest in the land, and the second, whether if there is a forfeiture, the Courts have power to relieve against it. The first question only has been considered by the lower Appellate Court, and the view taken by the learned Judge on his reading of some decisions of this Court is that no denial of title by a person in the position of the defendant could have that operation. I agree with the appellant that the learned Judge has misappreciated the effect of those decisions. But that does not dispose of the question.

It must be premised that there is no statutory law under which a denial of title by an agricultural lessee acts as a forfeiture. It is argued, and the argument is founded on several decisions of this Court, that the analogy of the Transfer of Property Act should be applied, although such leases are specifically exempted. I have, speaking for myself, pointed out in another case the danger of this method and, where statutory provision is absent, have preferred to seek another basis, namely, the English law of property. In doing so, we should in my opinion, always bear in mind the difference in the origin of tenures and also the conditions peculiar to land tenures in this country.

I entirely agree with my learned brother that the only denial which we have to consider in this case is that contained in Ex. J, and this denial is certainly not made in any transaction dealing with the property, the subject of this suit, and is not addressed to the landlord. That is the state of facts as to the denial. The tenancy in question arises in a rather peculiar manner. Claims were made to this property and other properties by the plaintiff and the defendant and the suit ensued. Their respective rights were settled by a razinama decree, under which this property was:

"to be held by defendants 2 and 3 until the death of both of them on Verumpattom rights under the plaintiff without being surrendered."

The defendants should pay a rental of Rs. 2 per year, and on the death of the

defendants, the Paramba should be taken possession of by the plaintiff or her representatives. The result of the decree was to create the relationship of landlord and tenant between the plaintiff and the defendants, the tenancy being one for joint lives of the defendants. The defendants have certainly, in Ex. J., declared that they held the property in jenmi rights, but they have not granted any lease inconsistent with their life tenure, nor have they repudiated that tenure directly to the landlord.

It appears from an examination of the English cases that forfeiture for denial of title is based on two different principles when applied to two different classes of tenancies. The first is with regard to tenancies from year to year. In *Doe d. Graves* v. *Wells* (4), Denman. C.J., points out that with regard to tenures from year to year the words "forfeiture" and "disclaimer" are wrongly applied and that where a landlord brings an action to recover possession from such a tentant the evidence of a disclaimer of the landlord's title by the tenant is evidence of the determination of the will of both parties, by which the duration of the tenancy from its particular nature, was limited; and viewed in this light, he held that a verbal assertion that the fee was in the tanant even though made to the landlord's agent, was not a sufficient indication of the desire of the tenant to put an end to the tenancy, in that mere words could not operate to affect an interest in law.

The origin of the doctrine as applying to tenancies not terminable at will is to be found in 3 Bacon's Abridgment, p. 196 Estate for Life and Occupancy

"another way of forfeiture in a Court of Record is by claiming a greater estate than he had by the feudal donation, or by affirming the reversion to be in any other person than his lord. This seems to be grounded on a rule in the old feudal law, that if a vassal denied that he held the feud of his lord, and it was proved against him, such denial was a forfeiture."

And then come the words explaining the limitation of this doctrine

"But as by the feudal law, the vassal was to be convicted of this denial, so in our law those acts which plainly amount to a denial must be done in a Court of Record, to make them a forfeiture; for such act of denial appearing on record is equivalent and equally conclusive as a conviction upon solemn trial; and all other denials, that might be used by the great lords for trepanning their tenants and for a pretence to to seizet their estates, by our law were rejected, for such convictions might be made by such great lords where there was no just cause: but the denial of the tenure upon record could never be counterfeit, or be abused to any injustice; and therefore, this notorious and solemn act of the tenant was retained as a just cause of forfeiture by our law."

That is the origin of the doctrine of forfeiture by denial; and it is hardly necessary to point out how unequivocal and direct denial must be to come within the mischief of this doctrine. The modern application of this doctrine is to be found stated in Woodfall's Law of Landlord and Tenant, Edn. 19, p. 431:

"In order to make either a verbal or written disclaimer sufficient, must amount to a direct repudiation of the relation of landlord and tenant or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with that relation, which by necessary implication is a repudiation of it."

This statement of the law is taken word for word from the judgment of the Court of Exchequer in *Doe d. Gray* v. *Stanion* (6) and was quoted as the basis of his judgment by a very eminent Judge Fry, J., in *Vivian* v. *Moat* (9).

It is clear, therefore that a mere allagation of title which does not amount to repudiation cannot work forfeiture and it is to be noted that in the Transfer of Property Act, this distinction has evidently been borne in mind, for the only disclaimers which operate under S. 111, Cl. (g), are in cases where

"the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself."

It seems to me that both the words repudiation and renunciation require something a great deal stronger than a mere assertion not communicated to the landlord. It is impossible to lay down a hard and fast rule; but, to my mind, a very good test to apply would be whether the assertion would operate as a starting point for adverse possession against the landlord vide *Doe d. Foster* v. *Williams* (10), where Lord Mansfield applies this test; and viewed in this light the assertion will not come within its mischief.

I am therefore of opinion that there was no denial of the title within the mischief of the doctrine. That being my conclusion on the first question, I do not think it necessary to enter into a consideration of the other point, whether a forfeiture for denial of title can be

(9) [1881] 16 Ch. D. 730.
(10) [1777] 2 Cowp. 621.

relieved against. I agree with the result of my learned brother's judgment.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 1110

AYLING AND SESHAGIRI AIYAR, JJ.

(*Karakkattitathil*) *Rayarappa Nambiar*—Plaintiff—Appellant.

v.

(*Koyotan Chable*) *Veetul Kamaran* and *others*—Defendants—Respondents.

Civil Appeal No. 52 of 1916. Decided on 21st January 1918, against decree of Sub-Judge, North Malabar, in O. S. No. 16 of 1913.

(a) Limitation Act (9 of 1908), S. 5—Delay due to representation in wrong Court is sufficient cause.

Delays in presentation of appeals are within S. 5 and the Court has power to excuse delays.

Where an appeal is time-barred on the date of its presentation and the delay is due to the fact that it was previously presented in a wrong Court and returned for re-presentation to the proper Court, the delay can be excused under S. 5, Lim. Act. [P 1110 C 2]

(b) Registration Act (1866), S. 17—Compromise decree need not be registered.

The validity of a decree passed on compromise was not dependent on registration under the Registration Act of 1866. [P 1111 C 2]

(c) Evidence Act (1 of 1872), S. 102—Compromise decree—Burden of proof.

The onus of proving that a compromise is illegal or void is on the party asserting it : 31 *Mad.* 474, *Foll.*; *A. I. R* 1917 *P. C.* 146, *Dist.* [P 1112 C 2]

(d) Malabar Law — Tarwad — Decree — Karnaven not sued in representative capacity will not make decree against Tarwad ineffectual.

Where a decree is in effect against a Tarwad, the fact that the Karnavan was not specially impleaded in lies representative capacity will not make it the less decree against the Tarwad: 20 *Mad.* 129 (*F.B.*), *Expl.* [P 1112 C 1]

(e) Malabar Law — Tarwad — Decree — Representative capacity—Party acting and pleading in representative capacity makes decree binding on family—Form of suit is immaterial.

It is not the form of the suit that is essential, but the question in each case is whether in substance the person suing ordered conducted the litigation for his own benefit for as representing the family of which he was the lead. [P 1112 C 1]

Chamier—for Appellant.

Menon—for Respondents.

Judgment.—Plaintiff, as the Karnavan of his Tarwad, sues to recover possession from the defendant. His case is that his Tarwad is the jenmi of the properties in suit, that its title was recognized by defendant 1 in Original Suit No. 112 of 1868 of the file of the Court of the District Munsif of Kavvayi (under the Zilla Court of Tellichery), and that defendant 1 and others who are Anandravans of the defendant's Tarwad hold the property under a Kanom from the plaintiff's Tarwad. The plaintiff further stated that sum of Rs. 400 was paid towards the Kanom and that the defendants are bound to surrender on the receipt of the balance. The defendants contended that the jenmi title belonged to their Tarwad and not to the plaintiff's Tarwad. The Subordinate Judge dismissed the suit. The plaintiff has appealed. A preliminary objection is taken by the respondent that the appeal filed in this Court is barred by limitation. The original valuation of the suit was below five thousand rupees; the plaintiff first presented an appeal to the District Court which admittedly was in time. Objection was there taken that the appeal should be preferred to the High Court. Upholding this objection, the District Judge returned the appeal for presentation to this Court on 24th January 1916, and it was filed on 31st January 1916.

Mr. Menon contended that the filing of the appeal in the District Court was due to an error of law and that S. 5, Lim. Act, is not applicable to such a case; and he relied on *Ramjiuan Mal* v. *Chand Mal* (1). That and other decisions were considered by the Judicial Committee in *Brij Indar Singh* v. *Kanshi Ram* (2), where it was pointed out that it is not the rule that delays due to an error of law are not within S. 5, Lim. Act. We hold therefore that we have power to excuse the delay. As regards the interval between the return of the plaint and its presentation in the High Court, having regard to the fact that a fresh vakalat had to be obtained from the parties and to the distance between Madras and Tellicherry, we do not think there was any negligence. We therefore overrule the preliminary objection.

On the merits the facts are these. The property in suit admittedly belonged to a Devaswom. The plaintiff claimed that he acquired the trusteeship as well as the right to be in possession of the properties of the temple from the Uralam. He has produced no documents in support of the claim, excepting the razinama

(1) [1888] 10 All. 587.
(2) A. I. R. 1917 P. C. 156=45 Cal. 94=42 I. C. 43=44 I. A. 218 (P. C.).

decree to which we shall presently refer. The defendants also trace their title to the Devasvom. They base their title on an alleged Saswatham grant from a person who at one time called himself the Sumudayee but who defendants assert was really the Uralam of the temple. Exs. 1 and 3 are the title-deeds. It is not necessary to examine the respective titles of the parties any further as the basis of the present litigation is the compromise decree passed in the Kavvayi Court. The parties to that litigation were the then Karnavan of the plaintiff's Tarwad, the present defendant 1 and the assignor of that defendant. The plaintiff's Tarwad then contended that the property was in their possession for a long time and that the defendants who claimed through a Samudayee were not entitled to it. It is said that before the written statement was filed, the parties entered into a compromise which was embodied in the decree of the Court. The result of that compromise was to recognize the title of the plaintiff's Tarwad to the property and to grant a Kanom in favour of the defendants' Tarwad. This was in the year 1868. The present suit is to enforce the terms of that compromise. The main contention of defendants 2 and 3 was that the compromise which gave up the rights of their Tarwad was not binding on them.

The Subordinate Judge bases his judgment upon three conclusions, (1) that the compromise did not confer any rights to the property and was not receivable in evidence for want of registration; (2) that as there were no doubtful rights to be settled the compromise was not binding upon the Tarwad; and (3) that the defendants have been in adverse possession. As regards the first contention reliance was placed upon the absence of an exemption for registration in favour of decrees of Court in the Registratian Act of 1866. Under that Act the Court passing a decree for property over a hundred rupees in value was directed to send that decree to the Registering Officer for registration. See Ss. 41 and 42. Under S. 17 of the same Act, documents executed by the parties for similar properties were compulsorily registrable. The contention of the learned counsel for the respondents is that the provisions of the Act of 1877 which exempted decrees from registration should not be applied retrospectively, and that as at the time of the compromise the decree could not confer any title to immovable property, it was not receivable in evidence. In the first place, it must be noted that parts 3 and 8 of the old Registration Act dealt with two different classes of cases Ss. 17 to 21 which are in part 3 dealt with documents inter partes. S. 41 referred to documents sued upon being superseded by a decree of the Court S. 42 to decrees otherwise declaring rights in immovable property. In S. 49 the reference was not to documents mentioned in part 8, but to documents referred to in S. 17. It is clear therefore that the validity of a decree was not dependent upon registration under the old Act. The provision in part 8 is only to complete the Record of Rights by the Registration Department. If it was intended by the legislature that a decree should not confer rights of property unless registered, it would have been included in the prohibitory S. 49. We hold that the compromise decree did confer title on the plaintiff's Tarwad, notwithstanding non-registration. The decisions in *Purmanand Das Jiwandas* v. *Vallabdas Walljee* (3) and in *Raju Balu* v. *Krishnarav Ramchandra* (4), although they related only to the admissibility in evidence and not to the conferring of rights contain observations which support our view. There can be no doubt that the document is receivable in evidence as well.

The next point for decision is whether the compromise is not binding upon the defendant's Tarwad. Defendant 1 having been a party to it, it is not open to him to dispute it. The main contention on behalf of defendants 2 and 3 is that, prior to the compromise, the defendants' Tarwad had been successful in every litigation against the plaintiff's Tarwad, that the former were in possession of the properties, that there was no doubt as to their paramount title at the time and therefore the Karnavan, defendant 1, was not justified in surrendering the rights of the Tarwad and in accepting in lieu thereof the subordinate right of a Kanomdar. As to this, the materials which influenced defendant 1 in consenting to the compromise have not been placed before the Courts, the evidence of defendant 1 does not show that in agreeing to the de-

(3) [1887] 11 Bom. 506.
(4) [1877-78] 2 Bom. 273.

cree he was acting in fraud of the Tarwad or that he was unduly influenced by the plaintiff. Mr. Menon for the respondents argued with great insistence that as the decree was passed against defendant 1 not as Karnavan but in his individual capacity it is not binding on the Tarwad. He relied upon the observations of Shephard, J., in *Vasudevan* v. *Sankaran* (5). The Full Bench in that case held that the Karnavan of a Malabar Tarwad honestly defending a suit in his representative capacity will bind the Tarwad. From this judgment, the learned Counsel argued that the converse of the proposition, namely, that if the decree is not passed against the Karnavan in his representative capacity, it is not binding on the Tarwad, follows. It was conceded (by Mr. Chamier for the appellant and by Mr. Menon for the respondent) that there is no decision which establishes this converse proposition. In the Full Bench judgment Shephard, J. says;

"One negative proposition is clearly established by the cases to which I have referred—a decree made against a Karnavan is clearly not binding on the Tarwad unless he sued or was sued in his representative character."

The learned Judge does not say, as was contended before us, that the Karnavan should be impleaded as such. We do not understand from the above quotation that, although in effect the suit was against the Tarwad, yet if the Karnavan is not specially impleaded as Karnavan the Tarwad will not be bound. Under Hindu law if a suit is brought against a manager of a Hindu family, although he is not impleaded as such in the suit, the result of the litigation will bind the other coparcenars: see *Subbanna Bhatta* v. *Subbanna* (6), *Baldeo Sonar* v. *Mobarak Ali Khan* (7) and *Sheo Shankar Ram* v. *Jaddo Kunwar* (8). It is not the form of the suit that is essential; but the question in each case will be whether in substance the person suing or sued conducted the litigation for his own benefit or as representing the family of which he was the head. We see no reason for not applying this principle to cases governing Malabar Tarwads. On examining the compromise we find that the rights secured were not for the individual benefit of defendant 1 but for the Tarwad and not that of the individual defendant. We are satisfied upon the evidence of defendant 1 and upon a perusal of the razinama that defendant 1 was sued as representing his Tarwad and that he agreed to the compromise in his representative capacity.

On the question whether it was a bona fide settlement of a disputed claim, the burden is on the defendants to show that the compromise was not honestly come to, In *Pulliah Chetti* v, *Varadarajulu Chetti* (9), it was held that it is for the party who impeaches the compromise to prove that it was illegal or void. As regards *Gunjeshwar Kunwar* v. *Durga Prashad Singh* (10), which was strongly relied on by the respondents' Counsel, it is enough to say that the finding of the Judicial Committee in that case showed that one of the parties to the litigation possessed information which he withheld from the other party and induced that party dishonestly to agree to the terms of the compromise. In the present case there is nothing to show that both parties were not equally cognisant of all the facts which led up to the compromise. There is no evidence that the then plaintiff wrongfully induced defendant 1 to accept the compromise to which he was not a willing party The compromise has stood unquestioned for nearly half a century. We must therefore hold that it is binding on the defendants. We agree with the Subordinate Judge that it has not been satisfactorily proved that any portion of the Kanom amount was paid by the plaintiffs Tarwad to the defendants. The result is that the decree of the Subordinate Judge must be reversed and a preliminary decree for redemption must be passed in favour of the plaintiff. There is an issue as to improvements which has to be decided before accounts are taken and the final decree is passed in the case, Costs hitherto incurred will be provided for in the revised decree.

S.N./R.K. *Appeal allowed.*

(5) [1897] 20 Mad. 129 (F. B.).
(6) [1907] 30 Mad. 324.
(7) [1902] 29 Cal. 583.
(8) A. I. R. 1914 P. C. 136=36 All. 383=24 I. C. 504=41 I. A. 216 (P. C.).
(9) [1908] 31 Mad. 474.
(10) A. I. R. 1917 P. C. 146=45 Cal. 17=42 I. C. 849=44 I. A. 229 (P. C.).

A. I. R. 1919 Madras 1113

SESHAGIRI AIYER AND NAPIER, JJ.

Amir Bi Bi—Plaintiff—Appellant.

v.

Arokiam and *others*—Defendants—Respondents.

Second Appeal No. 1374 of 1916, Decided on 16th November 1917 against decree of Dist. Judge, Salem, in Appeal Suit No. 56 of 1915.

(a) Arbitration —Award—Hypothecation bond allotted by oral award is enforceable without any instrument—Oral award is binding and enforceable as oral partition—Transfer of Property Act does not apply to transfer by oral award—No writing and registration is required--Transfer of Property Act—Registration Act.

A suit on a hypothecation bond allotted to the holder by an oral award of arbitrators passed on a voluntary submission is maintainable without the execution of further instruments following on the award. An award may be oral and it is as binding on the parties as a written award. An oral award may also be enforced as an oral partition which is effective without writing or registration. The Transfer of Property Act is not exhaustive of all modes of transfer and does not deal with transfer by an award. If there is a transfer of property which does not come within the special modes dealt with in the Act, the conditions as to writing and registration prescribed therein have no application. An oral award can however pass title without any further action by the parties on any other footing, as, by the submission, the arbitrators are constituted the parties' agents for the purpose of doing such things as are specifically or by implication embodied in the terms of the submission.

[P 1113 C 2, P 1114 C 2, P 1115 C 1]

(b) Arbitration—Award—Award though oral is enforceable as judgment—(Per *Seshagiri Aiyar, J., Napier, J*, differing.)

Per *Seshagiri Aiyar, J.*—An award by arbitrators is as binding in its nature as a judgment of Court and a right of suit accrues to a party to whom a bond is allowed by virtue of such award. 2 *I. C.* 431; *Foll.* [P 1114 C 1]

Per *Napier, J.*—The only method by which an award can be made efficacious for process by the Court is by making the submission a rule of Court and unless this is done, and enforcement can be had under the processual law, it cannot be said to operate as a judgment of Court. Even if it is equivalent to a judgment for some purposes, in the sense that it may have the same effect in barring suits, it is not a judgment in any real meaning of the word, far less is it a decree. 19 *Mad.* 290 and 2 *I. C.* 414, *Expl.* 23 *All.* 285, *Dist.* [P 1117 C 1]

K. V. Krishnasami Aiyar for *T. M. Krishnasami Aiyar*—for Appellant.

C. Madhavan Nair—for Respondents.

Seshagiri Aiyar, J.- This is a suit on a hypothecation bond. The plaintiff alleges that in a family settlement between herself, her mother-in-law and brother-in-law the arbitrators chosen by them are alleged to have given an oral award under which this bond and some other bonds were allotted to her share. The hypothecation bond was originally executed to her father-in-law. She now sues on it. The only plea of the defendant with which we are concerned, relates to the unsustainability of the suit on the ground that even if the award was true, as it was not followed by an execution of a conveyance, plaintiff is not entitled to maintain a suit to recover the money due under the bond. The learned District Judge has accepted this plea and has dismissed the suit. I am unable to agree with him. There are two aspects of the question; one is that the award itself operates to vest the property in the plaintiff, and the other, an award not being one of the instruments specially dealt with in the Transfer of Property Act no writing or registration is necessary to give validity to the award. Upon the first question it may now be taken as settled law that an award may be oral. *Kula Nagabushanam* v. *Kula Seshachalam* (1), *Savlappa* v. *Devchand Valchand* (2) and Second Appeal No. 837 of 916 have held that an oral award is as binding upon the parties as a written award. The further question is whether the award of an arbitrator is only a contract between the parties who submitted their disputes to his decision or whether it has the attributes of a judgment as well. There are no doubt dicta in certain cases that an award of the arbitrators must be regarded as in the nature of a contract. These are cases in which it was held that the award can be varied like a consent judgment, in certain particulars. I do not think that these authorities lay down that an award has no greater effect than a contract of the parties. It is true that under the English Law as pointed out by Russel on Awards at p. 311,

> "An award of the arbitrators must be followed up by execution of the necessary documents to give efficacy to it."

As Mr. Krishnasami Ayyar pointed out, an examination of the cases cited as authorities for this proposition does not fully bear out this statement of the law. For example, the case of *Johnson* v. *Wilson* (3) was one in which a further act would have been required to give the va-

(1) 1 M. H. C. R. 178.
(2) [1902] 26 Bom. 32.
(3) [1740] 125 E. R. 1156.

lidity to the decision even if it had been regarded as one passed by a Court of Law.

But there are some cases which bear out the view enunciated. I do not think that these decisions should be followed in India. In this country, decisions by panchayats have been accepted as binding long before the regular Courts were established by the British Government and there is nothing in Sch. 2, Civil P. C. to suggest that the decisions of the arbitrators are not valid until they are followed by the execution of the documents. Of course, in cases relating to specific performance or where one of the parties sues another for the enforcement of a particular act. the decree of the Court would still leave the parties under an obligation to perform the directions given in the judgment of the .Court. But where a complete adjudication of the rights of the parties is given by the judgment, the parties are concluded by it and it is not incumbent upon either of them to take further steps unless, they be the modes prescribed by processual law to give effect to the decree of the Court. This is undoubtedly the position so far as the judgments of the ordinary Tribunals of the country are concerned. Is the position of the arbitrators different? In my opinion, the fact that the parties have chosen to invoke the aid of the private Tribunal to settle their differences should not make any difference as regards the efficacy of the decision come to by such a Tribunal. So long as the resort to such a Tribunal is authorized by the law, I can find no justification for not giving the same finality to the pronouncement of such a Tribunal as is accorded to that of the ordinary Tribunals. The fact that in submitting reference to arbitration no Court fee is paid does not in the least affect the question. There are authorities which support the conclusion at which I have arrived. In *Muhammad Newaz Khan* v. *Alam Khan* (4) the question related to the applicability of the principle of res judicata to awards of arbitrators. Their Lordships of Judicial Committee point out that the fact that no application was made to make the award a decree of Court did not render the award any the less valid. The logical result of this conclusion is to regard the award as binding in its nature as a judgment of Court. In *Sornavalli Ammal* v. *Muthayya Sastrigal* (5) the learned Judges point out that the award is not simply a contract between the parties but had the effect of conferring title upon them. In *Jadunath Chowdhury* v. *Kailash Chandra Bhattacharya* (6) it was held that the award can be pleaded in bar to a suit relating to the subject matter covered by the award. *Sheo Narain* v. *Beni Madho* (7) is also to the same effect. See also *Krishna Panda* v. *Balaram Panda* (8) and *Sbbaraya Chetti* v. *Sadasiva Chetti* (9). In *Bhaurao Jivaji* v. *Radhabai* (10) the learned Judges, relying upon the decision of the Judicial Committee in *Muhammad Newaz Khan* v. *Alam Khan* (4), came to the conclusion that no further instrument need be executed to give validity to the award of the arbitrators. I am prepared to follow this decision. As regards *Talewar Singh* v. *Bahori Singh* (11), the learned Judges themselves point out that something had to be done in pursuance of the decision of the arbitrators. It is upon that ground they distinguish *Sornavalli Ammal* v. *Muthayya Sastrigal* (5). I am therefore of opinion that by virtue of the award of the arbitrators the right to recover upon the mortgage bond accrued to the plaintiff.

As I stated at the outset, there is also another aspect from which the award can be viewed. It has been held that oral partitions can be enforced notwithstanding the fact that there is no writing or registration to evidence such a partition. see *Thiruvengadachariar* v. *Ranganatha Aiyangar* (12), *Alamelu Ammal* v. *Balu Ammal* (13), *Latchumammal* v. *Gengammal* (14) and *Gyannessa* v. *Mobarakannessa* (15). It was also held that an oral dedication of property to an idol is valid. See *Pallayya* v. *Ramavadhanulu* (16). The principle of these decisions is that the Transfer of Property Act is not exhaustive of all modes of transfer and

(4) [1891] 18 Cal. 414=18 I. A. 37 (P. C.).

(5) [1900] 23 Mad. 593.
(6) [1909] 37 Cal. 63=2 I. C. 414.
(7) [1901] 23 All. 285.
(8) [1896] 19 Mad. 290.
(9) [1897] 20 Mad. 490.
(10) [1909] 33 Bom. 401=2 I. C. 431.
(11) [1904] 26 All 497.
(12) [1903] 13 M. L. J. 500.
(13) [1915] 26 I. C. 455.
(14) [1910] 34 Mad. 72=7 I. C. 858.
(15) [1898] 25 Cal. 210.
(16) [1903] 13 M. L. J. 364.

if there is a transfer of property which would not come within the special modes discussed in the Transfer of Property Act, the conditions as to writing and registration prescribed by the Act have no application. The mode of transfer by an award is not dealt with by the Transfer of Property Act. Consequently the decision of the arbitrators by which they are said to have given the mortgage bond to the present plaintiff is enforceable between the parties, if there is an oral award. In this view also plaintiff would have acquired a title to sue upon the hypothecation bond.

For both these reasons I am of opinion that the judgment of the District Judge must be reversed and the appeal should be sent back to him for disposal on the merits. Costs to abide the result.

Napier, J.—This second appeal arises out of the refusal of the District Judge of Salem to recognize an award as passing title to the appellant in the suit and thus enabling her to sue a third party on the strength of it. The case before the Court was that there was an oral submission to arbitration by certain members of a family of their claim to various properties and that an oral award was given by the arbitrators by which, among other arrangements, the property in question in the suit was given to the appellant, although she was not a party to the submission, and that the value of the property is below Rs. 100. On these facts it is contended before us that the award operated to vest title in her and the contention was sought to be supported on two grounds, first, that the award operated as a judgment, secondly, that the property being under Rs 100 in value, the arbitrator nominated by the parties had authority to transfer it orally and this award had had that effect.

It is undoubtedly settled law that an oral award is as binding between the parties as a written award, though the further question might arise whether even if a written award could operate as a judgment, an oral award would have the same effect. The contention that an award operates as a judgment and the further contention that qua judgment it can pass title is one that would have such far-reaching results that I think it necessary to examine it carefully.

The first difficulty to be met is as to the effect of a judgment alone as passing title. The primary effect of a judgment is to give a right to have the adjudication of the Court embodied in a decree under S. 33, Civil P. C. 'Judgment' is defined in the Civil Procedure Code as "the statement given by the Judge of the grounds of a decree or order," and I know of no process by which a judgment can be rendered effective without a decree or order having been passed. I must assume therefore that when the word 'judgment" is used it is intended to convey the idea of decree or order made by a person constituted by agreement of parties as a Court ad hoc. Assuming that this is so, I am unable to see how the matter is carried any further. Decrees and orders of a Court have to be executed by the Court and elaborate provisions are contained in the Civil Procedure Code regulating the procedure. It has not been contended before us that the provisions of Part 2 of the Code or O. 21 are applicable to awards by an arbitrator, and it would be a strange result that, whereas execution of a decree entitling a person to recover property has to be by delivery of the property specifically decreed under S. 51 the award of an arbitrator should be a judgment and decree capable of passing property without delivery. Another difficulty in the way of this contention is that no period of limitation would affect the efficacy of this judgment or decree. The only provisions in Lim. Act which touch awards are Arts. 45, 46 and 158. The first has a reference to a suit to contest an award, the second to a suit to recover any property comprised therein and the third to an application to set aside an award under Sch. 2, Civil P. C. None of these Articles has any application.

The next difficulty is that the Code expressly provides a method by which an award made on a reference to arbitration without the intervention of the Court may become a judgment within the meaning of the Code. That is Cl. 21, Sch. 2 which provides for the Court pronouncing judgment and a decree following. On such a decree execution would follow and limitation would apply. This is of course, the only method by which execution can be procured on an award, and that being so, I cannot see how an award on which a Court has not pronounced judgment and issued a decree can be a judgment capable of passing rights. In *Krishna Pandi*

v. *Balaram Panda* (3) the learned Judges used the phrase "an award duly passed in accordance with a submission of the parties is equivalent to a final judgment," but that language is only used as introductory to the proposition that 'to give effect to it the subsequent consent or approval of neither party is required.' I do not think that this dictum helps the appellant on this point. I am unable to find any other case in this Court where language of this sort has been used. The case of *Jadunath Chowdhary* v. *Kailash Chandra Bhattacharya* (6) was also relied upon. In that case an award on a private reference was held to be sufficient answer to a suit to recover property. Their Lordships did not however put it on the ground that the award operated as a judgment, but on the ground that the value of the property being under Rs. 100, the provisions of Registration Act of 1908 did not prevent title passing. The case reported as *Sheo Narain* v. *Beni Madho* (7) has also no bearing on this point and nothing was said in it to suggest that the award was a judgment.

Reference was made to the English law on the subject and I agree that if authority could be found in England for the proposition that an award on a voluntary reference operated as a judgment, the argument of the learned vakil for the appellant would receive great support, for it must be borne in mind that under the English procedure a judgment is not merely a statement given by the Judge but is the formal adjudication on which execution arises. The authority is however all the opposite way. It would be sufficient to refer to S. 12, Arbitration Act which deals with reference by consent out of Court, and provides that an award on such submission may, by leave of a Court or a Judge, be enforced in the same manner as a judgment or order to the same effect, a provision analogous to that contained in Cl. 16, Sch. 2, Civil P. C. It is common knowledge that the Courts of Law in England have in times past strenuously opposed the idea that the parties could by an agreement between themselves oust the jurisdiction of the Court. The only method by which the arbitration proceedings could be made in any way efficacious for process by the Court was by making the submission a rule of Court. When that had been done, the Court would, in a proper case and on application made, enforce an award by attachment as proceedings in contempt. No formal execution for the recovery of the money or land would however issue even where a submission had been made a rule of Court, and of course far less so where there had been no rule. After the passing of the Judgments Act of 1838 the practice began, in cases where submission had been made a rule, of applying after the passing of the award to the Court for a rule calling upon the party to show cause why he should not pay the amount of the award (vide Russell on Arbitration, p. 352) and on this rule execution would issue.

An old case of *Owen* v. *Hurd* (17) is instructive on the difference between awards made without a rule of Court, and those with. In that case there had been a submission between *A* and *B* which had been made a rule of Court. The arbitration had not however proceeded and *C* who was the person really interested agreed with *B* for a second arbitration and they appointed an arbitrator. This submission was however not made a rule of Court. On the arbitrator making the award, attachment was moved against one of the parties for not obeying the award. But the Court pointed out that the submission on which the award had been made had not been made a rule of Court and stated that the award was a mere nullity. This proposition may be too broad, but it is sufficient to dispose of any suggestion that such an award could operate as a judgment, while a modern case is indicative of the same idea even after the passing of the Arbitration Act. The case is *Bankruptcy Notice*, In re (18). A party to an arbitration procured an order under S. 12, Arbitration Act that the award could be enforced in the same manner as a judgment, and then applied to the Registrar in Bankruptcy to issue a bankruptcy notice, he having served on the debtor a notice requiring him to pay the judgment-debt in accordance with the terms of the judgment as required by S. 4, Cl. (g), Bankruptcy Act, 1883. The Court of appeal upheld the Registrar's refusal to do so and Vaughan Williams, L. J., states the law as follows:

"All that is done by S. 12, Arbitration Act is to give the successful party under the award the

(17) [1788] 100 E. R. 346.
(18) [1907] 1 K. B. 478.

right to enforce it as if it were a judgment. I have grave doubts whether there was any jurisdiction to enter judgment in this case,"

while Fletcher Moulton, L. J., says as follows;

"The arbitration was one outside the Court altogether. The powers of the Court in such a case are defined by S. 12 of the Act which provides that an award on a submission may by leave of the Court be enforced in the same mannef But it gives no power to turn such an award into a judgment."

This expression of opinion as to the present state of the law even after the passing of the Arbitration Act is conclusive as to the view which the English Courts take as to the character of an award made on a voluntary submission. For the above reasons I am satisfied that even if an award is equivalent to a judgment for some purposes in the sense that it may have the same effect as a judgment has in bearing suits, it is not a judgment in any real meaning of the word, far less is it a decree. The next question is whether the award could pass title without any further action by the parties on any other footing. In my opinion, the appellant is entitled to succeed on this point, both on principle and on authority. The parties by their submission agreed to be bound by the decision of the arbitrator and constituted him their agent for the purpose of doing such things as are, specifically or by implication embodied in the terms of the submission. This doctrine is laid down by Lord Ellenborough in *Hunter* v *Rice* (19). In that case an arbitrator as on a voluntary submission had awarded that the tenant should deliver to the landlord certain hay stacked on the premises. The landlord, assuming that title has passed to him, brought a suit against the tenant for coversion. The Court held that on the terms of the award no title passed and his remedy was on the award. Lord Ellenborough in delivering the judgment said as follows:—

"There is a difference between property awarded to be transferred by the owner and property which is actually transferred by the contract of the owner through the medium of his agent."

We have here, apart from the distinction, the foundation of an arbitrator's powers namely contract and agency. There are limitations to the exercise of these powers due to the formal requirements of the law, such as, in England, requirements of a conveyance by deed for land and in India, the provisions of the Transfer of Property Act and the Registration Act, but outside these limitations it must be held that an arbitrator legally authorized can carry out the directions of the parties as their agent. Apart from principle, there is abundant authority, vide *Subbaraya Chetti* v. *Sadasiva Chetti* (9) and *Soranavalli Ammal* v. *Muthayya Sastrigal* (5). In this latter case the Court pointed out the same distinction as was the basis of the jndgment in *Hunter* v. *Rice* (19). The language is:

"The award does not provide for the execution of any instruments between the parties or the performance of any conditions precedent to the plaintiff's enjoyment of the land. In other words, the plaintiffs acquired under the award a complete title to the land on the date of the award and were entitled to take possession thereof from that date,'.

and the same view was taken in *Sheo Narain* v. *Beni Madho* (7). For the above reason I think the appeal must succeed. It is to be noted that it was only ascertained in this Court that the property was under the value of Rupees 100; for the District Judge bases his refusal to accept the award as conferring title on the absence of a fully registered instrument, which have only reference to the requirements of S. 54, T. P. Act. I agree with the order proposed by my learned brother.

S.N./R.K. *Appeal allowed.*

(19) [1812] 15 East 100.

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* A. I. R. 1919 Madras 1117

SADASIVA AIYAR AND PHILLIPS. JJ.

(Raja Kumara) Venkata Perumal Raju Bahadur Varu—Defendant—Appellant.

v.

Subbaraya Pillai and *others*—Plaintiffs and Defendants—Respondents.

Appeal No. 48 of 1914, Decided on 29th August 1917, against decree of Sub-Judge, North Arcot, in O. S. No. 18 of 1911.

(a) Impartible estate — Inalienability — Change of tenure—Condition of inalienability must be deemed to be removed

There was no custom in the Karvetinagar zamindari either prior or subsequent to the Permanent Settlement whereby the zamindar for the time being was prohibited from alienating any portion of the estate except for purposes entitling the manager of a joint Hindu family (not the father) to alienate family property. [P 1118 C 2]

The condition of inalienability, which attached when the grant was made for military service, must be deemed to have been removed with the change of tenure and the abolition of the military service at the date of the Permanent

Settlement, when the necessity for the sanction of the overlord for an alienation also ceased. [P 1118 C 2; P 1119 C 1]

(b) Impartible estate—Impartibility does not enure after change of tenure.

Impartibility of either a raj or an estate based on a particular tenure is not linked with the tenure and does not enure after the alteration of the tenure. [P 1125 C 2]

(c) Impartible estate — Permanent Settlement -Sanad—Construction of—Incidents of alienability held created.

Where the sanad or fresh grant recited the removal of the military service and empowered the grantee as also his heirs and assigns to hold in perpetuity and to transfer, without the consent of Government, by sale, gift or otherwise, his proprietary right in any part of the estate provided the transfer was not repugnant to Hindu or Mussulman law or the regulations of the Government :

Held : (1) that the sanad created a new estate with the incidence of alienability for the benefit of the zamindar ; (2) that no sanction of Government was necessary for alienation : (3) that the absolute power of alienation conferred was in accordance with and not repugnant to Hindu law. [P 1126 C 2; P 1127 C 1]

(d) Impartible estate—Custom prior to cession whether can be considered.

Obiter.—Where there is no reservation of custom in the sanad or in the regulations of Government, it is very doubtful whether Courts can take into consideration any question of custom prior to the cession in determining whether the estate is alienable or not. *(Authorities reviewed.)* [P 1127 C 1]

(e) Civil P. C. (1882), S. 257-A—Terms of section are imperative.

The terms of S. 257-A, are imperative and any amount paid to the decree-holder merely as consideration for his forbearance to execute the decree must be treated as paid towards the decree. [P 1121 C 2]

(f) Contract Act (1872), S. 74—Compound interest at 12 per cent. per annum from date of default in payment is penal.

A provision in a bond for compound interest at 12 per cent. per annum from the date of default of the stipulated payment is of a penal character. For breach of such stipulation an award by Court of simple interest at 12 per cent. from the date of default as compensation is not unreasonable. [P 1122 C 1]

*** (g) Mortgage—Consideration for execution based on account settled — Mortgagor can plead failure of consideration owing to mistake in accounts.**

Where the consideration for a mortgage-bond is based on an account settled between the parties, it is open to the debtor to plead, in a suit based on the mortgage, that the settled account is incorrect and represents a higher sum than was really due and that there is a partial failure of consideration in respect of such excess. If circumstances are proved which would entitle an obligor to go behind a settled account, he is equally entitled to plead that the consideration based on that account, has never been received, and a separate suit for accounts is unnecessary.

It is open to a mortgagor to plead a failure of consideration in respect of part of the consideration and to contend that the mortgage is good for the balance.

An attaching creditor can question the correctness of the whole account on which a mortgage of the attached property is founded [P 1124 C 1, 2]

(h) Impartible estate—Custom—Prior to or after cession—Karvetinagar estate—Custom, to have force of law, must be consciously followed.

Per *Sadasiva Aiyar, J.*—Impartibility leads logically to the existence of a power of alienability and not to a rule of inalienability.

The custom of impartibility and of succession by a single owner are incidents, attached not so much to the property held by a family, as to the law governing that particular family, i. e., the law of impartibility depends on the family custom of succession and not on the nature of the estate. [P 1119 C 1]

Even as regards the family custom of succession, the family could revert to the ordinary law after the Permanent Settlement. [P 1119 C 1]

A custom, to have the force of law, must have been consciously followed as a special custom at variance with the ordinary law. Where a supposed custom followed the ordinary law as laid down by the Courts though it was wrongly assumed to be the ordinary law that supposed custom, which did not modify the understood general law, and which had therefore not independently the force of law cannot be recognized by the Courts as a custom having the force of law, even after it is established that the supposed ordinary law which it was alleged to have followed, was not the ordinary law : 22 *Mad.* 383 (*P. C.*), *Dist.* [P 1120 C 2]

The word "tanaka" means a mortgage [P 1121 C 1]

Per *Napier J.*—A practice that is in accordance with law cannot be relied on as a custom, for the essence of a custom lies in its being some special usage modifying the law. [P 1127 C 2]

L. A. Govindaraghava Aiyar—for Appellant.

T. Rangachariar—for Respondents.

Sadasiva Aiyar, J. — The question common to all these appeals is whether the Karvetinagar Estate is inalienable by virtue of its tenure or by a custom under which the zamindar for the time being is prohibited from alienating any portion of the estate, except for purposes for which the manager of a joint Hindu family (not the father) is entitled as such manager to make valid alienations of the joint family property. On this question I might at once say that I agree with the judgment to be pronounced by my learned brother. As it was however argued with great strenuousness and persistence by Mr. Govindaraghava Aiyar for the appellant, I deem it appropriate to express my views on this point in my own words. As regards inalienability by virtue of the tenure, as soon as the military tenure under which the properties were held was put an end to, about 120 years ago, that is when the

British Government granted the lands to the zamindar under a quite different tenure with express powers of alienation and after imposing a liability on the lands to be attached and sold in execution of decrees passed against the grantee, the restraint on alienation without the permission of the overlord came to an absolute end. The analogy of the incident of impartibility attaching to some estates is absolutely misleading. Impartibility, according to the Privy Council decision in *Sartaj Kuari* v. *Deoraj Kuari* (1), leads logically to the existence of a power of alienability and not to a rule of inalienability.

Further, the custom of impartibility and of succession by a single owner are incidents attached not so much to the property held by a family as to the law governing that particular family, see Lord Macnaghten in the *Udayarpalayam case*, *Kachi Kaliyana Rangappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (2). At p. 516 in that case, the following passages occur:

"On the cession of the Carnatic, the British Government assured the Poligars, of whom the Poligar of Udayar was one, that they would enjoy every just and ascertained civil right with a free exercise of the religious institutions and domestic usages of their ancestors."

One of the domestic usages, namely, succession according to rules of primogeniture, was upheld in that case. In the case of zamindaries where succession by primogeniture prevails, though that domestic usage might have begun in the times when the head of the family was a military ruler and though that position had ceased at the time of the Permanent Settlement, the family law of succession by primogeniture was presumed to continue even afterwards. In short, it is a question of the family law of succession and such law was held applicable even in the case of families of certain Mussalman zamindars: see *Mahammad Afzal Khan* v. *Ghulam Kasim Khan* (3). It is not really a question of succession to a particular property. It can never be argued that where portions of an impartible estate are alienated by a zamindar governed by his family law of promogeniture to Hindus governed by the ordinary Hindu law succession to the portions so alienated is also governed by the law of primogeniture. If the proprietor of the Karvetinagar Estate was incapable by the custom of his family from alienating or binding by his debts any part thereof beyond his own lifetime, except under circumstances which would entitle the managing member of a joint family to do so, the enactment of S. 4 (1), Impartible Estates Act, was superfluous so far as this estate was concerned. That the law of impartibility depends on the family custom of succession and not on the nature of the estate is also clear from the case in *Durgadut Singh* v. *Rameshwar Singh* (4), which related to certain properties given to junior members of a zamindari family for their maintenance. It was held in that case that it was proved that the family custom of primogeniture and impartibility governed the succession to those properties also. (See pp. 952 to 954 of 36 *Cal.*). As remarked by that eminent Judge (West, J.,) [See pp. 272—73 of *Bhau Nanaji Utpat* v. *Sundrabai* (5)].

"In a good many cases, the question of family custom has been mixed up with that of the supposed impartible character of a raj or principality and this has perhaps led to some little confusion in particular instances. but a careful examination of the cases will show that the special law of descent has usually been put by the Privy Council, as in the case of *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (6) on the ground of ancient family custom whether the property was a raj or not."

There are other cases like that of *Girdharee Sing* v. *Koolahul Sing* (7), in which the fact that the estate was a raj was held not to involve the consequence that it was indivisible under a special law of inheritance applicable to that species of property; and generally it may be said that it is the family custom of descent, which, for juridical purposes, gives the property the character of a raj and not anything in the estate itself, which determines the rights of pretenders to it. In a case in 7 Beng. S. D. A. R. 195 it was ruled that on a property which had descended in one family, according to a rule of primogeniture, undivided passing to another family in which no special rule prevailed, it became partible accor-

(1) [1888] 10 All. 272=15 I. A. 51=5 Sar. 189 (P. C.).
(2) [1905] 28 Mad. 508=32 I. A. 261=8 Sar. 855 (P. C.).
(3) [1903] 30 Cal. 843=67 P. R. 1903=30 I. A. 190=8 Sar. 455 (P. C.).
(4) [1910] 36 Cal. 943=4 I. C. 2=36 I. A. 176 (P. C.).
(5) [1874] 11 B. H. C. R. 249.
(6) [1867] 12 M. I. A. 523=12W. R. 21(P. C.).
(7) [1837] 2 M. I. A. 344=6 W. R. 1 (P. C.).

ding to the ordinary law. Thus viewed, all the numerous cases of property regarded as impartible because "partaking of the nature of a raj" are instances of the effect which the highest Court has given to family customs diverging from and therefore in a sense "repugnant or antagonistic to the general law." The prevalence in any part of India of the special course of descent in a family, differing from the ordinary course of descent, in that place, of the property of people of that class or race, stands on the footing of usage or custom of the family, *Soorendranath Roy* v. *Mt. Heeramonee Burmoneah* (8). In *Rajkishen Sing* v. *Ramjoy Surma Mozoomdar* (9) the following observations occur at p. 191:

"In the present case the estate was 'held directly from the Government, there being no intermediate lord. And it appears to their Lordships that, upon this settlement, any incidents of the old tenure, as a military jagir, requiring the render of services, if any such ever existed, were, as conditions of tenure, impliedly at an end: and that the zamindari, so far as relates to tenure, was thenceforth held under the Government as an ordinary zamindari free from any such conditions. The settlement would not however of itself have operated to destroy a family usage regulating the manner of descent. . . . ' It would not of itself affect an existing family custom."

At p. 195, their Lordships say that even the custom of impartibility could without any violation of law, be put an end to by the conduct of the members of the family after the Permanent Settlement. They say:

"Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the lex loci binding all persons within the local limits in which it prevails."

These passages show that even as regards the family usage of succession by primogeniture, the family could revert to the ordinary law after the Permanent Settlement. As regards the question of inalienability without the Sovereign's sanction in case of military tenures, the reason for the restricted ownership ceasing as soon as the military service is dispensed with, the ordinary law governing impartible estates, involving the right of the holder of that estate to alienate at his pleasure (which follows from there being no co-parcenary rights vested in the other members of the family, becomes at once applicable. In the Pittapuram case, *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards* (10), Mr. Mayne tried his best to argue that in the Madras Presidency, there was a special custom governing the impartible estates which were once held by military rules, which custom attached the incident of inalienability to those estates (except for purposes for which the Mitakshara family manager is entitled to alienate). Their Lordships however without even calling upon the respondent's Counsel, went through all the cases in Madras from the earliest case in *Raja Row Vancata Niladry Row* v. *Vutchavoy Vencatapautty Row* (11) and decided against the custom. It was very soon after this decision that the first temporary Act that preceded the Madras Impartible Estates Act was enacted. The evidence in this case, in my opinion does not establish any custom of inalienability but indicates, on the other hand, that the ordinary law which vests the power of alienation in the zamindar for the time being was followed by each successive zamindar, though the son or the brother of a zamindar sometimes claimed that the ordinary Mitakshara law applied to the estate. He never suggested that any custom which was against the ordinary law as understood by him applied to the zamindars. Their Lordships of the Privy Council say at p. 396 that where a supposed custom has followed the ordinary law as laid down by the Courts, though it was wrongly assumed to be the oridinary law, that supposed custom which did not modify the understood general law and which had therefore not independently the force of law, cannot be recognized by Courts, as a custom having the force of law, even after it is established that the supposed ordinary law which it was alleged to have followed was not the ordinary law. I therefore agree with the lower Court and with my learned brother that there was no proof of any family usgage having been consciously followed which was considered to be a special custom at variance with the ordinary Hindu law.

As regards the argument based on Ex. 7 series in which the word "Tanaka" is used, Ayling, J., says in *Dakkata*

(8) [1867] 12 M. I. A. 81=10 W. R. 35 (P.C.)
(9) [1875] 1 Cal. 186=19 W. R. 8 (P. C.).
(10) [1899] 22 Mad. 383=26 I. A. 83 (P.C.).
(11) 3 Knapp 23=12 E. R. 554

Thotapalli v. *Sasanapuri Dali Sethi* (12) that

"Exhibit A was intended by the parties to create a simple mortgage, I find no doubt whatever. The word "Tanaka" which is twice used in the operative portion of the document is to my mind conclusive. The learned District Judge says the word "Tanaka" is always used to denote a mortgage." "In Brown's Telugu Dictionary the only meanings given to the word "Tanaka" are (1) a mortgage, (2) an assignment of land revenue, the latter meaning being obviously inapplicable in the present case."

In *Patte Muhamad* v. *Sheikh Davood* (13) Spencer and Kumaraswami Sastri, JJ., interpret the word "Tanaka" occurring in the document in that case as mortgage. The interpretation sought to be put upon that word by Mr. Govindaraghava Aiyar when it occurs in Ex. 7 series, namely, that it meant only an assignment of revenue and not a mortgage, cannot therefore be sustained. Far from these documents supporting the learned vakil's argument that the zamindar was disinclined to execute deeds of alienation intended to last beyond his lifetime, they support the conclusion that he treated the lands in his estate as his absolute property to be alienated according to his pleasure.

The learned vakil next relied strongly on the decision in the Ammayanayakanur case, *Sivasubramania Naicker* v. *Krishnammal* (14). Even if certain observations of that decision have not got to be reconsidered in the light of the Privy Council decision in *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards* (10) the rule of succession applicable to that zamindar was a quite exceptional one, namely, Dayathipattam, and the evidence let in in that case to show the nature of the estate held by each succeeding zamindar was also of a very special character. The conclusion of fact arrived at in that case, in which the succession was not succession governed by the ordinary rule of primogeniture and where the evidence showed that each succeeding zamindar expressly admitted that his Dayadees were co-parceners with him cannot govern the consideration of the evidence in this case. Having thus dealt with the point common to all these cases, I shall now deal with the other particular questions arising in the appeals.

(12) A. I. R. 1914 Mad. 306=22 I. C. 524.
(13) [1916] 39 Mad. 1010=30 I. C. 569.
(14) [1819] 18 Mad. 287.

Appeal No. 173 *of* 1910. In the suit out of which this appeal has arisen, defendant 1 contends that the mortgage deed sued on has not been supported by consideration in respect of five of the items of consideration mentioned therein. The first of these items is a sum of Rupees. 6,617-6-5, due to plaintiffs 1 and 2s' father under a decree in Original Suit No. 1 of 1885 on the file of the District Court of North Arcot, which was passed against the zamindar. The amount of the decree debt was Rs. 6,581-0-10 on the date of the decree (25th February 1885), the decree providing for subsequent interest. About seven months before the date of the mortgage sued on (14th November 1890) the receipt Ex. 6 19th February 1890) for Rs. 2,500 was filed in Court by the decree-holder. This sum of Rs. 2,500 covered a sum of Rs. 2,000 agreed to be paid to the decree holder for the forbearance shown by him in not proceeding with the execution of the decree on a former occasion, that agreement not having had the Court's sanction. S. 257 (A) of the old Civil P. C. was as follows:

"Every agreement to give time for the satisfaction of a judgment-debt shall be void, unless it is made for consideration and with the sanction of the Courts which passed the decree and such Court deems the consideration to be under the circumstances reasonable."

"Any sum paid in contravention of the provisions of this section shall be applied to the satisfaction of the judgment debt."

I think these are imperative provisions and Rs. 2,000 which have been admittedly paid under an agreement as consideration for grant of time (see Exs. 5 and 6) ought to be treated as paid towards the decree. Out of the sum of Rs. 6,617-6-5 therefore mentioned in Ex A, the sum of Rs. 2,000 and interest thereon at six per cent. per annum from date of Ex. 6 (19th February 1890) till date of suit bond (14th November 1890) should be deducted in defendants' favour: see also *Venkata Subramania Ayyar* v. *Koran Kannan Ahmod* (15). The mortgage document is, however good security for the balance of the decree amount: see *Tirumal Raju* v. *Pandla Muthial Naidu* (16). The objections as to the other four items were not seriously argued and I agree with the District Judge that those objections cannot be sustained. It was next objected to the decree as drawn up in the lower Court that even simple interest at 12 per cent. per annum from

(15) [1903] 26 Mad. 19.
(16) [1891] 35 Mad. 114=9 I. C. 289.

the date of default mentioned in Ex. A is a penal rate, the original rate being six per cent. The provision in Ex. A for compound interest at 12 per cent from the date of default is no doubt of a penal character, but I think the lower Court was justified in giving 12 per cent. simple interest from the date of default as reasonable compensation for the breach of the contract to pay on the due date. Lastly it was contended that the decree drawn up by the lower Court was wrong in form and might be construed as making defendant 1 liable personally at once for the decree amount, as it begins by saying that:

"The Court doth order and decree that the defendants do pay plaintiffs," etc.

I think the decree ought to have followed the Form No. 4, Appx. D, Civil P. C. The decree will be modified accordingly. I must here state that the 11th and 12th grounds in the memorandum of appeal, namely, that the District Judge ought not to have excluded the time during which the estate was under the Court of Wards in calculating the period of limitation (as regards the right to a decree for sale) and that the mortgage document has not been proved, were not argued before us, and very properly, seeing that there is nothing in those contentions. In the result, the appeal is partially allowed, the amount due to the plaintiffs being calculated after deducting Rs. 2,000 and interst thereon at 6 per cent. for about nine months from the sum mentioned as principal in Ex. A. As this is only a slight modification of the lower Court's decree and as the mortgagee cannot be said to be guilty of dishonesty in claiming the whole sum mentioned in Ex. A, I would order the appellant who failed on the principal contention as to "inalienability" to pay the respondents' costs in this appeal, which can also be added to the mortgage amount. The consideration of the question whether the plaintiff would be entitled to a remedy against other properties if, under Cl (3) of Form No. 4, an application is made on the sale of mortgaged properties, is premature and we express no opinion on it.

Appeal No. 182 *of* 1910.—The only question argued when this appeal came up before this Court after submission of findings is that the decree is not in proper form and might be construed as making defendant 1 personally liable in the first instance. Let the decree be drawn up in proper form as directed in the connected Appeal No. 173 of 1910. The appellant will pay the plaintiffs' costs of the appeal.

Appeal No. 311 *of* 1914.—The suit out of which this appeal has arisen was brought (by the sons of the usufructuary mortgagee who obtained the mortgage document Ex. U from the then Zamindar of Karvetinagar) to establish the plaintiffs' right to enjoy the villages mentioned in item No. 1 of the plaint schedule (including the forests and jungles in those villages) as part of the property usufructuarily mortgaged under Ex. N and for a permanent injunction against the defendants, of whom the principal defendant is defendant 5 (the minor Zamindar of Karvetinagar), from interfering with the plaintiffs' enjoyment of the forest and jungles and of the produce therefrom and for other minor reliefs. The special defence raised in this case is that the poramboke wastes and the forest attached to the villages of Pillaiyarkuppam and Kannikapuram were excluded from the usufructuary mortgage, that the forests and porambokes were not put in possession of the mortgagee (the plaintiffs' father) and that they have been all along in the enjoyment of the zamindar. Ex. U mortgages about one hundred villages and it begins by saying that for the sum of Rs. 25,000 odd, the said one hundred villages with the hamlets, tanks, Kasams, channels, fruit trees garden, forests, forest porambokes, road cess, etc., income, mountain and mountain leases are secured. Then it says that ninety-two villages of the one hundred villages are secured without possession, while the remaining eight villages (including the two villages in dispute) are mortgaged usufructuarily. In the latter half of the document (which, I might say, has not been translated or printed for our use) the names of the villages are mentioned but the addition found in the first part, namely, forests, forest produce, etc., are not repeated. It was therefore argued that the forests and forest produce were intended to be excluded from the usufruct to be taken by the mortgagee. I find myself unable to accept this argument; especially as it is expressly stated in the document that the mortgagee was to enjoy all the income realisable from the above eight villages, which include the two villages in dispute. I also agree with the lower Court that the evidence in the case esta-

blishes that though the zamindar tried to let to others the produce of the forests in these two villages himself (the income from the said villages being comparatively trifling, the mortgagee was able to secure his possession of the produce by himself letting it to his own licensees. The lower Court's decree declaring the plaintiffs' right and securing future possession by injunction and granting the small amount of damages claimed was therefore right and this appeal is dismissed with costs.

Appeal No. 356 *of* 1913.

Defendant 1 (the minor zamindar) is the appellant in this case. The only ground argued in this case was 14th ground besides, of course, the common ground of inalienability. That 14th ground is as follows:

"Admittedly there being no personal liability for the payment of the amount found due, the decree directing that the defendants do pay the plaintiffs the amount decreed is not sustainable in law."

For reasons given in Appeals Nos. 173 and 182 of 1910, I would order the decree to be drawn up in the correct form, and it being admitted in this case that the personal liability is barred, Cl. 3 of form No. 4, App. D, need not be reproduced in the decree in this case. The appellant will bear his own costs in the appeal and the respondents will add their costs to the mortgage amount.

Appeal No. 48 *of* 1914.

The suit out of which this appeal has arisen was brought on a mortgage document marked as Ex. FF on remand and is dated 8th June 1894 and was executed by the then zamindar in favour of G. Gurusawmayya and E. Saravana Pillai, who were employed under him as Zamindari servants and agents (manager and deputy manager of the Zamindar). In order to protect himself from his creditors, the zamindar had executed a nominal lease of about 106 villages in favour of these two mortgagees in January 1890 uuder Ex. 24. The lease was a purely benami transaction and the nominal lessees were (as I said) his servants and chief officers who had, as such, to make collections from the tenants cultivating the lands in the villages, to pay the peishcush of Rs. 12,000 to Government and to account to the zamindari for the balance. In order to keep up the appearance of a real lease, these agents had sometimes to pay the peishcush of Rs. 12,000 due to Government even before collections to that extent had been made and to recoup themselves out of the collections afterwards made. The mortgage document sued on (Ex. FF) was executed for Rs. 54,763-12-11. Out of this amount, I find from the account statement Ex. 25 that Rs. 16,544-15-1 were connected with this nominal transaction. Out of that sum Rupees 16,544-1-1 again, Rs. 13,478-5-9 appear to be the principal amount alleged to be due on the accounts as between the zamindar and his agents in respect of the management of the 106 villages (see p. 202 of the printed paper), the remaining Rs. 3,366-9-4 being charged as interest. The zamindar (defendant 2 in this suit) contended in his written statement, para. 7, as follows:

"The said Gurusawmayya and Saravana Pillai occupied fiduciary position towards the late Rajah Bommaraja Bahadur in respect of the said lease of 106 villages and the amounts realised thereunder. This defendant submits that the suit mortgage-deed was executed on the basis of the accounts outstanding between the said Raja Bommaraja Bahadur Varu and the said Gurusawmayya and Saravana Pillai. If only the true state of accounts had been disclosed to the said Raja Bommaraja Bahadur inclusive of those relating to the said lease, as it was their duty to have done, the amount payable, if any at all would have been considerably less than the amount for which the mortgage-deed was executed and to the extent of this difference, as shown in the schedule hereto the mortgage-deed had no consideration.

On this plea, the question was raised generally whether the suit mortgage-deed was not supported by consideration. The zamindar's contention was that far from Rs. 13,000 principal plus Rs. 3,000 odd (interest), total Rs. 16,000 odd, having been due on the date of Ex. FF to the two mortgagees, on a calculation of receipts and expenditure relating to the 106 villages, Rs. 38,641 9-0 would be found to have been then due by the said agents to the Rajah in the matter of the receipts from the above ijara villages which the agent failed to account to the zamindar and that there was therefore want of consideration for the plaint mortgage-deed to the extent of the Rupees 16,000 odd entered in the statement Ex. 25, which was the basis of Ex. FF. Though in the written statement it is contended that the whole of the difference of Rs. 50,000 odd between the statement of accounts in Ex. 25 and the statement of accounts attached to the

written statement should be deducted from the consideration of Ex. FF, it is quite clear that defendant 2 could attack the consideration for the mortgage deed only in respect of the Rs. 16,000 odd mentioned in it as part of its consideration.

The learned Subordinate Judge refused to go into this question of partial failure of consideration on the ground that if complete and true accounts had not been rendered by the mortgagees on the date Ex. FF in the matter of the ijara transaction, that was a separate transaction, that a separate suit for account should be brought by defendant 2 and that he could not be allowed to raise it as a defence to the suit on the mortgage bond Ex. FF. I am unable to accept as sound the above reasoning of the learned Subordinate Judge. Here were two confidential agents obtaining a mortgage-deed from their principal not only for amounts due to them on other loan transactions but also on account of a debt of Rupees 16,000 odd alleged to be due to them for principal and interest in the matter of their management of 106 villages nominally leased to them. They were in a fiduciary position with regard to all sums of money received by them from the estate and were bound to render accounts. If they falsely represented that on the balance of the account the sum of Rs. 16,000 was due to them, then the zamindar would be entitled to have the account re-opened in a suit against them. Does the fact that the amount has become the consideration for a mortgage prevent the raising of this defence in a suit by the mortgagees? There is no doubt that it is open to a mortgagor to show that there has been an actual failure of consideration in respect of part of the consideration and that the mortgage is good for the balance : *Chinnayya Rawutan* v. *Chidambaram Chetti* (17) and *Tirumal Raju* v. *Pandla Muthial Naidu* (16). It is also clear that an attaching creditor can question the correctness of the whole account on which a mortgage of the attached property is founded : vide *Rajani Kumar Dass* v. *Gaur Kishore Shaha* (18). There seems to be therefore no principle which gives the consideration for a mortgage a position any higher than that of an ordinary bond debt, the transfer of interest being by way of security only. It follows therefore that if circumstances are proved which would entitle an obligor to go behind a settled account, he is equally entitled to plead that the consideration based on that account has never been received. The lower Court ought therefore to have allowed evidence to be adduced on the question of failure of consideration for Ex. FF in respect of this Rs. 16,000 odd ; and is now directed to take evidence adduced on both sides on this question and submit its finding within four months from the receipt of records. Ten days will be allowed for filing objections.

Napier, J.—These are appeals in Original Suits Nos. 34 of 1907 and 12 of 1908 in the District Court of North Arcot and Original Suit No. 18 of 1911, Original Suit No. 86 of 1911 and Original Suit No. 95 of 1911 in the Court of the Subordinate Judge of North Arcot. Appeals Nos. 173 and 182 of 1910 come before us on return of finding ; the other three are heard now for the first time. The issue on which the finding was called for is the same as one of the issues framed in the other three suits and it is with that issue that I propose to deal. The issue is as follows : Whether the Karvetinagar estate is inalienable by virtue of its tenure or the custom pleaded. The custom pleaded is as follows :

"Inalienability except for purposes for which the manager of a joint Hindu family can, as such manager, alienate joint family property."

With regard to the tenure there is no dispute. The zamindar was originally a semi-independent Poligar holding an impartible raj on the terms of paying an annual tribute to the Nawab of Arcot and supplying a military force. There is no doubt that the Poligar was originally a petty chieftain who had gradually improved his position, so his origin is different to that of other classes of zamindars who were in many cases mere tax collectors for the ruling power. In the year 1792 the East India Company took over the control of the dominions of the Poligars of Venkatagiri, Kalahasti and Bommarajapalayam, (the earlier name of Karvetinagar), from the Nawab under treaty with him and by a later treaty of 1801 these semi-independent kingdoms became merged in British territory, losing their quality of raj. A year later in 1802 the Poligars became zamin-

(17) [1878] 2 Mad. 212.
(18) [1910] 35 Cal. 1051.

dars and sanads were issued to them. The history of these proceedings and the nature of the settlement made at that time has been fully explained in Appeal No. 62 of 1913 reported as *Secretary of State* v. *Rajah of Venkatagiri* (19). It is sufficient to say that the settlement was based on the commutation of service and military tribute and not on the revenue of the raj and that the sanad shows material divergence from the ordinary sanad in consequence.

Mr. Govindaraghava Aiyar, who represents the present zamindar in all these suits, admits that there was, during the period when the Poligar was semi-independent under the Nawab, a condition arising out of the tenure which forbade alienation either of the whole or any part of the raj without the sanction of the Nawab, the overlord. But he contends that there was in addition a custom of inalienability as pleaded and that that custom remained in existence after the treaty of 1801 and after the Permanent Settlement of 1802 and has continued to the present time. He seeks to fortify his argument as to the possibility of the existence of the custem concurrent with the inalienability owing to tenure by the analogy of the custom on which impartibility is based. And he has invited our attention to a long series of cases which, he contends, support the proposition that impartibility of either a raj or an estate is linked with the tenure and enures after the alteration of the tenure. He has accordingly examined the decisions in *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (20), *Katama Natchiar* v. *Rajah of Shivagunya* (21), *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pratab Sahee* (22), *Collector of Trichinopoly* v. *Lekkamani*, *Oolgappa Chetty* v. *Hon. D. Arbuthnot* (23), *Mutta Vadugaanadha Tevar* v. *Dora Singa Tevar* (24), *Mallikarjana* v. *Durga* (25), *Udayarpalayam case*, *Kachi Yuva Rangappa Kalakka Thola Udayar* v. *Kachi Kalyana Rangappa Kalakka Thola Udayar* (26), *The Ramnad case* (27); *The Udayarpalayam case* (2); *Ram Nundun Singh* v. *Janki Koer* (28) and *Mahammad Afzal Khan* v. *Ghulam Kasim Khan* (3), quoting the passages which he relies on for his contentions. On the other side it is contented by Mr. Rangachari that impartibility arises out of a family custom as to succession, not out of tenure, and that therefore the custom of impartibility may well continue after the change of tenure, but that the prohibition against alienation without the sanction of the overlord arises solely out of the tenure, that no family custom could have existed side by side with that prohibition and that when the prohibition was removed the ordinary right of alienation came into existence.

I do not think it necessary to examine the accuracy of these alternate contentions, because undoubtedly Mr. Govindaraghava Aiyar has been unable to prove the existence of any such custom prior to the cession by any evidence whatsoever. We must begin to seek this custom in the history of the dealings with this estate by the zamindar after the date of the Permanent Settlement. Now it is perfectly obvious why the claim of custom is put forward in the form which Mr. Govindaraghava Aiyar contends for. It is well known that prior to the decision of the Privy Counil in *Sartaj Kuari* v. *Deoraj Kuari* (1), the view was taken in the Courts of this Presidency that after the Permanent Settlement these impartible estates were inalienable except for certain purposes. The basis of this doctrine has shifted during the history of decisions, a fact which was pointed out and relied on by the Privy Council in the Pittapur case *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards* (10), when the Board finally negatived the decision in contention. Undoubtedly, the decision *Sartaj Kuari* v. *Deoraj Kuari* (1) was unwelcome to the Courts of this Presidency and an attempt was made in *Court of Wards* v. *Venkata Surya Mahipati Ramakrishna Rao* (29) before the High Court and in *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards* (10) before

(19) [1916] 35 I.C. 266.
(20) [1861-63] 9 M. I. A. 66=1 W.R P. C. 30=1 Suth. 460=1 Sar. 826=19 E. R. 666 (P.C.).
(21) [1861] 9 M. I. A. 539=2 W. R. 31 (P. C.).
(22) [1867] 12 M. I. A. 1=9 W. R. 15 (P. C.).
(23) [1873] 1 I. A. 282=21 W. R. 358 (P. C.).
(24) [1880] 3 Mad. 290=8 I. A. 99=4 Sar. 239 (P. C.)
(25) [1890] 13 Mad. 406=171 A. 134 (P. C.)
(26) [1901] 24 Mad. 562.
(27) [1901] 24 Mad. 613n.
(28) [1902] 29 Cal. 828=29 I. A. 178 (P. C.)
(29) [1897] 20 Mad. 167

the Privy Council, to differentiate the impartible estates in this Presidency from those governed by the decision on *Sartaj Kuari* v. *Deoraj Kuari* (1) on the ground of a territorial custom. That plea failed and in consequence the Legislature intervened with the Impartible Estates Act, 2 of 1904. Now the attempt is renewed on the basis of the family custom pleaded here based on the language used by their Lordships in *Sartaj Kuari* v. *Deoraj Kuari* (1):

"The inalienability of the estate depends upon custom which must be proved, or, it may be in some cases, upon the nature of the tenure".

Mr. Govindaraghava Aiyar has argued that the Permanent Settlement was not intended to alter the tenure or the customs as Government were not seeking revenue but only seeking to disarm the Poligars, and he relies on the decisions in *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (22). *The Udayarpalayam case*, *Kachi Yuva Rangappa Kalakka Thola Udayar* v. *Kachi Kalyana Rangappa Kalakka Thola Udayar* (26) and *The Udayarapalayam case* (2) for the propsition that although it was undoubtedly open to the British Government to make any alteration it chose in the nature of the tenure it must be shown affirmatively that they intended to do so at the time. It may be doubted whether this proposition is an accurate statement of the law since the decision of the Privy Council in *Secretary of State* v. *Bai Rajbai* (30). It is there held that the conditions of the tenure prior to cession cannot be presumed to have continued and that it rested on the claimant to show that the manner in which the estate has been treated by the British Government indicated that Government intended to preserve the prior incidents: vide Second Appeal No. 210 of 1911. But even if this proposition is sound, it is difficult to see how it could help the mortgagor. We are referred to the sanad Ex. 2 (a) and it is argued that Art. 7 only relieved the zamindar of a disability but did not otherwise alter the tenure. The tenure was however in fact altered. the military service, the foundation of the tenure, being dispensed with, and as there is no evidence of a custom of inalienability other than that arising out of the tenure there is no material on which a Court could decide that the alleged custom continued. It is contended by Mr. Rangachary that the sanad shows clearly that the condition of inalienability was removed and intentionally removed, because its rationale had ceased with the abolition of the service. As put by my learned brother in the course of the argument:

"The raj was inalienable without the sanction of the Ruling Power. By the sanad the sanction was given."

The sanad recites the removal of the military service, the obligation to furnish troops and maintain forts and garrisons, and the commutation of that duty for an equivalent to be paid in money. Art. 7 reads as follows:

"You shall be at full liberty to transfer without the previous consent of Government, or of any other authority to whomsoever you may think proper either by sale, gift or otherwise your proprietary right in the whole or any part of your zamindari and such transfers shall be valid provided that they be not repugnant to the Mahomedan or Hindu laws or to the Regulations of the British Government."

Article 8:

"Your zamindari will be liable to be sold either whole or in part in satisfaction of a decree of Court."

Article 10:

"Although you will have free right and liberty to transfer by sale gift, or otherwise any part of your zamindari not repugnant to the Regulations of Government, yet it shall not be competent for you to form any part of your land into a separate estate unless the public assessment amounts to the annual sum of Rs. 500 star pagodas."

Mr. Rangachariar contends that these articles indicate the removal of the necessity for sanction. Mr. Govindaraghava Aiyar argues contra that the words in Art. 7, being only a reproduction of para. 8 of the Regulation and being inserted in sanads to all zamindars, cannot have special reference to the sanction and he calls in aid the language of Art. 2, where it is stated that the military service is commuted for an equivalent to be paid in money "by you and your posterity." With regard to Mr. Govindaraghava Aiyar's first contention, it may be that in other zamindaris dealt with in identical language there had not been a prohibition against alienation without sanction, but in my opinion that cannot limit the effect of the words. Bearing in mind that this was the creation of an "estate in land" in substitution for an existing raj and applying

(30) A. I. R. 1915 P. C. 59=30 I. C. 303=42 I. A. 229=39 Bom. 625 (P. C.)

the principle that it is entirely within the province of Government to create conditions on which the estate is to be held, it is to my mind impossibie to contend successfully that these words did not create a new estate with the incidence of alienability for the benefit of the zamindar. It is true that the Suddar 'Adaulat Court had at different times construed the sanads as creating an estate analogous to an estate tail or as a settlement on the zamindar for life with remainder to his heirs and successors in perpetuity [vide the history of these decisions set out in the judgment of the Board in *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards* (10)]. But those views were subsequently abandoned and have been declared by the Privy Council to be unsound. As to his contention on Art. 2, it is sufficient to point out that those words did not create an 'estate' and that they must be read with Art. 15, under which the zamindar is

"authorised and empowered to hold in perpetuity and his heirs, successors and assigns at the permanent assessment herein named the zamindari of Bommarajapalayam."

Mr. Govindaraghava Aiyar further argued that the rights of the poligars had been recognized in the treaty and could not be cut down by the language of the sanad. With regard to this the answer is that the short period of a few months between those two events is not sufficient to create new rights and that the Regulations passed in 1802 prior to the sanad contains same words, There still remain the words:

"provided that such transfers shall not be repugnant to the Hindu laws."

No argument has been addressed to us by either side on these words, but it is to be noted that since the decision in *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards* (10), it must be held that an absolute power of alienations is in accordance with the Hindu laws. There is indeed no reservation of custom in the sanad or in para. 1 of the Regulation and for this reason, I should be strongly inclined to doubt whether the Court could take into consideration any custom prior to the cession. But as I have held no such custom was proved, there is no necessity to decide this point. Coming now to the history of the zamindari after the settlement, we have to see whether the alleged custom is made out. The first difficulty in the way of the appellant is this. Up till the decision in *Sartaj Kuari* v. *Deoraj Kuari* (1), it was held by the Courts of this Presidency that an impartible zamindari was inalienable except for special reasons. The proposition is stated in *Pareyasami* v. *Saluckai Tevar* (21) as follows at p 177, speaking of the Palayaput of Padamathur, an ancient impartible zamindari:

"We think that the zamindar should be regarded as possessing only the qualified powers of disposition of a member of a joint family with such further powers, or it may be with such restrictions, as spring from the peculiar character of his ownership and that these powers fall short of a right of absolute alienation of the estate."

The language used in *Bhavanamma Guru* v. *Ramasami Guru* (32), the date of which is 1881, is as as follows:

"Assuming therefore that the zamindari of Devarkota is an impartible estate belonging to a joint Hindu family, descending to a single heir at a time to the exclusion of the rest of the family, that the zamindar for the time being is not competent to bind his successors by a permanent grant of property forming part of his estate, and that an alienation made by him in circumstances which would not ordinarily render it binding on a joint Hindu family could not enure beyond the grantor's life, the question for decision is whether the grant now in dispute ceased to be in force on the death of the late zamindar."

On these decisions the law, as I understood then, was practically what is contended for now as arising by custom. Is it possible for a custom to exist which is in accordance with the law as then understood? It has been held by a Bench of this Court in *Sivasubramania Naicker* v. *Krishnammal* (14) that such a custom can be proved. But I doubt whether this view is good law in the face of the language used by the Privy Council in *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards* (10). There Mr. Mayne was contending for a territorial custom and their Lordships use the following language:

"The supposed custom followed the law. . . . . The custom now relied upon did not modify the law. It had no force independently of the law."

It is difficult to see how a practice in accordance with law can be relied on as a custom, for the essence of a custom is in its being some special usage modifying the law. If this argument is sound, the whole of Mr. Govindaraghava Aiyar's case on custom must go, for it was only in 1896 that the right of free alienation

(31) [1874] 8 M.H.C.R. 157.
(32) [1882] 4 Mad. 193.

was definitely laid down by the Privy Council and the old law declared to be bad. (His Lordship then discussed the evidence as to custom and concluded): I do not think it necessary to examine the evidence let in by the respondents at all in detail. It admittedly lies upon the appellant to establish the custom and, in my opinion, he has absolutely failed to do so. So far from evidencing the custom alleged, the documents conclusively establish that each zamindar, however much he may have protested when he was a son, has exercised the right of alienating any portion of the estate he chose for any purpose which he thought fit—with the result, as stated above, that there is not a single village in the estate which has not either been granted in inam or mortgaged. On issue 1 therefore common to all the appeals, the appellant must fail. My learned brother in his judgment has dealt with the other issues that arise in each case and I concur with him in his reasons and the result that he has arrived at.

(In compliance with the order contained in the above judgment the Subordinate Judge of North Arcot submitted the following :)

Finding.—1. The issue sent to me for a finding is : Whether there was partial failure of consideration in respect of the suit mortgage-deed and if so, to what extent ?

* * *

I find that there was a failure of consideration in respect of the suit mortgage bond to the extent of this sum of Rupees 16,544-15-1.

(This appeal (Appeal No. 48) coming on for final hearing after the return of the finding of the lower Court upon the issue referred by this Court for trial, the Court delivered the following :)

Judgment.—We accept the finding of the Subordinate Judge on the question of failure of consideration for Ex. FF. The result is that the decree of the Subordinate Judge shall be modified by calculating the amount due to the plaintiffs on the date of suit on the basis that Rupees 54,763-12-1 minus Rs. 16,544-15-1 Rs. (38 218-13-0) is the principal amount due under the mortgage. As the plaintiffs are entitled to interest at 12 per cent till the date (19th September 1913) fixed for payment on the real principal amount and as the lower Court's decree allows only six per cent. interest between the date of the decree, 19th September 1913, and the said date 19th March 1913, the decree requires modification in that respect also. The decree contains further errors owing to its not following form No. 4 in Appendix D, Civil P. C., and also as it directs defendants who are not representatives of the mortgagors (some of them have even priority over plaintiff's claim) to pay up the amount decreed. These mistakes must also be corrected.

As regards costs, the appellant and plaintiffs will pay and receive proportionate costs in both Courts. The appellant will pay to the other respondents who have appeared to contest his appeal (except defendant 6) their costs including one set of vakil's fees to be shared between them on the amount found due to the plaintiff on the date of the lower Court's decree according to this judgment. The appeal is dismissed in other respects. Extension by six months from this date is granted for redemption.

S.N./R.K. *Decree varied.*

A. I. R. 1919 Madras 1128

ABDUR RAHIM AND NAPIER, JJ.

Sistu Seetaramayya— Plaintiff —Appellant.

v.

Tadapalli Sodemma — Defendant —Respondent.

Second Appeal No. 403 of 1917, Decided on 17th January 1918, against decree of Temporary Sub-Judge, Cocanada, in Appeal Suit No. 59 of 1916.

Civil P. C. (5 of 1908), O 21, R. 2—Agreement to give time not certified—No damages for breach can be claimed —No suit lies—Civil P. C. S. 47—Contract.

No suit lies for damages for breach of an agreement by a decree-holder to give time to the judgment debtor for satisfaction of the decree where the agreement has not been certified to Court under O. 21, R. 2, and there is no consideration to support it: 26 *Mad.* 19, *Foll.* [P 1129 C 1]

D. Appa Row—for Appellant.

V. Ramesam—for Respondent.

Judgment.—The plaintiff sues to recover damages from the defendant in somewhat curious circumstances. The defendant had a decree for money against the plaintiff and there was an agreement arrived at between the parties by which the decree-holder consented to receive an amount less than the decree amount in several instalments, covering a period of two years, the first instalment being pay-

able on the date of the agreement. It would seem that two instalments were paid to the decree-holder. In the payment of the 2nd instalment there was a delay of a few days but the defendant waived the delay and accepted payment but would not receive the 3rd instalment sent to him and then took steps to enforce the decree and realise the amount due upon the decree apart from the agreement. The agreement was never brought to the notice of the Court or sanctioned by it. The plaintiff says that he is entitled to recover damages from the defendant for violation of the agreement even though he could not set up the agreement as a bar to execution. But the agreement comes within the purview of S. 257-A of the old Civil P C. Act 14 of 1882, which lays down that

"every agreement to give timt for the satisfaction of a judgment debt shall be void unless it is made for consideration and with the sanction of the Court which passed the decree and such Court deems the consideration to be under the circumstances reasonable."

It would be void on two grounds: first of all it was not sanctioned by the Court and secondly there was no consideration for it. We cannot accept the contention that because the 1st instalment was paid at the date of the agreement there was valid consideration for it. The case referred to by the District Munsif, *Venkata Subramania Ayyar* v. *Koran Kannan Ahmod* (1), clearly shows that an agreement of this nature is an agreement to give time within the meaning of S. 257-A and does not put an end to the relationship of judgment-debtor and creditor by extending the time. It relieves the defendant from the obligation of satisfying the decree at any time he is called upon to do so by the decree holder. The agreement being void as not being sanctioned by the Court as required by law no rights can arise to the plaintiff under such an agreement and the suit was rightly dismissed by both the Courts.

The appeal fails and is dismissed with costs.

S.N./R K. *Appeal dismissed.*

(1) [1903] 26 Mad. 19.

1919 M/142 & 143

A. I. R. 1919 Madras 1129

COUTTS-TROTTER AND SESHAGIRI AIYAR, JJ.

Mallacheruvu Raghavayya—Appellant.

v.

Mallacheruvu Subbayya and *others*—Respondents.

Second Appeal No. 803 of 1916, Decided on 25th October 1917, against decree of Addl. Temporary Sub-Judge, Guntur, in Appeal Suit No. 125 of 1915.

(a) Specific Relief Act (1877), Ss. 39 and 41—Sale by minor—Before sale is cancelled, Court can put him on terms.

A sale deed executed by a minor is liable to be cancelled by him after he attains majority but before granting him possession the Court can put him on terms. [P 1132 C 2]

(b) Specific Relief Act (1877), S. 41 — Liability for compensation to vendee is statutory liability.

The liability to pay compensation to the vendee before getting possession of the property conveyed is a statutory obligation created by S. 41 and does not rest on any equities: 41 *I. C.* 180, *not Appr.* and *A. I. R.* 1914 *Mad.* 641, *Dist.* [P 1132 C 1]

(c) Specific Relief Act (1877), S. 41—Application of principle of awarding compensation how far to be extended stated.

Per *Coutts-Trotter, J.*—Whether the principle of awarding the relief of cancellation to infants on terms should be limited only to cases where on attaining age, they sue as plaintiffs or should be extended to cases where they are made defendants.—(*Quaere*) [P 1130 C 1]

Per *Seshagiri Aiyar, J.* — The fact that the infant is a plaintiff and not a defendant should make no difference in the principle to be applied. [P 1131 C 2]

(d) Minor—Advantage secured to minor by law—In order that he may lose it, untrue assertion must be made by him.

Per *Seshagiri Aiyar, J.* — It is not open to Courts to presume a representation from mere silence or conduct. In order that a minor may lose the advantage secured to him by the law, an assertion of an untrue fact must be made by him. [P 1131 C 2]

Quaere. — Whether relief should be refused where a false representation as to his age was made by the infant. [P 1131 C 1]

P. Narayanamurthy—for Appellant.

Somasundram—for Respondents.

Coutts-Trotter, J.—The facts of this case are very simple. The plaintiff on 2nd October 1903 executed a sale deed of certain lands to defendant 2 jointly with his undivided brother, defendant 1, for Rs. 300. At the time of the conveyance he was a minor; it is contended that he definitely represented that he was of age and I am not convinced that that allegation, if proved, would make any difference in law; but it is sufficient to say that it is not proved. A very great number of cases were cited before us, and a

very interesting discussion took place. In my opinion the decision of the English Court of Appeal in *Leslie Ltd.* v. *Sheill* (1) concludes the matter in all cases where the minor is a defendant and concludes it in his favour. I am not at all satisfied that the law is satisfactorily settled, apart from Statutes, in cases where the minor is plaintiff, as the English cases seem to me to fall into two groups not easy to reconcile. I may take as representing one group, *Nottingham Permanent Benefit Building Society* v. *Thurstan* (2) and as representing the other, *Valentini* v. *Canali* (3). I desire to express no opinion on the point now. But it is clear that in this country we have a statutory right to impose conditions by S. 41, Specific Relief Act, and that right is clearly recognized in *Mohori Bibee* v. *Dharmodas Ghose* (4). I regard this as proper case for exercising that discretion and make it a condition that the plaintiffs shall repay the Rs, 150 to defendant 2 before recovering possession of the property. The details of the order are contained in the judgment of my learned brother, which I have had the advantage of perusing. I desire to add that the decision in *Dadasaheb Dasrathrao* v. *Bai Nahani* (5) is vitiated by the fact that no reference is made either in the report of the arguments or the judgments to *Leslie Ltd.* v. *Sheill* (1) a decision approved of in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (6). I think the Bombay decision must be regarded as erroneous.

Seshagiri Aiyar, J.—The plaintiff and defendant 1 are members of a joint Hindu family. They executed a sale deed Ex. 1 to defendant 2 on 2nd October 1903. The consideration recited is three hundred rupees. The suit is brought for the cancellation of that sale deed in so far as it affects the plaintiff, and for the recovery of a half share of the property on the ground that at the time of its execution the plaintiff was a minor. The District Munsif and the Subordinate Judge in appeal both held that the plaintiff was estopped by his conduct from recovering the property. Hence this second appeal. The written statement of defendant 2 does not allege that an actual false representation as to age was made by the plaintiff. In para. 4 it is stated

"that the plaintiff was not a minor on the date of the execution of the sale deed as alleged in the plaint, but was a major."

Paragraph 9 says that

"plaintiff is estopped by his conduct subsequent to his ceasing to be a minor to prosecute his suit, even if the plaintiff was really a minor on the date of the execution of the suit document."

There is no specific issue on the question of any representation. The District Munsif was of opinion that plaintiff must have been aware of his real age and that, therefore he must be deemed to have intentionally represented himself to be a major. The Subordinate Judge is apparently of the same opinion. In the evidence given by defendant 2 as his own witness he states in cross-examination:

"I asked the defendant and plaintiff how old plaintiff was when Ex. 1 was executed because we had to give the age in the transfer application, I asked them about the age. I knew the plaintiff's age even before I asked them about it."

It may be that by implication it is intended to suggest by this evidence that some reply was given by the plaintiff about his age. It is unfortunate that this was not cleared up by the defendant in his re-examination. On these facts it is not open to the defendant to rely upon any actual false representation by the plaintiff as that was not alleged by him, and as there is no finding of any such representation by either of the Courts below.

Therefore the position is this: The plaintiff at the time of the execution of the conveyance was undoubtedly a minor: and it is not shown that he made any false representation as to his age at that time. The question for consideration, therefore is whether the plaintiff is entitled to have the sale-deed cancelled in respect of his share of the property and if he is so entitled, whether he should be bound by any equities. I do not think *Vaikuntarama Pillai* v. *Athimoolan Chettiar* (7) affects this question. It may be permissible to point out that the decisions relied upon by the learned Chief Justice in that case have since been considered elaborately by the Court of Appeal in England in *Leslie Ltd.* v. *Sheill* (1). Lord Sumner points out that

"for a very long time and in many forms equity has interfered to give relief against frauds com-

(1) [1914] 3 K. B. 607.
(2) [1903] A. C. 6.
(3) [1890] 24 Q. B. D. 166.
(4) [1903] 30 Cal. 539=30 I. A. 114 (P. C.).
(5) [1917] 41 Bom. 480=41 I. C. 180.
(6) [1916] 2 A. C. 575.
(7) A. I. R. 1914 Mad. 641=38 Mad. 1071=23 I. C. 799.

mitted by infants, or has refused it to infants guilty of fraud; but the practice and even the principles applicable to such cases were long ill-defined."

Then the Lord Justice proceeds to examine the case law on the question and says that unless there is a fiduciary relationship or a relationship of accountability between the parties, the minor on attaining age is entitled to repudiate the transaction. One exception to this rule is that if the minor is in possession of property which can be restored in specie, he will be compelled to give it back to the person from whom he received it. A distinction is drawn between the cases of restitution and of re-payment. If it is a question of re-payment, involving as it would new liability, personal or otherwise, he held the minor should not be subjected to it. Kennedy, L. J., in the same case says:

"It appears to me that whilst Courts of Equity have interfered to make an infant restore property found in his possession which he had obtained by fraudulent misrepresentation as, e. g., the promissory note in the old case of *Clarke* v. *Cobley* (8), to compel the recognition, in regard to property in his possession, of rights and interests of persons whom he has misled into entering into transactions in regard to it [*cf.* *Watts* v. *Creswell* (9)]; and to prevent the payment over again to the infant of moneys of which he has procured the payment already by a representation of full age, as in *Cory* v. *Gertsken* (10), there is no case in which I can find that a Court of Equity has given judgment against an infant in circumstances like the present, that is to say, in which it has interfered on the ground of the fraud of the infant, whereby he induced the making of the contract of loan, to order the infant to pay the plaintiff a sum equal to the sum borrowed under the void contract, and so, in effect, to the amount of the principal lent, to give validity as against the infant to a void contract."

Lawrence, J., expressed similar views. This decision was accepted as good law by the Judicial Committee in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (6). The decision of the Bombay High Court in *Dadasaheb Dasrathrao* v. *Bai Nahani* (5) does not refer to either of these decisions. Therefore if the point distinctly arises for consideration, whether even though a false representation was made by the infant as to his age he should be refused relief, the question may have to be referred to a Full Bench; but as I stated at the outset, there is no ground in this case for holding that an actual false representation was made by the infant.

Mr. Somasundaram for the respondent contended that the mere fact of the minor not disputing that he was a major is tantamount to a representation by him that he was a major. I am unable to agree with this contention. The authorities seem to establish that it is not open to Conrts to presume a representation from silence or from conduct. In order that a minor may lose the advantage secured to him by the law an assertion of untrue fact must be made by him: see *Jones, In re, Jones, Ex parte* (11) and *Stikemen* v. *Dawson* (12).

It was next contended by the learned vakil for the respondent that the principle of the English decisions should not be extended to cases where the minor comes into Court as plaintiff. There are dicta in some of the English decisions which to a certain extent support this contention. For example, in *Hamilton* v. *Vaughan Sherrin Electrical Engineering Co.* (13) Stirling, J., seems to concede that if the plaintiff who was a minor had derived any benefit he would not be granted relief without being compelled to refund the advantage which was secured to him, *Crope* v. *Overton* (14) also contains observations to a similar effect. In *Ram Ratan Singh* v. *Shew Nandan Singh* (15) that principle seems to have been accepted without any discussion whatsoever. But after the decision of the Judicial Committee in *Mohori Bibee* v. *Dharmodas Ghose* (4) it is not permissible to say that the fact that the infant is a plaintiff and not a defendant should make any difference in the principle to be applied. The observations of Romer, L. J. in *Thurston* v. *Nottingham Permanent Benefit Bulding Society* (16), which was fully endorsed by the House of Lords in *Nottingham Permanent Benefit Bulding Society* v. *Thurstan* (2), show that the array of the infant in the suit is not a matter of any significance, I am, therefore, of opinion that the fact that the suit is brought by the infant on attaining age is not a consideration for refusing relief to him.

(8) [1789] 2 Cox 173.
(9) [1714] 9 Vin. Abr. 415.
(10) [1816] 2 Mad. 40.
(11) [1881] 18 Ch. D. 109.
(12) [1847] 1 De. G. & Sm. 90.
(13) [1894] 3 Ch. 589.
(14) [1833] 10 Bing. 252.
(15) [1902] 29 Cal. 126=6 C. W. N. 132.
(16) [1902] 1 Ch. 1.

The further question is whether the infant plaintiff should not be put on terms before he is granted relief. Ch. IV, Specific Relief Act applied to both void and voidable contracts. S. 39 is clear on the point. S. 41 leaves it to the discretion of the Court to grant or refuse, to the party affected by the cancellation, compensation. Mr. Narayanamurthi for the appellant relied upon the judgment of the Judicial Committee in *Mohori Bibee* v. *Dharmodas Ghose* (4) for the broad proposition that under no circumstances should the infant be compelled to pay compensation. There are two passages in the judgment of the Judicial Committee which although they appear to be in conflict on the face of them, are not really so. At p. 125, their Lordships refer to S. 41, Specific Relief Act, and point out that as the Courts below had not exercised the discretion vesting in them, the Board were not prepared to direct the award of compensation for the first time. In the next paragraph they advert to a contention based upon the painciple that he who seeks equity must do equity.

They point out that if the contract is void ab initio no principle of doing equity would arise. The learned vakil for the appellant contended that this succeeding paragraph must be taken to have given the final answer to the contention as to compensation. I do not think so. In my opinion the two paragraphs are consistent with each other. In the second paragraph their Lordships must be taken to have held that if the matter rested purely on principles of equity, they would not be prepared to order compensation, as that claim was negatived under similar circumstances by the House of Lords in *Nottingham Permanant Benefit Building Society* v. *Thurstan* (2). Their Lordships should not be taken to have held that the statutory rule contained in S. 31, Specific Relief Act, should not be given effect to, as it only contains a rule of equity. The net import of the two paragraphs is to declare that the statutory discretion as to compensation does exist and can be exercised by the Courts, but that if relief is claimed on general equitable grounds apart from the Statute, such a claim is inadmissible, as that would be opposed to the principles laid down by the House of Lords.

There can be no doubt that in this case the substantial prayer of the plaintiff is that the deed executed by him should be cancelled. The Courts below did not consider the question of compensation, as in their opinion it was not open to the plaintiff to repudiate the contract at all. We have therefore for the first time to apply our mind as to whether compensation should be awarded or not. Nothing that has been said by Mr. Narayanamurthi has induced me to think that the plaintiff ahould not be put on terms. The contract was entered into by his own elder brother and although we are not now concerned with deciding whether the sale was for necessary purposes or not, there is no question that the money was actually received by both the brothers and that the plaintiff derived full benefit from the consideration paid by defendant 2. The property has admittedly risen in value considerably, and the plaintiff is enabled by law to get back that property. I think he must be compelled to refund his share of the purchase money before a decree for possession is given to him. I would therefore in reversal of the decree of the Courts below, give a decree to the plaintiff for possession of his half share in the property in suit and would also direct that he do pay within three months from this date to defendant 2 Rs. 150, being his share of the consideration for the sale. If the money is not paid, there will be a charge upon the property for this sum. I do not think that this is a case in which the plaintiff should be given any costs. I would order that each party do bear his own costs throughout.

S.N./R.K. *Appeal allowed.*

A. I. R 1919 Madras 1132

ABDUR RAHIM AND NAPIER, JJ.

(*Kompella*) *Anantaramayya*—Counter-Petitioner.

v.

Chikkatla Tukkadu—Petitioner — Opposite Party.

Criminal Misc. Petn. No. 466 of 1917, Decided on 14th February 1918. against revision of Ses. Judge, of Godaveri Div. in Criminal Misc. Petn. No. 23 of 1917.

(a) Criminal P. C. (5 of 1898), S. 195—Sub-Magistrate is subordinate to District Magistrate and not to Joint Magistrate who hears appeal on transfer.

A Sub-Magistrate is 'subordinate' to the District Magistrate within the meaning of S. 195,

and is not subordinate to a Joint Magistrate who hears appeals from orders of Sub-Magistrates only in such cases as are made over to him by the District Magistrate: 26 *Mad.* 656 (*F.B.*), *Foll.* [P 1133 C 1, 2]

(b) Criminal P. C. (5 of 1898), S. 195—False statement in trial Court—Sanction cannot be granted by appellate Court merely because of the appeal—"In relation to any proceedings" refers to proceedings in trial Court.

An appellate Court cannot accord sanction for prosecution of a person for false statements made in his desposition before the trial Court on the ground that the offence of perjury was again committed before the appellate Court with reference to that very deposition. The offence is complete when the evidence is given and it cannot be said to be repeated afterwards because there is an appeal. [P 1134 C 1]

The words 'in relation to any proceeding in any Court' have reference to the original trial of the suit or the criminal case: 18 *I. C.* 271, *Diss. from.* [P 1134 C 1]

G. Venkataramiah—for Petitioner.

The Public Prosecutor and *K. Ramanatha Shenai*—for the Crown.

Abdur Rahim, J.—It is unnecessary in this matter to repeat the entire history. When the application for sanction for perjury was made to the Sub-Magistrate before whom the petitioners had given evidence, he granted the sanction with reference to a particular statement made by the petitioner. That order was set aside by the Joint Magistrate, asn in his opinion, the order granting sanction was wanting in definiteness. But he granted sanction with reference to another statement made by the petitioner before the same Sub-Magistrate. It appears that the respondent had applied for sanction with reference to the very statement with respect to which sanction was ultimately granted by the Joint Magistrate, Mr. Fotheringham; but the Sub-Magistrate instead of granting sanction with reference to that statement, granted sanction with reference to another statement; and Mr. Fotheringham, as already stated, set aside that order on the ground that it was vague. The question of law arises whether the Joint Magistrate had jurisdiction to grant sanction when he did not try the case himself and whether his Court was a superior Court within the meaning of S. 195, Criminal P. C. It has been ruled in this Court that a Sub-Magistrate is subordinate to the District Magistrate, and is not subordinate to a Joint Magistrate who hears appeals from orders of Sub-Magistrates only in such cases as are made over to him by the District Magistrate. *Eroma Variar* v. *Emperor* (1).

The Joint Magistrate in this case no doubt heard the appeal. The question for decision however is whether it could be said that the offence of perjury was committed in his Court or in relation to a proceeding in his Court; for S. 195, Cl. (b), Criminal P. C., says:

"No Court shall take cognizance of any offence punishable under Ss 193, 194 etc., of the Penal Code when such offence is committed in, or in relation to, any proceeding in any Court, except with the previous sanction, or on the complaint of such Court, or of some other Court to which such Court is subordinate.

The Joint Magistrate argues that the application was not made to him as "an appellate authority for evidence given before the Sub Magistrate;" but "as the original authority for evidence in the appeal before his Court." That is practically the view of the law which has been taken by Banerji, J. of the Allahabad High Court in *Bhadesar Tewari* v. *Kamta Prasad* (2). But with all respect to that learned Judge, I am absolutely unable to agree with him. The case before him was not under Cl. (b), but under Cl. (c), which deals with offences of forgery and using forged documents, but its language, so far as the present question is concerned, is not substantially different from that of Cl. (b). Banerji J. argues that though it could not be said that the document with respect to which sanction was applied for, was produced in the appellate Court i. e., of Additional Judge of Basti, it was given in evidence in the proceedings, that is, the appeal—before that Judge. If this interpretation was correct, then the offence of perjury or using a forged document would be committed. first in the original Court and thereafter again, though the deponent or the party concerned did nothing fresh, excepting that appeal was filed against the judgment of lower Court before the appellate Court—again in second appeal supposing that a second appeal was preferred in the case.

Prima facie, dealing with Cl. (b), it seems to me to be straining the language of the Code too far to say that a witness commits perjury not only in the Court where he gives his evidence but also in the appellate Court where he did not give

(1) [1903] 26 Mad. 656=2 Weir 202 (F.B.).
(2) [1913] 35 All. 90=18 I. C. 271.

any evidence, and where he that could be said, was that the evidence given by him was relied upon by the party interested. Neither he nor the party who called him might even use that evidence but might impeach the decree of the lower Court on other grounds. As regards the words "in relation to any proceeding in any Court," a man giving evidence cannot be said to have any proceeding other than the one in which he is giving evidence in contemplation When a man gives evidence in a suit or in a criminal case, that evidence is given with reference to the original trial of that suit or criminal case. Then, as is pointed out by the learned pleader for the petitioner, if the intention of the legislature were that any Court hearing the appeal, whether it is a superior Court or not, could grant sanction because of the words "where such offence is committed in, or in relation to any proceeding in any Court," then it would have been superfluous on the part of the legislature to add the words 'or to some other Court to which such Court is subordinate.' It seems to me that it would be going much further than the language of the section warrants to say that an offence like that of perjury or using false evidence is committed once in the Court of trial, afterwards in appeal with reference to that very evidence. The offence is complete when the evidence is given or the document is produced or put in evidence. It cannot be said to be repeated afterwards because there has been an appeal. It may be that the person who committed the offence, does not appeal at all. It is difficult to see how an offence committed in the Court of first instance can be said to be multiplied with the number of appeals that are filed.

I would therefore dissent from the judgment in *Bhadesar Tewari* v. *Kamta Prasad* (2). In this case the Sub-Magistrate's Court before which the offence is alleged to have been committed, was not a Court subordinate to that of a Joint Magistrate although the latter Court heard the appeal. For these reasons, I set aside order of the Joint Magistrate dated 2nd June 1917 granting sanction.

Napier, J.—I agree. I think that Banerji, J. in the case of *Bhadesar Tewari* v. *Kamta Prasad* (2) has been misled owing to his not having given due weight to the language of the section. His reasoning is as follows:

"Similarly, the false evidence was given in a proceeding which was pending in the stage of appeal in the Additional Judge's Court."

In a broad sense of the words this is true, because at the hearing of the appeal the false evidence would be read. But this is not what is required by the section. The section requires that such offence should be committed in, or in relation to, any proceeding in any Court and that the sanction should be granted by that Court or some other Court to which that Court is subordinate. So that, what is to be ascertained is not whether false evidence was given in a proceeding, but whether the offence was committed in a proceeding. Now as my learned brother has pointed out, the offence of giving false evidence is complete by the statement on oath or affirmation in a Court of facts which the Court finds to be false. And the fact that subsequently such a statement, having become part of the record, comes before an appellate Court, cannot make this a second offence. The offence is complete when the evidence has been given and it seems to me impossible to say that however the proceedings came before the appellate Court, whether by the appeal of the party who has himself given false evidence or by the appeal of a person in whose favour he gave false evidence or by the appeal of the opposite party or whether the person who gave false evidence in his appeal expresses through his counsel or, it might possibily be, himself has desire to withdraw that story, however it comes and whatever his attitude before the appellate Court, the offence is re-committed in that Court. It seems to me that this contention must fail on the language of the section and that therefore the objection raised by the learned vakil before us, must prevail. For these reasens I agree with the order proposed by my learned brother.

S.N./R.K. *Sanction revoked.*

A. I. R. 1919 Madras 1135

SPENCER AND KRISHNAN, JJ.

Chandrasekharaswami Siva Matha Temple, Maramangalam and *another*—Plaintiffs—Appellants.

v.

Nainar Ammal and *others*—Defendants—Respondents.

Second Appeals Nos. 1648 to 1652 of 1916, Decided on 25th September 1917, against the decree of the District Judge, Tinnevelly, in Appeal Suits Nos. 63 to 67 of 1913.

(a) Landlord and Tenant — Ejectment — Yearly tenancy denied — Failure to prove permanent tenancy—Burden of proof is still on landlord to prove that tenancy is terminable—Proof of tenancy terminable given—Burden of proof shifts on tenant to prove permanency.

Where a landlord sues to eject a tenant on the allegation of a yearly tenancy which is denied, the landlord must show that the tenancy is a terminable one and has been validly terminated. This burden is unaffected by any defence of permanent tenancy set up by the tenant but which he has failed to prove. [P 1136 C 1]

Where however the plaintiff landlord has made out a prima facie case of a terminable tenancy and his right to eject, either by evidence as to the origin of the tenancy or from admissions of the tenant as to the character of his tenancy, either before or in the suit or by reliance on presumptions arising in his favour from the circumstances, and the tenant sets up, in answer to it, the existence of permanent rights in himself, the burden is on him to prove the special case thus set up. [P 1136 C 2]

Principles affecting the onus of proof and presumptions arising in ejectment suits discussed. [P 1136 C 2 ; P 1137 C 1]

(b) Landlord and Tenant—Permanent tenancy—Temple lands—Permanent occupancy rights pleaded—Uniformity of rent for 50 years—Presumption of permanent tenancy arises.

Where in an action to eject a tenant from temple lands to which Estates Land Act does not apply, it is proved by the tenant that he has been paying a uniform rent for 50 years, which is equivalent to the Government assessment on a single crop land, that he alienated the lands by mortgage or sale to the knowledge of the temple trustees, that the latter never successfully attempted to enhance the rent and that the property devolved from father to son, a presumption of permanent tenancy arises in his favour. [P 1137 C 2]

(c) Landlord and Tenant — Occupancy rights—Unoccupied Government lands—Presumption.

There is no presumption in law that, because lands were unoccupied Government lands at one time cultivating tenants can never have occupancy rights in them. [P 1138 C 1]

(d) Landlord and Tenant—Permanent tenancy—Uniformity of rent for 50 years—Presumption can be raised—Trust property—Presumption should not be drawn if breach of trust is involved.

No general rule can be laid down as to the minimum length of occupancy required to raise a presumption of permanent rights. Each case must be decided on its own facts. 50 years' occupation at a uniform rent may give rise to a presumption of occupancy rights. [P 1137 C 2; P 1138 C 1]

The presumption in favour of permanent tenancy in temple lands is not an impossible one, though the presumption should not be drawn when the matter involves a breach of trust. [P 1138 C 2]

T. R. Ramachandra Aiyar, T. R. Krishnaswamy Aiyar and *T. M. Vedantachariar*—for Appellants.

C. V. Ananthakrishna Aiyar — for Respondents.

Judgment. — *S. A. No.* 1648 *of* 1916. In this case, the trustees of a temple in Tinnevelly District sued to eject the defendant from certain temple lands in her possession, alleging that she was a yearly tenant and that her tenancy was terminated by notice to quit. She pleaded in answer, inter alia, that she had a permanent occupancy right in the land and that plaintiffs were not entitled to eject her but only to receive the thirvai due; she also pleaded a right of permanent tenancy acquired by adverse possession. The temple traced its title to an inam grant by the Government in 1865. One of the questions in the case was whether the grant was only of the revenue payable to Government or of the land itself and as a result whether the Estates Land Act applied. The Munsif held that the grant was of the land itself and not of the revenue alone and that the Estates Land Act did not apply. He further held that the tenants in this and the connected suits were not shown to be yearly tenants liable to be ejected or to have even been let into possession by the temple trustees, that they and their predecessors-in-title were proved to have been in occupation of the land for nearly 50 years paying a uniform rate of rent, which never exceeded the assessment payable to the Government, that they were dealing with the land as their own, subject only to the payment of thirvai, to the knowledge of the trustees and were making transfers and that the trustees recognized those transactions, that in some instances the property devolved from father to son, that the circumstances proved pointed to a permanent right in the tenants and that there was no foundation for any presumption of yearly tenan-

cy and that as the burden was on the plaintiffs to prove the yearly tenancy alleged by them and as they had failed to prove it, their suit for ejectment failed. On appeal, the District Judge held that the grant was of the revenue alone but confirmed the Munsif's decree.

The trustees appealed to the High Court in Second Appeal No. 2694 of 1913 and this Court held that what was granted was the land itself and remanded the appeal for fresh disposal. In doing so they also came to a finding of fact that the lands when granted, were unoccupied and stated that the occupancy rights, if any must have been acquired since the grant. The District Judge has now found on the evidence all the facts except one relied upon by the Munsif for holding that plaintiffs failed to prove their case of yearly tenancy and that defendants have shown their tenancy to be permanent; and that fact is that the defendants were not in possession before the date of the grant which was concluded by the finding of the High Court; he however agreed with the Munsif that the burden was on the plaintiffs to prove the yearly tenancy and their right to eject and that it was not discharged and that the defendants had established their case of permanent tenancy; and he dismissed the appeal. The plaintiffs have again appealed to this Court and Mr. Ramchandra Aiyar for them has contended before us that the burden of proof was on the defendants, that the finding as to defendants' permanent occupancy was erroneous and that, if the burden was on his clients, they had proved the tenancy to be a yearly one.

The question of burden of proof in a case like this is a somewhat vexed question. It seems to us however that there need be no difficulty if the general principles of burden of proof in the Evidence Act are kept in view. Ordinarily, when a person seeks to eject another from possession on the ground that the latter is his tenant whose tenancy has been terminated, he must prove not only that the tenancy is as alleged, if that is denied, but also his right to eject. In doing so he must necessarily show that the tenancy is a terminable one and has been validly terminated. This burden is unaffected by any defence of permanent tenancy set up by the defendant but which he has failed to prove: vide *Venkatacharlu* v. *Kandappa* (1). On the other hand, when the plaintiff has made out a prima facie case of a terminable tenancy and his right to eject, either by evidence as to the origin of the tenancy or from admissions of the tenant as to the character of his tenancy, either before or in the suit or by reliance on presumptions arising in his favour from other circumstances, and the tenant sets up in answer to it the existence of permanent rights in himself, the burden is on him to prove the special case thus set up. The many cases on the point will on examination be found to have proceeded on one or other of these rules. In one class of cases where the evidence showed that the tenant was, at one time either at the beginning of the tenancy or at some later period during the continuance of the tenancy, a temporary or terminable tenure-holder, it was held that the tenant must prove that he had a permanent tenancy at the date of suit.

The examples of thease are *Achayya* v. *Hanumantrayudu* (2), where the landlord proved a lease from him to the tenant; *Rangasami Reddi* v. *Gnana Sammantha Pandra Sannadhi* (3), where the admissions of the tenants that they were "*ulvadai purakudis*" was held "to favour the contention that the tenancy was temporary": *Marapu Tharalu* v. *Telukkula Neelakanta Behara* (4), where the Munsif had found on the evidence that the defendants were tenants from year to year and the High Court holding there was no necessary presumption of permanent occupancy in favour of tenants under inamdars held that the burden was on the tenants to prove the alleged occupancy right, and *Naina Pillai* v. *Ramanathan Chettiar* (5), where the tenancy was under muchilikas executed by some tenants on behalf of all. In some cases presumptions of fact have been raised in favour of the landlord or of the tenant from the conduct of the parties with reference to the land when there is no direct proof of the origin of the tenancy: periodical raising of the rent and periodical resumptions of land by the landlord, tenants submitting to them, have thus been held to raise a presumption in favour of the landlord, and

(1) [1892] 15 Mad. 95.
(2) [1891] 14 Mad. 269.
(3) [1899] 22 Mad. 261.
(4) [1907] 30 Mad. 502=2 M. L. T. 470.
(5) [1917] 41. I. C. 788.

against the tenant, that the tenancy was a terminable one. See *Rajah of Venkagiri* v. *Mukku Narasaya* (6). On the other hand, circumstances such as long continued occupation at a uniform rate of rent, dealings by the tenant to the knowledge of the landlord as if he had an alienable permanent tenure without objection, and devolution of property from father to son have been considered as indicating permanent tenancy. Where circumstances exist in any particular case, some of them in favour of a presumption of a terminable tenancy and some in favour of that of a permanent tenancy, the Court which has to weigh the evidence must decide on which side the balance of evidence falls. In a third class of cases presumptions are raised in favour of the landlord or the tenant, as the case may be, from the situation and character of the lands themselves; for example lands in a zamindari are presumed to be held on permanent tenancy. See *Cheekati Zamindar* v. *Ranasooru Dhora* (7). That question is now regulated by the Estates Land Act. Again if the land is in a district or locality where the usual rule is permanent tenancy there will be a presumption in favour of it; and vice versa. Here again if there are conflicting presumptions the Court considering the facts must decide which presumption should prevail.

It may also be stated that a tenant who comes into possession as a temporary tenure-holder cannot develop himself into a permanent tenant by mere length of occupation, vide the case cited as *Rangasami Reddi* v. *Gnana Sammantha Pandara Sannadhi* (3), or even by setting up a title as permanent tenant in himself, so long as the original tenancy has not been terminated by the landlord. See *Rajah of Venkatagiri* v. *Mukku Narayasa* (6). Bearing the above considerations in mind we must examine the present case. The Estates Land Act does not apply to it and the presumption under S. 106, T. P. Act also does not apply, as these are agricultural lands and there has been no notification issued by the Government under S. 117, of that Act. The fact that the lands are inam lands does not by itself give rise to any presumption in the inamdar's favour, vide, *Maddu Yerrayya* v. *Yadulla Kangati Naidu* (8), and we think there is no presumption from that fact in favour of the tenants in this case either, as the lands are Government raiyatwari lands to which the Estates Land Act does not apply, though in inam lands to which the Act applies the presumption is distinctly in favour of the tenants, vide, *Adusumulli Surayanarayana* v. *Achutta Potanna* (9).

The plaintiffs have produced no muchilikas or other documents to prove the terms of the tenancy. They attempted to show that the lands were held on waram tenure and that they themselves cultivated them for some time, but they failed to prove these allegations. The cumulative effect of the facts found by the lower Court, viz, the holding at the same rent for nearly fifty years, that rent being equivalent to the Government assessment for a single crop land in the Government village, the absence of any successful attempt being made by the trustee to enhance the rent for all these years, the selling and mortgaging of their lands by the tenants to the knowledge of the trustees, as if the lands were their own subject only to the payment of thirvai to the temple, the devolution of property from father to son in some cases, the trustees recognizing the alienees and the heirs in each case, certainly supports an inference of permanent rights, and is against the landlord's allegation of yearly tenancy. It was argued that there was a presumption in favour of the temple because the lands were unoccupied at the time of the Government grant in 1865 and because the landlord in this case is a temple No doubt we must take it that at the date of the grant there was no permanent tenancy right in existence; that does not prevent the acquisition of permanent rights subsequently.

It was suggested that fifty years was too short a period for it. It is not possible to lay down any gereral rule as to the minimum length of occupancy required to justify the use of that fact as one of the factors in drawing an inference of permanent tenancy. Each case must be decided on its own facts with reference to all the facts proved though of course the amount

(6) [1910] 37 Mad.=17 I. C. 202.
(7) [1900] 23 Mad. 318.
(8) [1910] 34 Mad. 246=6 I. C. 711.
(9) A. I. R. 1915 Mad. 201=22 I. C. 839=38 Mad. 608.

of support given by the length of occupation to such an inference will necessarily vary with the period. We do not think 50 years' occupation at a uniform rent should be treated as an immaterial fact in considering the nature of the tenancy because the period is only 50 years. It does not follow as a matter of law that because the lands were unoccupied Government raiyatwari lands at one time cultivating tenants could never have acquired occupancy rights in them. See if authority is needed *Peria Karuppan* v. *Annaswami Aiyar* (10). In the case of *Tadikonda Buchi Virabhadrayya* v. *Sonti Venkanna* (11) their Lordships held that the landlord was bound to prove his right to eject and allowed him to eject only on proof that he and his predecessor in title were in possession of both the melwaram and kudiwaram for the past 40 or 50 years before suit and that the tenant came into possession when they were owners of both warams which they continued to be up to the date of suit. In the case before us though the land was unoccupied in 1865 and the plaintiffs had therefore full rights in the land including both warams at that time they have not shown that they continued to be in possession of both rights up to the present time the evidence pointing to the contrary. The question therefore really is whether on all the facts in the present case a presumption of permanent tenancy does not arise one of those facts being that the land was unoccupied in 1865. It cannot be urged that from that fact alone there is a presumption of yearly tenancy at the date of suit.

The next point taken is that as the lands are temple lands no presumption of a creation of permanent rights by grant was permissible as that would be a breach of trust and reliance was placed on *Satya Sri Ghoshal* v. *Kartik Chandra Das* (12), which was followed in *Naina Pillai* v. *Ramanathan Chettiar* (5). No doubt a Court will not presume the existence of an illegal transaction or as Jenkins, C. J., put it "the presumption in favour of a transaction assumes its regularity." But the grant of a lease in perpetuity of temple lands is not necessarily a breach of trust though it may be if it was an act of management not authorized by the terms of the endowment or by the usage of the temple. Such a grant is perfectly valid if made for necessity or for the clear benefit of the temple. Vide the Privy Council case of *Palaniyappa Chetty* v. *Deivasikamony Pandara Sannadhi* (13) and the observations of Sadasiva Aiyar, J., in *Naina Pillai* v. *Ramanathan Chettiar* (5). The presumption in favour of permanent tenancy in temple lands is not therefore an impossible one the only point is that when drawing the presumption it should not involve a breach of trust. In *Satya Sri Ghoshal* v. *Kartik Chandra Das* (12) what their Lordships did was to send the case down to find on the question of permanent tenancy on all the materials before the Court bearing the objection in mind. It should also be remembered that a grant is not the only way that permanent rights could be obtained in temple lands, prescription is another.

In this case the lands were originally waste and were evidently brought under cultivation by the tenants. The arrangement to get that done by granting permanent rights may have been very beneficial to the temple. The presumption of a valid creation of permanent rights is therefore easier to make. At any rate the learned District Judge in considering on which side the balance of evidence and presumptions was had his attention drawn to the objection now dealt with and his finding therefore cannot be said to be vitiated by the objection in question as in the Calcutta case. On all the facts of this case we think there is no ground for holding that the primary burden of proof which was on the landlord to prove the tenancy alleged by him and his right to eject has been discharged or for interfering with the District Judge's finding on the facts and the presumption arising from them in favour of the defendant, that she has an occupancy right in the lands in suit. The second appeal fails and is dismissed with costs.

In S. A. Nos. 1649 to 1652 of 1916. The other second appeals, Second Appeals Nos. 1649, 1650, 1651 and 1652 of 1916, follow our decisions in Second Appeal No. 1648 of 1916 and for the like reasons as are recorded in our judgment therein we dismiss the Second Appeals Nos. 1649, 1650, 1651 of 1916 with costs

(10) [1911] 12 I. C. 1.
(11) [1913] 20 I. C. 769.
(12) [1912] 13 I. C. 596.
(13) [1917] 40 Mad. 709=39 I. C. 722.

and without costs in Second Appeal No. 1652 of 1916.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 1139

ABDUR RAHIM AND NAPIER, JJ.

Thatha Pillai and *others* —Accused—Petitioners.

v.

Emperor —Opposite Party.

Criminal Revn. Cases Nos. 711 and 736 to 755 of 1917, and Criminal Revn. Petn. Nos. 563 and 535 to 604 of 1917, Decided on 14th February 1918, praying the High Court to revise judgment of Court of Subdivisional Magistrate, Trichinopoly, in Criminal Appeals Nos. 94, etc., of 1916.

(a) Madras Forest Act (5 of 1882), S. 26 —S. 26 cannot be used to detriment of person having pre-existing rights.

Section 26 does not empower the Government to regulate the use of the land which is dealt with in Ch. 3 to the detriment of any rights existing in individuals and communities: 42 *I. C.* 724, *Foll.* [P 1139 C 2]

(b) Madras Forest Act (5 of 1882), S. 26 —Accused claiming right of pasturage—Conviction without inquiry is illegal.

Where the residents of a village claim the right of pasturage and the right to cut fuel a conviction under S. 26 without an inquiry into these allegations is illegal. [P 1139 C 2]

S. Swaminadhan—for Petitioners.

R. Ramanatha Shenai — for the Crown.

Order. — The convictions in these cases are under S. 26, Madras Forest Act and the rules and regulations framed thereunder. The land with reference to which this section has been applied admittedly belonged to the Devastanam and is Inam land. The zamindar of Kadavur is the manager of the Devastanam. His estate and also the management of the Devastanam have been taken charge of by the Court of Wards under the Madras Court of Wards Act. Then an application was made for the use of the pastuarge and of the natural produce of this land being regulated under Ch. 3, Forest Act. This chapter deals with the protection of land at the disposal of Government not included in reserved forests and says:

"subject to all rights now legally vested in individuals and communities the Governor in Council may for any district or portion of a district make rules to regulate the use of the pasturage or of the natural produce of land at the disposal of Government and not included in a reserved forests. Such rules may with respect to such land regulate or prohibit the cutting of grass and pasturing of cattle and regulate the payments to be made for such cutting or pasturage (clause c).

It is first of all argued that the land being in the Devastanam and not part of the zamindari of Kadavur was not properly included within the scope of S. 26, Madras Forest Act. But it is found by the appellate Magistrate and it is not disputed here that the land is within the limits of the Kadavur estate though it is part of the Devastanam Inam. The notifications relate to the entire estate and the Court of Wards took up mangement of the land in question under those notifications. We do not think therefore that this objection has any force.

The second point which is the more substantial raises the question whether S. 26 contemplates that the Government can under that section prohibit the use of land which is dealt with under Ch. 3, Forest Act for pasturage or prevent persons claiming right to cut trees for fuel and doing similar acts from doing so. The section begins by saying that the prohibition or the regulation shall be subject to all rights now legally vested in individuals and communities. In this case it is alleged that the petitioners who are the villagers living in the vicinity have a right to graze their cattle and goats on the land in question and also to cut trees for the purpose of fuel and to take the produce of the trees in the forest. If the claim is well founded it could not be said that under S. 26 the Legislature empowered the Government to prohibit these persons from exercising the rights already vested in them. If that were its intention what the Legislature would have said was that notwithstanding any rights which any person may claim as to pasturage or produce of the land the Government can prevent and prohibit the use of the land for such purposes. The language of the Legislature seems to us clearly to mean just the reverse. They did not intend to empower the Government to regulate the use of the land which is dealt with under this chapter to the detriment of any rights existing in individuals and communities. This becomes still clearer when we refer to Ss. 10 and 11 of the Act. S. 10 lays down the procedure with reference to rights claimed in land other than rights of way pasturage water course or forest produce. The procedure

with regard to dealing with those rights is laid down in S. 11. These sections deal with the procedure for reserved forest. Ch. 3 deals with land not included in reserved forest and it seems to us that the wording of the section is clear enough to show that as in the case of reserved forest so also with respect to lands not included in reserved forest the Legislature did not mean to interfere with the existing rights of the people. There is a decision of this Court to the same effect recorded in *Rangadu In re* (1).

The petitioners' claims were put forward before the second class Magistrate who originally tried these cases, but he apparently ignored the question altogether. Then on appeal the Sub-divisional Magistrate thought that the question had been finally disposed of by the decision of the Collector in another proceeding. The present petitioners were not parties to that proceeding and the appellate Magistrate in these circumstances ought to have dealt with the question as to the right claimed by the petitioners before coming to a conclusion on the question whether the acts imputed to them made them liable to the penalties prescribed by the Act. On these grounds therefore we set aside the judgment of the Subdivisional Magistrate in appeals nd remand the appeals to him for disposal according to law. If the parties desire to adduce fresh evidence on this question they will be at liberty to do so before the Subdivisional Magistrate.

S.N./R.K. *Case remanded.*

(1) [1917] 42 I. C. 724.

* A. I. R. 1919 Madras 1140
Full Bench

AYLING, COUTTS-TROTTER, AND SESHAGIRI AIYAR, JJ.

Pandiri Veeranna—Plaintiff—Appellant.

v.

Grandhi Veerabhadraswami—Defendant—Respondent.

Civil Appeal No. 343 of 1916, Decided on 20th February 1918, against decree of Addl. Temporary Sub. Judge., Rajahmundry, in Original Suit No. 3 of 1916.

*** Limitation Act (9 of 1908), S. 21—Authority to acknowledge debt on behalf of co-contractor or partner can be presumed from circumstances.** 2 *I. C.* 309 and 11 *I. C.* 332, *Overruled.*

In the absence of direct evidence that a co-contractor or partner has authorised his co-contractor or partner tomake acknowledgments or payments saving limitation on his behalf such authority can be inferred from other circumstances such as the position of the other co-contractors or partners in the business. 21 *I. C.* 634, *Foll.* 2 *I. C.* 309 and 11 *I. C.* 332, **Overuled**

[P 1142 C 2]

V. Ramadoss—for Appellant.

T. Ramchandra Rao—for Respondent,

Order of Reference

Wallis, C. J.—It is quite clear in this case that the defendant 1 and his adult son defendant, 2 carried on business as timber merchants with the joint family property. It is also clear that the advances made by the plaintiff were made to them both and that defendant 2 was personally liable on them as well as defendant. 1 This is abundantly proved by the fact that defendant 2 has signed the settlements in the plaintiff's books Ex. A, dated 27th April 1907, and Al, dated 12th September 1909, and the promissory notes D, dated 1st May 1907, and E, dated 13th September 1909. He did not sign the settlement A-2, the promissory note F, dated 26th September 1910, or the letter J, dated 1st October 1910, as he was absent but on 7th February 1911 he signed the letter Ex. G, set out in the judgment of the Subordinate Judge, in which he stated that he and his father had been borrowing from the plaintiff, that his father had settled accounts on 26th September 1910, and signed in the plaintiff's book that he had not signed as he was not present and that subsequently they had received further advances to the extent of Rs. 4,000. In this letter he undertook to discharge both these amounts on his personal liability and added:

"There subsists also my personal bliaility for the whole of the amount payable according to your accounts. As I did not sign in your accounts, this letter was written and given."

He did not however sign the subsequent settlement A-3, dated 7th September 1913, or the promissory note Ex. H, dated 7th September 1913, or the letter Ex. K, dated 9th September 1913, by which defendant 1 acknowledged the joint indebtedness to amount to Rs. 9,855 andarranged for a further advance of Rs. 1,200 for which they were to give a fresh mortgage. The plaintiff has given evidence in support of his case, and neither the first nor defendant 2 has ventured to go into the box and the witnes-

ses called for defendant 2 to prove that he had no connection with his father's business are contradicted by the documents under his own signature already mentioned. There is evidence, and it is defendant 2's case, that for the last few years he has been looking after a cloth business, and according to the plaintiff's evidence defendant 1 was the manager and always wrote the letters and invoices relating to the timber business.

In these circumstances, the only question is whether the suit is barred against defendant 2 personally, and this depends on whether defendant 1 can be assumed to have had implied authority to sign the settlement in Ex. A-4, and the letter Ex. K on behalf of defendant 2 as well as himself. The last acknowledgments were made by defendant 1 when he was managing the joint timber business, which was being carried on with joint family funds by defendants 1 and 2 as co-contractors or partners and while defendant 2 was looking after another business According to the decisions of this Court in *Valasubramania Pillai* v. *Ramanathan Chettiar* (1) and in *Sheik Mohideen Sahib* v. *Official Assignee* (2), these facts are not sufficient to raise a presumption that defendant 1 had authority to make an acknowledgment on behalf of defendant 2. In the latter case it was expressly decided that the fact of a partner being left in management of the business did not give rise to a presumption that he was authorised to sign acknowledgments. I have pointed out in *K. R. V. Firm* v. *Sathayavada Sitharama Swami* (3) that a different view has been taken by other Courts in India in the cases cited, to which may be added *Lalta Parshad* v. *Babu Parshad* (4) and also apparently in England, where the statutory provisions are substantially the same as in India. The point is fully discussed in *K. R. V. Firm* v. *Sathayavada Sitharama Swami* (3) and, as it is one of great importance to the commercial community, we have decided to refer to a Full Bench the question whether, in the absence of direct evidence that a co-contractor or partner has authorized his co-contractor or partner to make acknowledgments or payments saving limitation on his behalf, such authority can be inferred from other circumstances such as the position of the other co-contractors or partners in the business?

Kumaraswami Sastri, J.—I agree to the reference proposed by my Lord, as I am of opinion that the decisions in *Valasubramania Pillai* v. *Ramanathan Chettiar* (1) and in *Sheik Mohideen Sahib* v. *Official Assignee* (2) require re-consideration in the light of the decision in *K. R. V. Firm* v. *Sathayavada Sitharama Swami* (3), which, if, I may say so with respect, gives cogent reasons for placing on S. 21, Lim. Act a more liberal construction in conformity, with the decisions of the other High Courts. There is no essential difference between the position of partners in England and India and if under S. 251, Contract Act the act of one partner which is necessary for or is usually done in the course of the business binds the other partners, there is no reason why acknowledgments of liability or payments made by one partner should not bind the others. I have rarely come across any instance where partners, while providing for authority to borrow on behalf of the firm, make any express provision for acknowledgments or payments with reference to limitation. Very often the partnership agreement restricts the powers of certain of the partners to borrow, but when there is no restriction, business is conducted on the footing that one who has the power to borrow has also power to settle accounts, make payments and in general to do all things necessary to ensure the credit of the firm. It is well known that Marvadis and Nattukottai Chettys who open account with persons insist on periodical settlements and would make no further advances unless accounts are settled when required.

The object of the settlement is to prevent disputes as to its correctness and pleas of limitation from being raised. It is difficult to see why partners who allow business to be conducted on lines which are well known to everybody should not be presumed to have given authority, in the absence of evidence that the authority to borrow was limited and excluded the doing of things which are ordinarily done where accounts are opened with money-lenders. I do not think that the wording of S. 21, concludes the matter or

(1) [1909] 32 Mad. 421=2 I. C. 309.
(2) [1911] 35 Mad. 142=11 I. C. 332.
(3) A. I. R. 1914 Mad. 609=37 Mad. 146=21 I. C. 634.
(4) [1909] 32 All. 51=4 I. C. 708.

makes any difference in the general law applicable to partners. The use of the words "by reason only of" in the Acts of 1877 and 1908, instead of the words 'by reason of,' suggests that the legislature did not intend to affect the powers of one partner to bind another by acts falling under S. 251, Contract Act. If it is shown that one partner has been borrowing money, making payments and settling accounts without objection by the other partners, it may well be presumed that he was authorized to do so. There is no reason who we should go further and require an express authority treating the implied authority as useless for the purpose of S. 21.

Section 21 is similar in language to S. 14, Mercantile Law Amendment Act of 1856, which has received judicial interpretation in England so far as partners are concerned. The following passage from Lightwood (time limit to action) correctly summarises the law in England on the subject.

"Though the doctrine of implied agency as between co-debtors is abolished, one may still be the actual agent of the other so as to bind him by payment. In the absence of evidence to the contrary, one partner is presumed to be the agent of the other to make payments in respect of partnership debts *Goodwin* v. *Parton* (5) and though the agency is in general terminated by a dissolution of partnership *Watson* v. *Woodman* (6) it may under special circumstances be treated as continuing where for instance the retirement of a partner is kept secret and payments of interest are made in the name of the firm, *In re Tucker* (7)."

I agree with the judgment in *K. R. V. Firm* v. *Sathayavada Sitharama Swami* (3), which deals fully with the English and Indian Statutes and decisions and which is entirely in accordance with my experience of the consciousness of the mercantile community and the course of business usually followed. The same view has subsequently been taken in *Lalla Prashad* v. *Babu Parshad* (4) and in *Abdulalli Badrudin* v. *Ranchodlal Trikamlal* (8) and in *Karmali Abdulla Allarkhia* v. *Bora Karimji* (9).

Opinion.—In this case the two defendants carried on the business of timber merchants as a family business, they being father and son in an undivided Hindu family. They are sued on a debt which would be statute-barred in the absence of an acknowledgment, sufficient, within S. 19, Lim. Act, to take it out of the Statute. There is such an acknowledgment, but it is only signed by defendant 1, the father, and the question is whether it can operate as against the son, the co-defendant, also.

The learned Judges who referred the case have propounded a question about the answer to which we feel no hesitation, but it is obviously referred to us because they felt a doubt as to whether the decisions in *Valasubramania Pillai* v. *Ramanathan Chettiar* (1) and *Sheik Mohideen Sahib* v. *Official Assignee* (2) did not preclude them from arriving at the conclusion which they clearly thought to be the right one. The exact question propounded is:

"whether in the absence of direct evidence that a co-contractor or partner has authorized his co-contractor or partner to make acknowledgments or payments saving limitation on his behalf, such authority can be inferred from other circumstances such as the position of the other co-contractors or partners in the business."

Our answer is in the affirmative. We think that direct evidence of a specific authority to give acknowledgments is quite unnecessary, and that authority may be inferred from circumstances, though it is, of course, quite beyond our province to indicate what circumstances should, in our opinion, be deemed sufficient to warrant the inference. It is important to notice the exact wording of S. 21 (2), Lim. Act. The section does not say that a person shall not be liable on acknowledgment signed by the partner by reason only of his being a partner but by reason only of a written acknowledgment signed by his partner; and it amounts to saying that if you have no more than a written acknowledgment signed by defendant 1 the fact that the other defendant is his partner cannot affect the latter's liability. You could obviously have a case where one partner signed an acknowledgment in respect of a gambling debt of his own; but for the sub-section proof of the acknowledgment would be sufficient to fix the other partner with liability, a conclusion manifestly repugnant both to sense and justice. We see nothing in the sub-section to make it necessary to suppose that it is intended to apply to transactions conducted in the ordinary Courts of partnership business.

(5) [1879] 41 L. T. 91.
(6) [1875] 20 Eq. 721=45 L. J. Ch. 57.
(7) [1894] 3 Ch. 429=63 L. J. Ch. 737.
(8) [1917] 38 I. C. 873.
(9) A. I. R. 1914 P. C. 132=39 Bom. 261=26 I. C. 915=42 I. A. 48 (P. C.).

We need only refer to the general principle of law embodied in S. 251, Contract Act that partners are the agents of one another and that their acts done in the ordinary course of the partnership business bind the partnership.

As regards the two decicions referred to, it is not quite easy to say whether they should properly be regarded as laying down as a condition of liability that there should be direct evidence of express authority to give acknowledgments. But at least one sentence in *Sheik Mohideen Sahib* v. *Official Assignee* (2) lends colour to that view. White, C. J., referring to the former decision in *Valasubramania Pillai* v. *Ramanathan Chettiar* (1), says:

"Following the principle we here i. e., *Valasubramania Pillai* v. *Ramanathan Chettiar* (1) lay down, we have to see in this case if there is evidence that the person who made the acknowledgment had authority to do so on behalf of his firm."

Those words are capable of the construction that what is meant is direct evidence of specific authority, and they were obviously so regarded by the learned Judges who referred this question to us. If that be so, we have no hesitation in saying that they were wrongly decided and should no longer be regarded as law. Such a view is completely at variance with that taken by the other Courts of India and by the English Courts in their construction of the corresponding sections of the English Acts and would obviously put a premium on commercial dishonesty.

S.N./R.K. *Answered in the affirmative.*

A. I. R. 1919 Madras 1143

OLDFIELD AND SADASIVA AIYAR, JJ.

Katha Pillai and *others*—Defendants—Petitioners.

v.

Kanakasundaram Pillai and *others*—Plaintiffs and Defendants—Opposite Parties.

Civil Revn. Petn. No. 481 of 1917, Decided on 28th January 1918, against order of Sub-Judge, Negapatam, in Interlocutory Petn. No. 1038 of 1916, in O. S. No. 109 of 1916.

(a) Civil P. C. (5 of 1908), O. 1, R. 8—Leave to represent community some opposing—Order need not be restricted to represent persons not opposing.

Leave to file a representative suit under O. 1, R. 8, may be granted as on behalf of a community or body of persons even though some persons object to it. The order need not be restricted to the grant of leave on behalf of the persons not opposing. [P 1144 C 1, 2]

(b) Civil P. C. (5 of 1908), O. 1, R. 8—Damages cannot be claimed by representatives, but leave to include individual damages can be given to representatives.

Though leave cannot be granted to file a representative suit for damages the prayer may be allowed in combination with other relief sought. The plaintiff may be allowed to claim damages not in their representative capacity, but on account of the acts by which they were individually aggrieved. [P 1144 C 1]

(c) Civil P. C. (5 of 1908), S 92 and O. 1, R. 8—Scheme of management can be claimed in representative capacity—Suit how framed illustrated.

A scheme of management of trust property may be prayed for in a respresentative suit subject to objections when the scheme is actually framed.

Leave was granted under O. 1, R. 8, Civil P. C. to the plaintiff a leading Mirasidar to file a suit on behalf of 200 co-Mirasidars as trustees of a forest land for a declaration that the property belonged in common to them on trust for an injunction restraining the defendants from trespassing on it for damages and if necessary for a scheme of management. [P 1144 C 2]

T. N. Krishnaswami Aiyar—for Appellants.

T. R. Venkatrama Sastri—for Opposite Parties argued contra.

Judgment.—The order before us is one granting leave to plaintiff to sue as representing those of his fellow Mirasidars who have not opposed his application, and it was passed under O. 1, R. 8, Civil P. C. The proposed suit is brought by plaintiff as a leading Mirasidar and as trustee in management of certain forest land on behalf of the other Mirasidars alleging that defendants, some of the Mirasidars, have trespassed on it and removed a quantity of forest produce. The reliefs claimed are declarations, an injunction, damages measured by the value of the produce removed and if necessary a scheme for future management. The main objections to the lower Court's order are that O. 1, R. 8, deals only with representative suits, and that (1) as the plaint refers to the forest as the common property of the Mirasidars, their interest in it should be protected by a suit framed in accordance with O. 1, R. 1, with all the individuals concerned as parties, not by a representative suit under O. 1, R. 8 and (2) that a representative suit cannot be brought for damages. Both these contentions have been supported by reference to *Market* v. *Knight Steamships Co.* (1) in

(1) [1910] 2 K. B. 1021.

which one of several shippers sued, as representing all, for compensation for the losses, which each of the shippers had incurred by the loss of the ship. But the main relief claimed in the present case resembles rather that in question in *Duke of Bedford* v. *Ellis* (2), a declaration regarding the rights of the six plaintiffs and other interested persons, whom they were allowed to represent under the English O. 16, R. 9 corresponding with O. 1, R. 8, in the Indian Code, and following the latter case we hold that as regards the reliefs claimed other than damages, the suit is properly constituted.

As regards damages there is no doubt the dictum of Moulton, L. J., in *Market* v. *Knight Steamships Co.* (1) that a representative suit cannot be brought for damages. But it is clear that the objection is only to the representative suit, as such, being for that relief. In fact in *Duke of Bedford* v. *Ellis* (2) the plaintiffs were allowed to claim damages, not in their representative capacity, but on account of the acts by which they were individually aggrieved, the Court sanctioning the combination in one plaint of the claim by them as representatives under O. 16, R. 9, and of their individual claims raising common questions of fact and law under O. 16, R. 1, corresponding with the Indian O. 1, R. 1. Similarly in the present case two claims are made in the plaint. But the combination is no more open to objection than that which the House of Lords permitted, since it is of the claim already referred to as made by plaintiff under O. 1, R. 8 and of that which he makes alone as trustee or manager of the forest for damages for the loss of its produce and in respect of which there is no question of combination at all. These objections to the lower Court's order therefore fail. It is said next that the lower Court's discretion was wrongly exercised. But only 19 persons actually objected to its order and they merely referred generally to some others not specified as showing their objection. The total number of Mirasidars is, we are told, about 200. The lower Court's discretion was, therefore, exercised properly. Then it is argued that under O. 1, R. 8, plaintiff must sue as representative of all the persons interested, and that he should not have been allowed to sue if any of them, even only one repudiated his representation.

This does not, in our opinion, follow from the wording of the Order and it takes no account of the provision in it, enabling any person desiring to be a party to be made one. But in this connexion, we observed that the lower Court ought not to have limited plaintiff's representation to those who did not oppose the grant of leave to him before it. It should have permitted him to sue as representing all, who have not been made or do not apply to be made parties to the suit. Lastly it is said that the prayer for a scheme of management involves or will probably result in a partition of the property among the Mirasidars, and that permission for a representative suit with that object should not have been given. It is not clear that the suit has that object, in fact the scheme asked for is merely one for the management of the property. But in any case it will be for defendants to object to the scheme, when one is proposed, on the ground that it is not of a kind which can be sanctioned in the suit as brought. It is not for them to object to the frame of the suit, because an inadmissible scheme may be proposed at a later stage. The lower Court's order is modified to the extent stated above, but is confirmed in other respects. Petitioners will pay respondent 1's costs in this Court.

S.N./R.K. *Order modified.*

(2) [1901] A. C. 1.

A. I. R. 1919 Madras 1144

SADASIVA AIYAR AND NAPIER, JJ.

Lakshmanan Chetty and *others*—Petitioners—Appellants.

v.

P. P. V. Palaniappa Chetty and *others*—Opposite Parties.

Civil Misc. Petn. No. 248 of 1918, Decided on 18th March 1918, against judgment of Temporary Sub-Judge, Ramnad at Madura, in Original Suit No. 75 of 1914.

Civil P. C. (5 of 1908), O. 41, Rr. 5 and 6—Inherent power of appellate Court under R. 5 is not cut down by power conferred by R. 6 on executing Court.

An appellate Court has power, on an original petition presented to it, to direct stay of sale of immovable property in execution of the decree under appeal before it. The inherent powers of the appellate Court recognized by O. 41, R. 5, are not cut down or limited by the special and

exceptional power conferred on the executing Court by O. 41, R. 6: 17 *I. C.* 763; *Diss. from.* [P 1145 C 1]

K. V. Krishnasami Ayyar—for Petitioners.

K. Bashyam Ayyangar—for Opposite Parties.

Order.—As regards the preliminary objection that no petition under O. 41, R. 5, Civil P. C., lies in this Court in respect of a stay of sale of immovable property, Wallis, C. J., and Hannay, J., doubted in Civil Miscellaneous Petition No. 1595 of 1914 (in Appeal against Order No. 173 of 1914) the soundness of the decision in *Kanniappan Chetti* v. *Manikavasagam Chetti* (1), which was quoted in support of the objection. We are inclined to go further and dissent (with great respect) from the decision in *Kanniappan Chetti* v. *Manikavasagam Chetti* (1). The inherent powers of the appellate Court clearly recognized by O. 41, R. 5, cannot be held to have been cut down or limited by the special and exceptional power conferred on the executing Court by O. 41, R. 6, which rule seems to have been clearly intended in order that the executing Court might be compelled to exercise it in emergent cases for the benefit of the judgment-debtor: see also the pertinent observations of Mookerjee, J., in *Tribeni Sahu* v. *Bhagwat Bux* (2) and *Rama Prasad Roy* v. *Anukul Chandra* (3). We overrule the preliminary objection.

On the merits it is not the decree under appeal that is sought to be executed by the sale of immovable property but another decree against the execution of which the decree under appeal refused to grant an injunction. The present petition is not for a temporary injunction but it is for stay of execution of the decree under appeal. The decree appealed against not being under execution O. 41, R. 5, does not apply, and this petition is misconceived. It is therefore dismissed with costs. Memorandum of costs will follow.

S.N./R.K. *Appeal dismissed.*

(1) [1912] 17 I. C. 763.
(2) [1907] 34 Cal. 1037 (F. B.).
(3) A. I. R. 1915 Cal. 122=27 I. C. 444.

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* A. I. R. 1919 Madras 1145

ABDUR RAHIM AND OLDFIELD, JJ.

Bangaroo Thirumalai Souri Naicker —Defendant—Appellant.

v.

R. G. Orr and *others* —Respondents.

Appeal No. 65 of 1908, Decided on 23rd November 1917.

*** (a) Contract Act (1872), S. 70—No contribution where payment is mainly for plaintiff's benefit—Defendant need not pay even to extent of benefit derived—For contribution payment must be for other's benefit alone.**

Section 70, does not apply to cases where a person does an act for his own benefit and that act incidentally benefits his neighbour or any other person. In such cases the latter need not pay for the extent of the benefit derived by him from the act. [P 1147 C 2]

A person claiming contribution from another under S. 70, Contract Act, must prove that he did some act for the latter. An act cannot be described as done by one person for another, unless it can be shown that, but for the existence of that other's interest, it would not have been done. [P 1150 C 1, 2]

(b) Contract Act (1872), S. 70—Repairs of tank by lessee for his benefit—Other lessees incidently benefited — Defendants refused to contribute to repairs before they were undertaken—Plaintiff sued for contribution and charge for decree amount—No contribution can be claimed—No charge could be created—Art. 120 and not Art. 61 applies to such claim—Limitation Act (9 of 1908), Arts. 61 and 120.

Plaintiffs the lessees of the Sivaganga Zemindari, executed certain necessary repairs to a tank which irrigated their lands and the defendants' lands and also the lands of other persons. Before commencing the repairs they intimated to defendants their intention to do so and called upon them to bear their rateable share of the expenses. Defendants replied that they did not want the repairs and refused to pay any portion of the expenses. The plaintiffs, however completed the repairs, and filed the present suit for contribution against the defendants, relying on S 70. They prayed also that the amount that may be decreed to them may be made a charge on the defendants' properties.

Held: (1) that as the repairs were executed by the plaintiffs mainly for their own benefit though the defendants were also incidentally benefited by them, the latter were not liable for a proportionate share of the expenses under S. 70.

(2) that, even if defendants were liable, plaintiffs were not entitled to a charge on their property: 26 *Mad.* 686, *Dist.* [P 1147 C 2]

(3) that Art. 120 and not Art. 61, was applicable to the case. [P 1149 C 2]

(c) Limitation Act (1908), Arts. 61 and 120—Art. 61 applies where benefit conferred is direct, e.g., payment of revenue—Otherwise Art. 120 applies to suit for contribution.

Per *Oldfield, J.*—Art. 61, Lim. Act, can be applied to cases under S. 70, Contract Act, where the payment made by the plaintiff produced an immediate benefit to the defendant, as in cases

of payments of Government revenue or of decree amounts, but the article will not apply when the benefit will only arise at a subsequent stage and plaintiff's cause of action will not be complete until that subsequent stage is reached. To such cases Art. 120 must be applied.

[P 1151 C 2; P 1152 C 1]

(d) **Contract Act (1872), S. 70—Non-liability under S. 70 is not affected by recovery of share of expenses under—Madras Regulation (27 of 1802).**

Per *Abdur Rahim, J.*—The fact that the Collector has levied some portion of the expenses for repairs from defendants by coercive process under S. 32 of Regn. 27 of 1802 will not affect their non-liablity under S. 70. [P 1148 C 1]

C. S. Govindaraja Mudaliar, C. S. Venkatachariar and *N. R. K. Thathachariar*—for Appellant.

K. Srinivasa Aiyangar, T. R. Venkatarama Sastri and *S. R. Muthuswami Aiyar*—for Respondents.

Abdur Rahim, J.—This appeal is from a decree of the Subordinate Judge of Madura, by which he directed the defendants to pay a sum of money as compensation for the benefit enjoyed by them as a result of certain repairs executed by the plaintiffs to a tank called Marnad Tank situate in the Sivaganga Zamindari. The defendants are Inamdars of a village called Vellikurichi and admittedly, this tank is the source of irrigation for that village and also a number of Ayan and Devastanam villages. Vellikurichi is what is called a jividam Inam. It was granted prior to the Permanent Settlement to a descendant of Tirumal Naick and is held rent-free. The first ground of the claim is based on S. 70, Contract Act. Sivaganga Zamindari is now in the possession of the plaintiffs who are lessees, and their case is to the effect that the tank which is a common source of supply to the Ayan villages as well as to Vellikurichi was badly in need of repairs, the bund in more than one place had been worn out and the sluices were not in order. It was necessary for the maintenance of the tank in proper condition that considerable repairs should be executed. The finding of the Subordinate Judge is that the tank was, as a matter of fact, in need of repairs and, as a result of the repairs, it has been restored to its proper capacity and even improved. Vellikurichi has benefited by these repairs just as much as other villages, and the Subordinate Judge also finds that, were it not for the repairs, the tank would have gradually gone into ruins. The plaintiffs sent a notice to the defendants that repairs were necessary for the maintenance of the tank in proper condition and also a copy of the estimate, claiming that the defendants were liable to contribute to the cost in proportion to the land which was cultivated with water from the tank. The defendants in reply denied their liability and in fact said that they did not want any repairs to be done to the tank, so far as they were concerned. The plaintiffs however proceeded with the repairs, the cost of which has amounted to Rs. 14,000 odd.

There can be no doubt that as a result of the repairs, the tank has been improved. The plaintiffs have not only repaired the tank but they have improved the sluice and put in a regulator under lock and key for the purpose of regulating the discharge of water from the tank. The Subordinate Judge has held the defendants liable for a proportionate share of the expenses of the repairs, but that so far as the repairs to the sluice are concerned, they could not be said to be for the benefit of the defendants, and he has disallowed the cost of those repairs. The memorandum of cross-objections mainly relates to the cost of repairs to the sluice.

The question we have to consider in this case has a fairly long history, going as far back as 1820 or so. On going through the entire evidence both oral and documentary, one fact seems to be clear, namely, that the Inamdars have all along been refusing to pay anything for the repair of the tank. I shall have again to refer to that matter later on. So far as the application of S. 70, Contract Act, is concerned, it must be taken to be proved that the defendants never authorized the plaintiffs to execute the repairs at their cost and never assented to payment of the expenses. I may assume for the purpose of argument, so far as this question is concerned, that the defendants did in fact enjoy the benefit of the repairs done by the plaintiffs. But that is not enough to bring the case within S. 70. This section has been the subject of interpretation in a number of cases in this Court beginning from *Damodara Mudaliar* v. *Secy. of State* (1), and it could not be said that the rulings have been consistently uniform on every point. But the weight

(1) [1895] 18 Mad. 88.

of the decisions undoubtedly preponderates in favour of the views expressed by Munro and Sankaran Nair, JJ., in *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar* (2) and by Sankaran Nair and Spencer, JJ., in *Rajah of Pittapur* v. *Secy. of State* (3). In those cases the scope of the section hes been fully discussed. That section says:

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered."

In this case there can be no doubt that the act of the plaintiffs was lawful. The next element that has to be proved by them is that they did the act, the compensation for which they claim from the defendants, for the defendants. It has further to be proved that they did not intend to do what they have done gratuitously and this, we may take it, has been amply proved and is not disputed. The last condition that has to be satisfied is that the defendants should have enjoyed the benefit of the act. As regards this, it is laid down, in the two cases already referred to that the person who is sought to be charged must have the option of refusing or adopting the benefit. But on this point there seems to be some difference of opinion. Ayling and Tyabji, JJ., in *Saptharishi Reddiar* v. *Secy. of State* (4) appear to have doubted whether that view of the law is correct. It is not however necessary for us in this case to go into that question. I think that the plaintiffs have failed to bring their case within S. 70 by failing to prove that they did the repairs for the defendants. The irrigation of their own villages also depends as much upon the maintenance of this tank as that of Vellikurichi. The extent of land irrigated in the Ayan villages is more than three times that of the wet land of Vellikurichi. So they had undoubtedly a preponderating interest in the maintenance of the tank. The tank is situated in the plaintiffs' Zamindari and they are the owners of the soil and the tanks. There is nothing in the terms of the notice which the plaintiffs gave to the defendants or in any other evidence to show that the plaintiffs were executing the repairs for the benefit of the defendants. The fact that it is this tank which irrigates their own land and that land is much larger in extent than the wet lands in Vellikurichi village would suggest that when they executed the repairs, they did so for their own benefit. If they did not keep the tank in order, their lands would suffer and we have not been referred to any circumstance which would suggest the inference that they wanted to repair the tank not primarily for the benefit of their own lands but for the benefit of the defendants' lands. The natural inference is that as they had to repair the tank in order to cultivate their own lands, and did so for that purpose, no doubt the repairs would inevitably and incidentally also benefit the defendants' "lands." But that in itself would not show that the plaintiffs' intention in executing the repairs was to benefit the defendant.

The law is not that, when a person does any act for his own benefit, and that act incidentally benefits his neighbour or any other person, that neighbour or other person must pay for the extent of the benefit he derives from the act. That certainly is not the scope of S. 70 and we have not been referred to any authority that, apart from all question of intention of the person who seeks to charge the defendant for the benefit which he has derived from a certain act of his, the defendant would be liable, if the act happens to be beneficial to him. That, at any rate, is not the scope of S. 70, and none of the cases which have been referred to at the Bar have in any way minimised the importance of the condition that the act must be done for the benefit of the defendant. This proposition has never been doubted though in some cases the question did not really arise, for instance, where payments were made in discharge of arrears of Government revenue by a co-owner of the property or by any other person interested in making the payments. To cases of that class which have been brought to our notice, S. 69 would apply.

The history of the present case is this. The documents show that before 1820, the Sivaganga Zamindar used to receive a certain periodical payment from the inamdars in the shape of kulavettu, that is to say, annual payment in connexion with the digging of, or repairs to, the

(2) [1909] 33 Mad. 15=3 I.C. 110.
(3) A.I.R. 1915 Mad. 428=25 I.C. 783.
(4) [1915] 28 I.C. 309.

tank. This appears from Ex. 3. However by 1852, the demand made by the zamindar was not for any kulavettu but for the defendant's share of the cost of repairs, which is something quite different from kulavettu. There is nothing whatever to show that any time, the inamdars acceded to this demand. Only once in 1854, the Court of Wards, or rather, the Collector, who was in charge of the zamindari at the time, though it does not clearly appear in what circumstances, did, under S. 32, Reg. 27 of 1802, realize a certain sum of money in connexion with the repairs to the tank. That section deals only with the payment of tuccavy or of advances of money for repairs of tanks. The plaintiffs now seek, not to recover any advance of money made for repairs, but to enforce contribution towards the cost of repairs already executed without authority from the inamdars. S. 32, Reg. 27 of 1802, would have no application to the present claim of the plaintiffs. If therefore the Collector attached the property of the inamdars and under coercion of such process realized any proportion of the costs of repairs executed by the zamindar, he clearly acted beyond the powers given to him under S. 32 of the Regulation. If on the other hand, the provisions of the Regulation were properly enforced, that is to say, in order to realize the advances made by the zamindar or by the Government, then such enforcement can in no way support the present case of the plaintiffs. So I do not think that the plaintiffs now in any way rely on what the Collector realized in 1854 under coercive process. It is conceded that that was the only time when any money was actually realized, so far as the evidence goes, from the inamdars in connexion with any repairs to the tank. But the inamdars have throughout been protesting against any obligation to pay anything for repairs done against their wishes or without their consent.

Then certain accounts have been produced of the year 1880 and thereabouts. In one or two instances, a small sum of money is shown as due from the inamdars of Vellikurichi on account of repairs to this tank. But it is not proved by any evidence that anything was paid on this account by the Inamdars. The evidence, both oral and documentary, shows clearly that there had been repairs done to this tank since 1854. There is a body of evidence to this effect of witnesses, whom I do not find any reason for disbelieving, and the accounts produced by the plaintiffs themselves corroborate that evidence. One witness says that, sometime ago, repairs which cost about Rs. 2,000 were executed. If, as a matter of fact, the zamindar was conscious that he had a right to levy contribution for repairs or at any rate that he had not lost that right if he had it at any time, it is not conceivable that since 1884 to the date of the present suit, he would not have made any serious attempt to realize the share of the defendants' liability. In fact, the result of the entire evidence is that, at no time, the Inamdars either actually paid anything for the repairs or that their liability for such repairs was ever established or admitted. I have already pointed out that what the Collector did under S. 32, Regn. 27 of 1802 is of no importance in the absence of clear evidence as to the circumstances in which the money was realized, and so far as it appears, his action does not seem to have been authorized by the law.

Then the plaintiffs sought to base their case on a general custom, to the effect that every village held under a zamindar by way of Inam or similar tenure is liable to contribute to the cost of repairs done to their sources of irrigation, whether tanks or channels. The evidence that we have on record falls far short of establishing any such general custom. We have been referred especially to the accounts maintained by the zamindar and produced by the plaintiffs, Exs. F, G, H and M series. They do not extend lower down than 1886, and it is not possible to extract from these accounts sufficient particulars upon which one could find with any amount of certainty that a custom such as that alleged prevailed in the zamindari. We ought to know much more about the circumstances in which the payments were made by the different Inamdars or holders of Devastanam and other villages. It is not even clear that such payments as were made were not made voluntarily or under contract. It is not shown at what rate the contributions were made, or on what basis. We do not know anything about the conditions of the tenures of the villages from the proprietors of which these contributions towards the cost of repairs, either

to channels or to tanks, were received. Unless these points are cleared up, it could not be said that any custom has been established. Then it is remarkable that, so far as Velikurichi is concerned, there is only a single instance which has been already alluded to in which a small payment is shown as due from the Inamdars. I cannot, upon the evidence in the case, hold, whatever else the accounts of the zamindar might show in this connexion, that the Inamdars either agreed to make any such payment or did in fact make it. Whatever might be the case with the other villages shown in the accounts, they certainly do not make out a case against Vellikurichi. Even if it be taken to be sufficiently established that a general custom exists in the zamindari such as is contended for by the plaintiffs, the evidence and the circumstances above alluded to indicate that, so far as Vellikurichi is concerned, the custom has lost its force for a very long time if it ever applied to it. In this connexion, I may refer to what happened in the lower Court with respect to the evidence adduced by the plaintiffs to prove a general custom. It is stated in para. 38 of the judgment, from which it would appear that the Subordinate Judge at one stage of the trial formed an opinion that a general custom had been proved by evidence adduced by the plaintiffs, and he intimated to the plaintiffs that it was unnecessary for them to encumber the record with further documents in support of the alleged custom.

Such an observation on the part of the Subordinate Judge was unjustified, as it might have had the effect of deterring the plaintiffs from adducing all the evidence they had on the point. But whether they were in fact so deterred and whether any further evidence which they were in a position to adduce would have improved their case, is not at all made clear. No application has yet been made to us to admit into evidence any documents wrongfully rejected by the Subordinate Judge; nor is the learned vakil for the respondents able to state what the materiality is of the evidence which the respondents might have produced. None of the documents are here. And the only inference I can draw from what has happened is that it did not strike the respondents or their pleaders that any further evidence which they could have produced would have improved their position so far as the question of custom was concerned. I hold that the plaintiffs have failed to make out their right.

The question relating to limitation discussed at the Bar does not arise, but I may state that it is difficult to see how Art. 61, Lim. Act, has any application to the facts of the case. Under S. 70, Contract Act, the plaintiffs would have no cause of action merely because of their having incurred expenses in executing the repairs. It has to be further made out that the benefit of those repairs was enjoyed by the defendants. Both the elements must be present in order to constitute a cause of action, that is, the incurring of cost by the plaintiffs and the enjoyment of the benefit by the defendants. Art. 61 applies to cases of money payable to the plaintiff for money paid for the defendant and time runs from the date when the money is paid. But here it cannot be said that the payment made by the plaintiffs to the contractors was money paid for the defendants. Under S. 70, if the case of the plaintiffs fell within it, what they would be entitled to is compensation for the benefit enjoyed from the act done by the plaintiffs for the defendants. If, for instance, defendants never derived any benefit from the plaintiffs' act, the mere payment of money by the plaintiffs, to contractors who executed the repairs would not entitle them to any compensation under S. 70. The only article that would be applicable to a case like this, if the plaintiffs were able to establish their right, would be Art. 120, which is the residuary article dealing with suits for which no period of limitation is provided elsewhere in Sch. 1, and the right to sue would accrue from the date of the doing of the repairs and the enjoyment of the benefit thereof by the defendants. On that view of the matter the suit would be in time.

I may also mention that the Subordinate Judge has held that the plaintiffs are entitled to a charge on the village for the share of costs payable by the defendants. None of the cases cited at the Bar support that proposition. One case in which there are some expressions to be found which might favour the Subordinate Judge's views, viz., *Rajah of Vizianagram* v. *Rajah Setrucherla Sama-*

sekhararaz (5), has no analogy to this case. There the payment was by one co-owner for arrears of revenue due to the Government, and the charge on the property which was saved by such payment might be supported on the basis that th person making the payment should be allowed in equity to stand in the shoes of the Government, who under the Act have a lien for arrears of revenue on the lands concerned. It is difficult to see how such a charge could be sustained under S. 70, Contract Act. Then the Subordinate Judge seems to think that the doctrine of salvage lien has some application to this case. It is rightly conceded however by the learned vakil for the respondents that he could not uphold that view of the law. I therefore allow the appeal and reverse the judgment of the Subordinate Judge. The suit will be dismissed with costs hereand in the Court below. The memorandum of cross-objections also fails and is dismissed with costs.

Oldfield, J.—The plaintiffs have sustained their claim with reference either to S. 70, Contract Act or custom ; and in either case, the burden of proving all the necessary facts is entirely upon them. As regards S. 70, it is only necessary to deal with one of the requisites for its application. It requires that the plaintiff shall have done something for the defendant. In this case, the plaintiffs allege that they have made the repairs for the defendants. But it is difficult to say exactly in what sense they have done so, or that they have shown that they have done so in any sense other than the very general one, that the defendants have derived or may derive some advantage from the repairs. That does not seem to be sufficient, and it is not the current of decisions that it is so. I refer to *Rajah of Pittapur* v. *Secy. of State* (3) as an instance of a case very similar to the present; and it is clear there that the learned Judges did not think that the work connected with an irrigation source was done for the defendant on the grounds either that the defendant derived some benefit from it or that he was asked to contribute to it. It is not desirable to attempt to formulate any general test as to whether a thing is done by one person for another; but it is I think sufficient to say that what is done cannot be described as done by one person for another, unless it can be shown that but for the existence of that other's interest it would not have been done. Here we have evidence of demand, and it may be assumed for the present that there is evidence of benefit conferred. But there is nothing further, since the evidence of demand does not in any way show that the intention was to do the work only if the defendants wanted it done.

There was a suggestion in the course of the arguments that the plaintiffs' attitude was indicated directly by the fact that they had actually supplied other villages besides those which have hitherto taken water from the tank, with irrigation from the increased supply, which the tank is alleged to have received in consequence of these repairs. Only two cases were however referred to in two years, and the evidence is conflicting regarding them. Under that head therefore it does not seem to me that anything is proved. Then as regards the Ayacut, we have the fact that one portion of it is in a Devastanam village; but it is insignificant and may be neglected. Roughly the defendants own a little over a quarter. But that fact in the absence of anything else adduced, does not seem to be sufficient to enable us to assume that the defendants' interest in the Ayacut was the factor which determined the plaintiffs' favour of making these repairs. When the plaintiffs owned such a preponderating interest, as they did in the property, the burden is on them to show that they did not make the repairs for themselves and that they did make them for the defendants, and it does not seem to me that they have discharged that burden. In these circumstances their case based upon S. 70, of the Contract Act fails.

Then as regards custom, I entirely agree with my learned brother's conclusion, and only wish to say a few words regarding the particular custom allegd with reference to the liability of the defendants' village. Really, there is very little evidence regarding that liability except that which is afforded by Ex-S, an order from the Collector in 1852 to the Manager of the Estate, in which the tank is situated, and which is apparently in the possession of the present plaintiffs. The Collector's position in this matter is not clear. It is suggested on the one side that he was acting as the Agent of the

(5) [1915] 26 Mad. 686.

Court of Wards and that he really was simply a managing superior and was in the position of zamindar. On the other hand it is suggested for the plaintiffs, though nothing has been adduced to prove it that he attached the estate for the recovery of revenue due on behalf of Government. In Ex. S, we simply have a reference by the Collector to the fact that kulavuttu, a periodical charge for tank repairs payable by the inamdar or tenant to the proprietor, had been hitherto levied on this village. But the only evidence the Collector refers to in support of his statement is the information he had received from a gumasta, whom he names, that in the accounts of one year 1816, about 40 years before he was writing, this kulavettu had been entered. That is all there is by way of an affirmative statement regarding kulavettu. The Collector asked the Manager to try and find further evidence and to look to other accounts in order to find it. It is clear that we have here only a very insufficient foundation for a conclusion that any custom ever existed. If any custom did exist, this indicates the existence of only a custom to make a periodical charge and not of a custom which would enable the proprietor or the plaintiffs acting as his representatives to make a definite demand on a particular property for an amount proportionate to the defendants' interest in the tank towards making all these repairs. After Ex. S, we have not got a reply to it and we do not know whether anything was found by the Manager by searching the accounts. So far, therefore the custom alleged is only as to kulavettu and it rests entirely upon what the Collector heard from a gumasta about an account written 40 years before which so far as it appears no one else ever saw.

The next letter Ex. S.-1 does not mention any further information than that the Collector, for reasons which are not very clear considered himself justified in directing the manager to recover a lump sum which was being claimed on account of repairs and he directed him to recover it under S. 32, Regulation 27 of 1802. That section, as my learned brother has pointed out, is on the information before us inapplicable to the recovery of any such sum and the Collector's action must be taken as entirely unauthorized by law. It is in evidence that money was recovered in this illegal way which obviously had nothing to do with the assertion of the custom, and cannot be considered as equivalent to to one. After that there is nothing more for about 30 years. We then have got one or two entries to the effect that insignificant sums are due on account of the repairs. But whether they were ever collected or not there is no evidence to show. On the other hand it must be borne in mind that the plaintiffs though they are lessees of the estate do not suggest that they are under any disability in the way of producing the accounts or that ordinary accounts of the estate have been withheld from them.

There is evidence that in comparatively recent times the tank has been repaired at very considerable expense and we have had no excuse offered for the plaintiffs' failure to produce distinct evidence as to the making of these repairs and as to the recovery of contribution if any was recovered from the defendants. It seems to me in these circumstances that the plaintiffs have adduced practically nothing in favour of any custom as binding on the defendants' village. I do not wish to add anything to what my learned brother has said regarding the more general custom alleged except that the plaintiffs who will have all the estate records in their possession should have been able if their case was correct to produce very much clearer evidence either regarding the period to which the accounts they have produced relate or regarding the later period and it seems to me that their explanation as to what happened in the lower Court for not doing so cannot be accepted when as is the case they have not made any definite request here for an opportunity to repair their failure to adduce evidence at the trial.

Regarding limitation I think that Art. 61 is clearly inapplicable. So far as the claim is made with reference to S. 70, Contract Act, it is an essential part of the cause of action under that section that the defendants shall have received a benefit from what the plaintiffs have done and apart from the fact to which my learned brother has referred that Art. 61 refers only to money paid for the defendants and we have no such payment alleged here there is a further objection to the application of that article that there was at the time

of payment no question of any immediate benefit being conferred on the defendants by it for it is not suggested that the benefit derivable by the defendants from the repairs to the tank could have arisen when the money was paid. No doubt, there are cases in which Art. 61 may be applied to claims under S. 70. Such application will be legitimate in cases of the common type concerned with payments of revenue or decree amounts on the part of the defendants. The benefit to the defendants is then immediate but it is quite otherwise when as here the benefit will only arise at a subsequent stage and the plaintiffs' cause of action will not be complete until that subsequent stage is reached. In these circumstances no other article having been suggested we must apply Art. 120. With these observations, I concur in the decretal portion of my learned brother's judgment.

S N /R.K. *Appeal allowed.*

A. I R. 1919 Madras 1152

SADASIVA AIYAR AND PHILLIPS, JJ.

Emani Lakshminarasu Avadhanulu and *others* - Plaintiffs—Appellants.

v.

Secy. of State —Defendant—Respondent.

Second Appeal No. 1496 of 1915, Decided on 19th September 1917, against decree of Dist. Judge, Guntur, in Appeal Suit No. 346 of 1910.

Easements Act (1882), S. 7 (b)—Lands half mile distant from natural stream are not riparian lands—Non-riparian owner is liable to water cess for irrigating lands with water from stream in absence of grounds exempting him from liability—Madras Irrigation Cess Act (1865).

Per *Curiam*.—Lands which are not on the bank of a natural stream, e. g., which are half a mile distant from it, are not riparian lands. [P 1154 C 2]

A person who is not a riparian owner is liable to pay water cess to Government for irrigating his lands with water from a stream or river, unless he establishes grounds exempting him from such liability. [P 1154 C 2]

Per *Sadasiva Aiyar, J.*—Having regard to the customs and necessities of a tropical agricultural country like India, Indian Courts should be liberal in recognizing irrigational rights as natural rights of as strong a character as any other, provided the lower riparian owners are not injured and the equality and the wide participation of the benefits of the natural stream are not interfered with to an unreasonable extent. [P 1153 C 1]

In India riparian land must be confined to land which is on the bank of a stream and which extends from that bank to a reasonable depth inland. A depth of more than half a furlong would usually be unreasonable. [P 1154 C 2]

The right of a riparian owner is not restricted to lifting water from a natural stream and carrying it at once to the land, but extends to temporary storage of the water in wells before carrying it on to the irrigated lands. [P 1152 C 2]

Government have no right to levy assessment under the Cess Act on a person exercising riparian rights, whether the bed of the stream whose water is used by an inamdar or a zamindar to irrigate his riparian lands bordering on a natural stream belongs wholly to Government or partly to Government and partly to the inamdar or zamindar or wholly to the inamdar or zamindar. [P 1152 C 1, 2]

Per *Phillips, J*,—Where lands were, at the time of the Inam Settlement, irrigated by a tank and wells unconnected with a river, which was half a mile distant from the lands, and these sources of irrigation were taken into account for purposes of enfranchisement and there was no agreement between the owner of the land and the Inam Commissioner for freedom from water tax, the owner cannot claim the use of the river water by virtue of an implied agreement with Government and is liable for water cess for its use : 41 *I. C.* 98 (*P. C.*), *Cons.* [P 1155 C 1]

Pandalai—for Appellants.

V. Ramesam—for Respondent.

Sadasiva Aiyar, J.—The appellants have no doubt, argued fresh questions which were not expressly raised in the pleadings and which were probably thought of only after the decision in *Kanudukuri Balasurya Prasadha Row* v. *Secy. of State* (1), but having regard to the very difficult and novel questions raised in these water cess cases owing to the obscurity of the Water Cess Act, I think it better to consider and decide these questions also. On the findings of fact by the lower appellate Court, the only arguable questions in this case are : (1) whether the plaintiffs are riparian owners and whether the plaint lands are riparian lands ; (2) whether baling out water from the natural stream Musi and leading it into and storing it in wells and thence irrigating the plaint lands falls within the natural rights of a riparian owner in India ; and (3) whether the water of the Musi stream, if taken by the riparian owner of inam lands, is water belonging to Government within the meaning of the Cess Act for which a separate cess can be legally levied by Government. Assuming for argument's sake that the first question is to be decided in the appellants' favour (that is that the appellants are riparian owners

(1) A. I. R. 1917 P. C. 42 = 41 I. C. 98 = 44 I. A. 166=40 Mad. 896 (P. C.).

and that the lands in dispute are riparian lands, I should be inclined to answer the second and third questions in the appellants' favour. S. 7, Cl. (b), Easements Act and Illus. (j) thereto recognize the right of a riparian owner to enjoy without disturbance " the natural advantages arising from the situation of " his riparian land, including his right to use and consume the water of the stream for drinking, household purposes and watering his cattle and sheep and " for irrigating " such land, provided it does not thereby cause material injury to other like owners. It has no, doubt, been said that

" irrigation necessarily consumes a large part of the water taken from a stream for that purpose, while milling permits practically all the water to remain in the stream "

and that therefore " the right of irrigation is less strong " than the right of milling. Having however regard to the customs and necessities of a tropical agricultural country like India, Indian Courts should, it seems to me, be liberal in recognizing irrigational rights as natural rights of as strong a character as any other, provided, of course, the lower riparian owners are not injured to an unreasonable extent and " the equality and the wide partcipation of the benefits " of the natural stream are not interfered with to an unreasonable extent (see Vol. 2, Farnham, paras. 465 and 466). (No such question of unreasonableness in the user has been raised in this case). As I said in *Secy. of State* v. *Kannepalli Janakiramayya* (2),

"It is not wise to confuse ourselves by juggling with the word " property " or the word "owner" when used with reference to flowing waters. Having carefully considered the decision of their Lordships of the Privy Council in *Kandukuri Balasurya Prosadha Row* v. *Secy. of State* (1), I have seen no reason to depart from the opinions which I gave expression to in *Janakiramayya's* case (2), on the extent and limits of the rights of the Government to levy assessment under Act 2 of 1905. I am further of opinion that the reasoning on which I founded those opinions applies whether the bed of the stream whose water is used by an inamdar or a zamindar to irrigate his riparian lands bordering on a natural stream belongs wholly to Government or partly to Government and partly to the inamdar or zamindar or wholly to the inamdar or zamindar. In any of the three alternatives, the Government has in my opinion, no right to levy separate water cess for the use of such water. It is significant that the appeal in *Ambalavana Pandara Sannadhi's* case (3) to the Privy Council* from the judgment in *Secy. of State* v. *Ambalavana Pandarasannadhi* (4) was decided in the appellant's favour as governed by the Urlam judgment *Kandukuri Balasurya Prasadha Row* v. *Secy. of State* (1), though in that case the lands on only one of the banks of the natural stream belonged to the mittadar. See foot note at p. 536 (1917) *M. W. N.* Mr. Ramesam for the Government argued that while irrigation by lifting water from a natural stream and carrying the lifted water at once to the land direct may be recognized as the natural right of a riparian owner in India, the right to store such lifted water in wells temporarily before carrying it on to the irrigated lands should not be recognized as a natural right. I am unable, having regard to the conditions of the country, to recognize such prudent and temporary storage in wells as either an unreasonable or non-natural exercise of the natural right of the riparian owner. The first question however remains namely whether the plaintiffs are riparian owners and whether the plaint lands are riparian lands that is entitled to the natural rights of irrigation from the bordering natural stream. As pointed out by my learned brother in his judgment, the Musi river was, in 1903 and 1904, nearly half a mile away from Survey No. 35 in which the plaint lands are situated. The plaintiffs tried to show by producing a

(2) [1915] 30 I. C. 609.

* The judgment of the Privy Council in *Ambalavana Pandara Sannidhi* v. *Secy. of State* (3) reported as *I. L. R.* 40 *Mad.* 909, is as follows :

Lord Parker of Waddington (20*th June* 1917).—The Secretary of State for India in Council admits that the rights of the parties in this appeal are governed by the recent decision in the consolidated appeals of *Kandukuri Balasurya Prasadha Row* v. *Secy. of State* (1). The appellant on this admission asks for no further relief. Both parties leave the question of costs to the discretion of the Board. The declaration and injunction claimed by the appellant are, in their Lordships' opinion two wide, and under the circumstances they think that justice will be met by humbly advising His Majesty that no order should be made on this appeal, except that the parties should each bear his own costs.

(3) A. I. R. 1917 P. C. 194=40 Mad. 909 = 43 I. C. 114n (P. C.).
(4) [1911] 34 Mad. 366=8 I. C. 357.

sketch plan that the plaint lands are almost on the northern bank of the present bed of the stream, but the lower appellate Court says that "this sketch has not been proved" and that "it cannot therefore be acted upon." As regards what is riparian land, the opinions of Judges and text writers have not been uniform. Franham says in para. 463a:— "The first and the most important test" is the natural configuration of the country through which the stream flows, so that all land within the watershed which lies in such a manner that the drainage from it finds its way into the stream might be regarded as riparian land.

But a rule which would recognize such a vast extent of territory as riparian land would be almost as destructive of the rights of the riparian owner as a rule which would permit any one who could gain access to the water to make use of it. Such a rule not only would permit the consumption of the water near its source of supply, but it would result in conflicts between landowners as to rights of way and the construction of the necessary apparatus to make the water available. Another criterion for determining what is riparian land might be the land which is in possession of one person whose holdings actually extent so as to come in contact with the water. This test, in some cases, might be too broad, because part of the land might be out of the natural watershed of the stream and therefore be outside of the boundaries established by nature for riparian ownership. The criterion which most nearly meets the necessities of the case is the rule that all land must be regarded as riparian

"(a) when it is with the natural watershed of the stream," (b) "the title to which is in one owner," and (c) "the boundaries of which have been established in accordance with the requirements of the conditions which will best serve the interests of individual landowers. Under ordinary circumstances, the individual acquires title to such an amount of land only as he can reasonably care for and cultivate by his own efforts with such paid assistants as his business ability make it profitable for him to employ."

I think that, in India, riparian land must be confined to land which is on the bank of the stream and which extends from that bank to a reasonable depth in land. I do not wish to express a final opinion in this case as to what would be the lineal measurement of such a reasonable depth, but I am clear that a depth of more than half a furlong would, usually, be unreasonable. In this case, there is no evidence that the plaint lands are situated on the banks of the stream or connected in one block with lands situated on the bank and owned by the same owner or situated within even a furlong's depth from the northern bank of the stream. Mr. Pandalai argued that the case should be sent back for giving an opportunity to the plaintiffs to prove that the lands are reparian lands satisfying the tests above indicated by me. But this suit is now more than nine years old and this Court allowed to the plaintiffs ample opportunity by its order of July 1913 to raise all their contentions and adduce all their proofs. I do not think that the plaintiffs are now entitled to any further indulgence so far as the establishment of the facts necessary to support their claim as riparian owners is concerned, though I have allowed them even at the last stage to raise these fresh contentions and put forword new arguments in support of the said contentions, provided they could sustain arguments on them on the materials already on the record.

On the ground then that the plaintiffs have failed to establish that the plaint lands are riparian lands and consequently have failed to establish that they are entitled to use the water of the Musi stream for the irrigation of the plaint lands without liability to pay assessment to the Government, I agree that this second appeal should be dismissed with costs.

Phillips, J.—This case has already been before this Court on three occasions and finally on 17th February 1914 the case was remanded for fresh trial on six issues framed in this Court, the original issue 2 and any other issues that might be framed. The sole question now at issue is whether Government (defendant 1) has any right to levy water-tax on the plaint garden lands 8·58 acres in extent on account of water taken from the Musi river. The plaintiffs have not been able to locate the plaint lands definitely but say that they form portion of the 69 acres 28 cents confirmed to plaintiffs at the time of the Inam Settlement. The District Judge has however found that the plaint lands are not portion of the 69 acres of garden

land, and has further observed that that finding is not important, as even if they formed part of the 69 acres, the further findings as to the source of irrigation refer to the 69 acres as well as to plaint lands. The findings are that the plaint lands form part of re-survey No. 30, that the only facilities for irrigating the lands at date of settlement were a tank and wells unconnected with the Musi river, that these sources were taken into account for purposes of enfranchisement, and that there was no agreement between plaintiffs and the Inam Commissioner for freedom from water-tax. Inasmuch as these lands were not irrigated by the Musi river at the time of the Inam Settlement, and no provision was then made for their being so watered, it is obvious that plaintiffs cannot claim the use of that river water by virtue of an implied agreement, and consequently their suit has been dismissed. This second appeal was filed on 12th July 1915, and it was not until 5th May 1917 that an additional ground of appeal was filed, upon which the case has mainly been argued. The case now put forward is that the plaint lands being situated on the banks of the Musi river, plaintiffs as riparian owners are entitled to use the river water for irrigation as of right, apart from any agreement with Government. This is an entirely new case apparently put forward on the strength of the recent judgment of the Privy Council in the *Urlam* case [*Kandukuri Balasurya Prasadha Row* v. *Secy. of State* (1)], but in that case the question of whether an engagement with Government could be implied arising out of the natural or prescriptive right of a riparian owner was left undecided, and the decision was based upon the engagement at the time of settlement, for their Lordships remark at p. 160 (of 33 *M. L. J.*:)

> "It is enough in their Lordships' opinion that the person relying on the proviso (that is, to Act 7 of 1865, S. 1,) shall show an engagement between the Government and himself or his predecessors in title by virtue of which he is in fact entitled to water for irrigation (1) from the source from which he is actually irrigating his lands, (2) to the amount of water actually used for such irrigation, and (3) without being subject to a 'separate charge' for such irrigation."

It is thus, to my mind, quite clear that the present case cannot be decided by the judgment in the *Urlam* case [*Kandukuri Balasurya Prasadha Row* v. *Secy. of State* (1)] alone, in which the following passage also occurs:

> "It is a nice problem whether a riparian owner is exercising his natural or prescriptive right of taking water from a natural stream for purposes of irrigation is taking water from a stream belonging to the Government within the meaning of the Cess Act,"

and this "nice problem" was left undecided. It however appears to me that the plea now put forward by appellants need not and should not be determined at all by this Court. No such plea was raised in the plaint and there is no issue on the question. No doubt an issue was framed as to whether plaintiffs are entitled to the water as of right, but that this issue did not refer to their right as riparian owners is clear from the latter part of the issue which runs, "and have been in enjoyment of the same over the statutory period." There is a reference in the plaint to some of the garden lands being situated on the bank of the Musi river, but it is nowhere specifically stated that the plaint lands are so situated and the statement in para. 1 of defendant 1's written statement,

> "nor have they any right to the water of the river flowing past their land except to the extent to which their right to irrigation was recognized at the Inam Settlement,"

cannot be deemed to be an admission that the plaint lands are riparian lands. It does not appear from the Inam Settlement that the lands were on the bank of the Musi river, and it is clear from the survey plans which were prepared in 1903 and 1904 that the Musi river is nearly half a mile from Survey No. 35 in which the plaint lands are found to be situated. If therefore plaintiffs have any right as riparian owners, they must have acquired the right since 1904. It is in evidence that the course of the river has shifted considerably of recent years, but there is no evidence to show in which year the plaint lands became riparian lands if they ever did so. The levy of the water-tax complained of was for water taken in Fasli 1316 (1906-1907). If therefore plaintiffs are allowed now to raise this plea of riparian right, the case would have to be sent back to be tried upon an entirely new set of facts. As this litigation started in 1908, I think it would be most improper to allow plaintiffs to put forward this new case which has only been discovered two years after this second appeal was filed, and nine years after the suit was instituted.

I would therefore dismiss this second appeal with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 1156

WALLIS, C. J. AND KUMARASWAMI SASTRI, J.

Kamepalli Ayilamma and *another*—Plaintiffs—Appellants.

v.

Mannem Venkataswamy and *others*—Defendants—Respondents.

Second Appeal No. 1889 of 1915, Decided on 21st September 1917, against decree of Court of Addl. Temporary Sub-Judge, Guntur, in A. S. No. 304 of 1913.

Hindu Law—Partition—Declaration of intention is sufficient provided it is clearly expressed—Doctrine applies even between major and minor co-parceners.

A partition in status may be effected among the members of a joint Hindu family by any of the coparceners unequivocally declaring his intention to be divided. 33 *I. C.* 858, *Foll.*

Such declaration of intention, however, should be clearly expressed to the other co-parceners 37 *I. C.* 321 (*P. C.*) and 40 I. C. 286 (*P. C.*), *Foll.*

[P 1158 C 2]

This doctrine applies even between a major coparcener and a minor co-parcener. In the case of a minor member, there must be such an intimation of the intention to be separate as the case admits of, that is, an intimation to the person who becomes the natural guardian of the minor as soon as the partition is effected.

[P 1158 C 2]

T. Prakasam and *P. Chenchiah*—for Appellants.

P. Narayana Murthi—for Respondents.

Judgment.—The plaintiffs claim property conveyed to defendant 5 by her husband, which she says was allotted to him on partition. The lower appellate Court, dealing with the case before the Full Bench decision in *Soundarajam* v. *Arunachalam Chetty* (1), came to the conclusion that enough was not proved to satisfy the tests till then accepted in such a case.

We have decided before disposing of the case to call for a finding on the evidence on record as to whether:

(1) there was a division in status (2) a division of the properties binding on the minor, and if so, (3) whether the plaint properties fell to the share of the defendant 5's husband. The findings should be submitted in six weeks and seven days will be allowed for filing objections.) In compliance with the order contained in the above judgment, the Additional Temporary Subordinate Judge of Guntur submitted the following.)

Findings.—Findings in Second Appeal No. 1889 of 1915 on the file of the High Court against Appeal Suit No. 304 of 1913 on the file of the Additional Temporary Sub-Court, Guntur. As directed by the High Court, I record findings on the following three issues sent for finding:

(1) Whether there was a division in status (2) Whether there was a division of the properties and it is binding on the minor, and if so, (3) Whether the plaint properties fell to the share of defendant 5's husband. Issue No. 3. The question is whether the plaint properties fell to the share of defendant 5. 4 On plaintiff's side, though there is some evidence of an alleged division between defendant 5's late husband and others, there is no definite or reliable evidence as to what particular properties were allotted to the share of the former, and much less if the plaint properties fell to his share. Except the recitals by defendant 5's husband in his sale-deed, Exs. C and D, that the properties mentioned therein had fallen to his share, there is no prior writing filed to prove what particular properties fell to his share. Though plaintiff's evidence would go to show partition lists were prepared at the said division and were also signed by the parties to the division, yet none such have been filed in this case. On issue No. 3, I find that plaintiffs have failed to prove that the plaint properties fell to the share of defendant 5's husband.

Issue No. 2. The question is whether there was an actual division of the properties and whether it is binding on the minor defendant 1, who is the younger brother of defendant 5's late husband Seshayya. As regards this alleged division between Seshayya and his brother, the evidence in the case is most discrepant. In para. No. 3 of their plaint in this suit, dated 29th February 1912, the plaintiffs state that this alleged division took place seven or eight years ago, which would place it about the year 1904 or 1905. Soon after Seshayya died, defendant 5, his widow, gave a statement as per Ex. 3 on 17th November 1911, before the Curnam of Tadikonda. In this she stated that her husband and his brother, defendant 1, got separated three years ago. This would be 1908.

(1) [1917] 39 Mad. 136=33 I. C. 858. (F. B.).

The evidence of P. Ws. 2 and 3 would go to show that, at the alleged division which is said to have taken place during the lifetime of the father Seshayya and defendant 1, partition lists were prepared and signed by all the three, defendant 1, Seshayya and their late father. Their evidence is discrepant in that P. W. 3 says that defendant 1 was then only 10 or 12 years old, whereas P. W. 2 would say that, at the partition, defendant 1 took one of the lists and that he was old enough to do so. As I have already said, none of these partition lists have been filed in this suit. If we look to the circumstances attending the alleged partition, they do not seem to support the plaintiffs' version of the division. Defendant 5 had not by that time come to live with her husband, late Seshayya, and no reason is shown for Seshayya being then anxious to divide from his father and brother. Plaintiffs' evidence as regards the division of debts is not free from discrepancies. We have also the significant fact that, even after the division, the patta for the family lands stood jointly in the name of Seshayya and the minor defendant 1, with Seshayya as the minor's guardian. The kist receipts, Ex. 2 series, would go to show that, till his death, Seshayya himself paid all the kists of the lands even for the share of the minor defendant 1 and P. W. 2 would depose that even now their house has only one door, These circumstances do not support the division set up. On issue 2, I would therefore find that there was no actual division of properties as alleged in the plaint. On the 2nd part of the issue, as the plaint division is said to have taken place during the lifetime of defendant 1's father and nothing has been shown against its validity, if the said division is true, I have no doubt it is binding on the minor defendant 2.

Issue 1.—The question is whether there was division in status. The Full Bench case of *Sounda Rajam* v. *Arunachalam Chetty* (1) would go to show that a clear and unambiguous declaration by one co-parcener to become divided in status is enough to create a division in status, though it is unilateral and is not consented to by the other members of his co-parcenary. The question in the present case is whether there is such division in status with defendant 1 and and his late elder brother, Seshayya, though the actual division set up in the plaint has been held not proved. The Privy Council case reported as *Girja Bai* v. *Sadasir Dhundiraj* (2) lays down that this declaration of intention to become divided may be either by express communication to the other co-parceners or it may be inferred from the conduct of the co-parcener. In the present case, there is no evidence that defendant 5's husband, late Seshayya, expressly informed defendant 1, his minor brother, of his clear intention to remain divided in status. In the pattas, Seshayya himself is shown as the guardian of his minor brother, defendant 1. Rattamma, the mother and guardian of defendant 1, is alive. Plaintiffs have not shown that during Seshayya's lifetime, either she or any one else had been constituted the guardian of the minor defendant nor that late Seshayya informed either the minor defendant 1 or any guardian on his behalf of his definite intention to remain divided in status. The appellants contend that, in his registered sale-deeds, Ex. C and D, late Seshayya had clearly expressed that there had been already a division and that, in such division, the properties recited therein had fallen to his share.

As we have already seen, as a matter of fact, there has been no actual division of the family properties as alleged by the plaintiffs nevertheless, the appellants' pleader contends that the effect of the execution of these two sale-deeds by late Seshayya with the declarations about division therein stated is sufficient to create a division in status between him and his brother. Defendant 1 is not a party to either of these two documents, nor have plaintiffs shown that defendant 1 or his guardian was informed of the recitals about division in these documents during the life-time of Seshayya. Plaintiffs' witnesses have been shown to be discrepant and unreliable in their evidence about the alleged division. I cannot therefore credit them when they say that defendant 1 and late Seshayya were living separately. On the other hand as we have already seen, the house they live in has only one doorway even now as P. W. 2 would depose and till Seshayya's death the kist on all the family lands

(2) A. I. R. 1916 P. C. 101=43 Cal. 1031=43 I. A. 151=37 I. C. 321 (P. C.)

was paid by Seshayya alone. Thus apart from the mere execution of the sale deeds Exs. C and D, to which defendant 1 was not a party, nothing else has been shown in the conduct of Seshayya to prove a clear and unambiguous intention to separate in status. On issue 1 I would therefore find that a division in status between defendant and his brother, late Seshayya has not been established.

(This second appeal coming on for final hearing this day after the return of the finding of the lower appellate Court upon the issue referred by this Court for trial the Court delivered the following.)

Judgment.—The plaintiff in this second appeal failed to prove that the items of immovable property which he seeks to recover had fallen to the share of defendant 5's husband on partition. When the case came before the Court on the last occasion as it had been decided by the lower Court before the Full Bench decision in *Soundarajam* v. *Arunachalam Chetty* (1), we thought that it was desirable to ascertain whether although there had not been a division by metes and bounds, there had been a division in status having regard to the decision of the Privy Council in *Suraj Narain* v. *Iqbal Narain* (3), which was acted on by the Full Bench in *Soundarajam* v. *Arunachalam Chetty* (1). The finding in this case is that in a sale-deed concerning immovable property not in suit, the major co-parcener inserted a recital that he had become divided in an alleged partition many years previously which is found not to have been proved. The question argued before us is whether this recital can be taken as having effected a severance in interest. It is not shown that it was communicated to anybody on behalf of the minor before the death of the major co-parcener, and it is contended on the other side that in these circumstances he was undivided from his minor brother at the time of his death. Now the position for which Mr. Prakasam has contended is that under the recent decisions of the Privy Council, it is not necessary that there should be any communication to the other cosharers of the intention of the co-parcener to sever himself from the joint family. We are unable to accept that position. The language of Mr. Ameer Ali delivering the judgment of their Lordships in *Suraj Narain* v. *Iqbal Narain* (3), is that "to have that effect the intention must be unequivocal and clearly expressed." The natural meaning of that in our opinion is that it should be clearly expressed to other co-parceners who are the persons interested. But the matter is put beyond all doubt by the two following decisions of their Lordships. In one of them, *Girja Bai* v. *Sadashiv Dhundiraj* (2), Mr. Ameer Ali, delivering their Lordships' judgment says:

"once the decision has been unequivocally expressed and clearly intimated to his cosharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither the cosharers can question it nor can the Court examine his conscience to find out whether his reasons for separation were well founded or sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others."

In the still more recent case in *Kawal Nain* v. *Budh Singh* (4) Lord Haldane, delivering their Lordships' judgment, applied the same rule to the decision of that case. He says:

"by his plaint he had claimed a fifth share of the family property, and their Lordships entertain no doubt that the claim amounted to an intimation to the defendants, his cosharers, of the unequivocal desire of the plaintiff for separation from the joint family. If this be so the judgment of the Judicial Committee (reported in the case we have referred to) renders it beyond question that the commencement of this suit for partition effected a separation from the joint family."

This is a clear recognition of the necessity that the intention should be communicated to the cosharers to effect a severance. As at present advised we are not prepared to say that this doctrine does not apply even between a major co-parcener and a minor co-parcener. But we think that in such a case, there must be such an intimation as the case admits of that is an intimation to the person who becomes a natural guardian as soon as the partition is effected, and that person in this case is the mother of the minor. She is clearly a proper person to protect the separate interests of her son and she is the person who according to the invariable practice of the Courts is in the absence of the father appointed guardian ad litem in a suit for partition instituted by a major against a minor. In the present case no such communication is proved during the lifetime of the major co-parce-

(3) [1913] 35 All. 80=40 I. A. 40=18 I. C. 30 (P.C.).

(4) A. I. R. 1917 P. C. 39=39 All. 496=44 I. A. 159=40 I. C. 286 (P.C.).

ner and therefore the only conclusion we can come to is that when he died he was undivided in status from his brother. No doubt the plaintiff may have acquired the major co parceners' share by virtue of the transfer in his favour, and may have succeeded to his rights and be able to work them out in a suit properly framed; but he has not established the right which he claims in this suit for possession of these specific items of immovable property. In the result therefore the second appeal fails and is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 1159
Full Bench

WALLIS, C. J., AND SADASIVA AIYAR AND SPENCER, JJ.

Pazhavathil Mavilaputhia Veethil Chindan Nambiar—Appellant.

v.

Kunhi Raman Nambiar and *others*—Respondents.

Second Appeal No. 1177 of 1916, Decided on 4th March 1918, against decree of Temporary Sub-Judge, Tellicherry, in Appeal Suit No. 535 of 1913.

(a) Malabar Law—Tarwad—Senior Anandravan appointed by karar in place of Karnavan—Suit for removal for misconduct lies.

Were the senior Anandravan in a Malabar Tarwad is appointed to the office of karnavan by a family karar whereunder the existing karnavan renounces or is deprived of his office, a suit will lie to remove the karnavan so appointed for misconduct. 38 *I. C.* 513, *Expl.* [P 1160 C 1,2]

(b) Malabar Law—Tarward—Family Karar depriving Karnavan of this status and unilateral act of relinquishment distinguished.

A family karar to which all the adult members of a Tarwad are parties and by which a person is deprived of his status as karnavan is not the same thing in the eye of the law as a unilateral act of relinquishment of his office by the karnavan, though the result on his status as karnavan may be the same. [P 1160 C 2]

C. V. Anantakrishna Aiyar—for Appellant.

T. R. Ramchandra Aiyar—for Respondents.

Order of Reference.

Sheshagiri Aiyar and Napier, JJ.—This is a suit to remove a karnavan. The Courts below directed his removal. Mr. Anantakrishna Aiyar for the appellant contested the findings regarding the charges framed against the karnavan. There is evidence to support the findings and we are not prepared to differ from the Courts below on these points. The next contention was that, even if the charges are proved, they are not serious enough to entail the removal of the karnavan. One of them which relates to the assignment of a satisfied decree to defendant 16, the son of the karnavan, to enable the said defendant to bring Tarwad properties to sale is a very serious one. Both the Courts below have found that the conduct of the karnavan in this respect was fraudulent. Other charges also have been proved against him. They are all detailed in the judgments of the Courts below. We think that taking them all together, there is enough justification for the decree passed in the case. Mr. Anantakrishna Aiyar relied on *Cheria Pangi Achan* v. *Unnalachan* (1) and contended that the suit was not maintainable, as defendant 1 was not the de jure karnavan, but was appointed to his position by a family karar. The facts necessary to understand this contention are these:—Defendant 3 (who has since died) was the senior in age and was the de jure karnavan. He was removed by a karar. Then defendant, 2, who is also now dead and who was next in age, was in management. During this period the members of the tarwad were dissatisfied with the way the affairs were being conducted. Therefore there was a family council and Ex. B dated 17th May 1892, came into existence. All the members of the Tarwad were parties to that document. By its terms, defendant 2 was removed from the general management and defendant 1 who was admittedly the senior Anandravan was constituted the karnavan. Defendant 2 was allowed to manage a family temple and to utilise the surplus income for his maintenance. The result of the karar was that defendant 2, the Karnavan, was substantially removed from his office and his duties were entrusted to defendant 1. As both the defendants were parties to this karar it was argued that defendant 2 must be deemed to have renounced his rights by his assenting to it. The decision in *Kenath Puthen Vethil Tavazhi* v. *Narayanan* (2), on which Mr. Ramachandra Aiyar relied, seems to enunciate the following propositions: (a) the renunciation by a karnavan is binding on the Tarwad and is irrevocable by him: (b) this renunciation may be by a unilateral act or

(1) [1917] 38 I. C. 513.
(2) [1905] 28 Mad. 182 (F. B,).

by being a party to the contract by which his rights are superseded, and (c) by such renunciation, the next in age becomes the karnavan de jure. Applying these conclusions to the present case, it may be said that defendant 1, who was the senior in age after defendant 2 became the de jure karnavan by virtue of the renunciation implied by the karar. It is true that some powers which ought ordinarily to have been exercised by the karnavan were entrusted to defendant 2. This may be taken to have entailed some restrictions on full powers of defendant 1. In other respects his rights as karnavan were recognized and confirmed by the karar. If this is the correct view of Ex. B we think that a suit will lie to remove defendant 1. This conclusion is, in our opinion, not inconsistent with the decision in *Cheria Pangi Achan* v. *Unnalachan* (1). But Mr. Anantakrishna Aiyar argued that this decision is authority for the larger proposition that whenever a karnavan is designated by a karar, he is not liable to be removed by a suit. We express no opinion on the question whether, even though the karar karnavan is not the senior in age, a suit may not lie at the instance of some of the parties to the karar to remove him. But we think that when a de jure Karnavan is recognized by the karar, he does not acquire a higher status than that which he originally possessed. However the question raised is a very important one affecting as it does the rights of management in numerous families in Malabar. We have therefore resolved to refer the following questions for the decision of the Full Bench:

(a) Where a de jure karnavan is a party to a family karar by which his general rights as karnavan, subject to some minor exceptions, are taken away, can he be said to have renounced his rights as karnavan? (b) When, under the above circumstances, the next in age to the karnavan is recognized as the karnavan by the karar, whether a suit will not lie to remove him from the Karnavanship.

Opinion.

Sadasiva Aiyar, J.—It is clear to my mind that the karar Ex. B dated in 1892 deprived defendant 2 of his karnavastanam though with his consent and vested the office in defendant 1. The fact that the Tarwad (including the new karnavan) gave the management of a temple and its income to the removed Karnavan did not affect the other results of the karar, namely, the putting an end to the tenure of defendant 2's office as karnavan and the appointment of defendant 1 to the said office. The supersession of defendant 2's rights by the family karar cannot, of course, be affected by any subsequent unilateral act or expression of intention on his part. Defendant 1 became not only the de facto karnavan but also the de jure karnavan under the karar and he can therefore be removed by suit for gross misconduct.

As soon as a karnavan ceases to be such by death or removal, the next in order of seniority becomes the karnavan and any family karar binding on the person who has ceased to be the karnavan ceases to have any effect on the new Karnavan:

"except perhaps where he has himself agreed in that karar to be bound by those restrictions whenever he succeeded to the Stanom."

There is no scope for the framing of a scheme of management by a Court under those circumstances. This was all that I intended to express in *Cheria Pangi Achan* v. *Unnalachan* (1). A family karar to which all the adult members of a Tarwad are parties and by which a person is deprived of his status as karnavan is not the same thing in the eye of the law as an unilateral act of relinquishment of his office by the karnavan, though the result on his status as karnavan may be the same. I think that the question (a) referred to us does not arise for decision on the above view of the legal nature and effect of the family karar Ex. B and I would answer as regards question (b) that a suit will lie to remove the karnavan recognized as such by a family karar.

Wallis, C. J.—I agree.

Spencer, J.—I agree.

S.N./R.K *Order accordingly.*

A. I. R. 1919 Madras 1161

SPENCER AND KRISHNAN, JJ.

Chandooru Punnayya and *another*—Plaintiffs—Appellants.

v.

Venugopala Rice Factory Co. Ltd., Tenali—Defendants—Respondents.

Second Appeal No. 39 of 1915, Decided on 24th September 1917, against decree of Tempy. Sub-Judge, Guntur, in appeal suit No. 58 of 1915.

(a) Contract Act (9 of 1872), Ss. 196, 197, and 251—Partnership — Submission to arbitration by partner with general authority under S. 251 does not bind other partners without special authority, express or implied —Partners may ratify submission.

The general authority of a partner under S. 251 to represent his co-partners is not sufficient to bind them by a submission to arbitration by him. [P 1162 C 1]

Special authority is needed for the purpose. Such special authority need not be express but may be implied from conduct. The submission may also be ratified by the partners expressly or by conduct. [P 1162 C 2]

(b) Contract Act (9 of 1872), S. 251—Submission to arbitration by managing partner—Implied authority may be presumed.

Where the submission to arbitration is made by the managing partner of a firm on behalf of the firm, it may amount to an implied authority to refer by the other partners. [P 1163 C. 1]

(c) Partnership—Sub partner—Liability.

Sub-partners are equally liable with the principal partners for the debts of the partnership.

(d) Companies Act (6 of 1882), S. 21—Articles of Association—Charges for debt on share — Debtor becoming share holder makes share liable to charge.

A provision in the Articles of Association of a registered company which makes a share-holder's debt to the company a charge on his shares applies to the case of debtors who afterwards become share-holders. [P 1163 C 1]

(e) Specific Relief Act (1 of 1877), S. 42—Suit by share-holder debtor to establish extent of right in company property is maintainable.

Per *Spencer, J.*, (*Obiter*)—A person who is not only a debtor to a company but also a share-holder is entitled to institute a suit to establish the extent of his right to property in the company's hands without asking for any further relief, inasmuch as he is not entitled to demand the value of his shares out of the company's capital on demand as if they formed a debt due to him by the company. [P 1163 C 1]

T. R. Ramachandra Aiyar and *T. Ramachandra Rao*—for Appellants.

P. Narayanamurthy — for Respondents.

Krishnan, J.—The facts necessary for the disposal of the second appeal may be briefly stated as follows. One Pedda Ramanna and P. W's. 7, 8 and 9 were partners of a firm, Plaintiff and one Ramayya were jointly interested in all the business carried on by P. Ramanna and they were thus interested also in the partnership share of Ramanna in this firm, though Ramanna alone was the partner. Their position was that of sub-partners with Ramanna in his partnership share, Ramanna representing the whole share in the firm. The defendant is a registered company, having been so registered in June 1909 but the company was started originally as an unregistered one. The firm and the unregistered company had dealings with each other. On account of a dispute as to the amount due on these dealings, there was a reference to arbitration but the written reference was signed by only two of the partners of the firm, P. Ws. 8 and 9, and not by the other two. There was an award in favour of the company for Rs. 575 and odd in December 1906. Pedda Ramanna had also a share in the unregistered company. When that company was registered that share was split into 4 and 2 of them were given to plaintiffs and 2 to Ramayya. The registered company took over all the assets and liabilities of the unregistered one and the amount of the award thus became one of the assets of that company and the share amount originally payable to Ramanna, and now in equal halves to plaintiff and Ramayya, was one of its liabilities.

In 1910 the company passed a resolution and made a formal debit entry in their books against plaintiff and Ramayya of one half of the balance due under the award against each. Plaintiff sued in Original Suit No. 174 of 1912 to have it declared that the debit against him was illegal and for recovery of the amount due. The company sued both plaintiff and Ramayya for Rs. 495 odd on dealings, on the footing that the debit was right, in Original Suit No. 413 of 1912 and the cases were tried together.

Plaintiff contended that the award and the debit were not binding on him and that the debt was barred by limitation at the time of the debit and that the resolution of 1910 was not valid against him and therefore the debit was illegal. The Munsif found that plaintiff and Ramayya were liable to pay any debts legally due by Ramanna to the company, but he held that the award was

not binding on Ramanna or on the plaintiff and Ramayya, as the reference had not been signed by the former; he did not consider whether apart from the award any sum was due on the original dealings themselves. He gave a decree to the plaintiff declaring the debit against him was wrong but no decree for any money apparently because of other items of account between the parties. In the company's suit he gave a decree against Ramayya for Rs. 231 odd on account, but dismissed the suit against the plaintiff who was defendant 3 there.

On appeal by the company the Subordinate Judge concurred with the Munsif on the question of plaintiff's and Ramayya's liability for trade debts properly due by Ramanna, but reversed his finding as to the binding character of the award holding that it was binding. He also overruled the plea of limitation. He dismissed the plaintiff's suit and gave a decree to the company as sued for.

In second appeal both these points have again been raised before us. Considering the position of the plaintiff and Ramayya with reference to Ramanna in the firm there can be no doubt that they were bound by the debts of the firm equally with Ramanna though they were not the principal partners but only sub-partners of Ramanna; they were thus liable to the creditors of the firm just as much as Ramanna and the other partners were. I agree with the Subordinate Judge that they were bound to pay the award amount to the company. Though the reference to the arbitration was only signed by two of the partners they were the partners who were in charge of the business of the firm and were keeping the accounts thereof, about which the dispute arose. The submission was on behalf of the firm. The arbitration and the award were entered in the books of the firm and the award amount was also entered in the books as a debt of the firm. P. W. 7 has accepted the award. No objection was taken by the other partner Ramanna. In fact in 1907 Ramayya paid to the company a sum of Rs. 252 odd towards the award amount. No doubt the general authority of a partner under S. 251, Contract Act, to represent his co-partners is not sufficient to bind them by a submission to arbitration by him: see *Ram Bharose* v. *Kallu Mal* (1) and the case of *Stead* v. *Salt* (2) cited there. Special authority is needed for the purpose. Such special authority need not however be express but may be implied from conduct. And furthermore where a partner acts without authority his action may nevertheless be ratified by his co-partners as he is in the position of their agent by virtue of S. 251, and the agent's unauthorized act can be ratified by the principal: vide S. 196 of the same Act. Under S. 197, ratification may be express or implied from conduct. The circumstances above set out and others referred to by the Subordinate Judge in para. 4 of his judgment show that there is sufficient evidence of conduct to support an inference of ratification if not of implied authority to refer against Ramanna and if the debt is binding on him plaintiff is bound by it also.

The next question is whether the debt was barred by limitation and unenforceable when debited against plaintiff. In this connexion Art. 39 (h) of the Articles of Association of the Registered Company in which plaintiff is a share holder is most important. Under it any debt due by a share-holder to the company jointly with another is made a first charge on his share dividend and interest. Whether the plaintiff signed the articles or not bound himself by this condition when he became a share-holder under S. 21, Companies Act. The award debt is one which plaintiff was jointly bound to pay to the company with others and at the dates when the company was registered and the articles confirmed it was not barred by limitation so that we need not decide if the debts referred to in Art. 39 (b) should be subsisting debts or not. The company was therefore entitled to debit against plaintiff's share, etc., the debt due by him at any time before payment of those shares and no question of limitation arises. A further question about the maintainability of the suit was raised based on S. 42, Specific Relief Act. There is also the objection that plaintiff's suit refers to one item only of an account between the parties. It is not necessary however to decide these objections as plaintiff's suit fails on other grounds. I agree in dismissing the second appeal with costs.

Spencer, J.—I agree. I see no difficulty in arriving at the conclusion that

(1) [1920] 22 All. 135.

(2) [1825] 3 Bing 101.

the plaintiff's share was legally liable for the debt to the company. The plaintiff was the assignee of the shares of P. Ramanna in the unregistered company, the assets and liabilities of which were taken over by the new registered company when it was formed. The plaintiff when he became a share holder in the defendant company was bound by all its articles of association one of which had the effect of charging the shares of share-holders with liability for any debt which they owned to the company jointly with any other person. This was an ordinary incident of company law and is commonly inserted in articles of association. The plaintiff therefore became liable by assignment of P. Ramanna's shares in the old company for his assignor's debts to the company to the extent of the plaintiff's share and the company were legally entitled by their articles to set off the plaintiff's proportionate share of the debt due to them against his share as a member of the company. The company having been registered within three years of the date when P. Ramanna's liability to the company through the firm of which he was a partner was fixed by the award of arbitrators on 29th December 1906, no question of limitation arises. An objection has been raised by respondent as to the maintainability of the suit under S. 42, Specific Relief Act. As the plaintiff was not only a debtor to the company but also a share-holder he was entitled to institute a suit to establish the extent of his right to property in the company's hand without asking for any further relief. He was not entitled to ask the company to pay him on demand the amount of the shares held by him out of their capital as though they formed a debt due to him by the company. The objection is not good. The second appeal fails however on the merits for the reasons given by me which my learned brother has set forth more fully and with greater detail in his judgment. It is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 1163

ABDUR RAHIM AND NAPIER, JJ.

Annasami Nadavan and *others* In re —Accused—Petitioners.

Criminal Revn. Case No. 733 of 1917, and Criminal Revn. Petn. No. 583 of 1917, Decided on 26th February 1918 to revise order of Sess. Judge, Trichinopoly, Division.

Criminal P. C. (5 of 1898), S. 408—Joint Trial -- Some convictions appealable and others not—Right of accused with not appealable conviction in appeal by others stated.

In an appeal under S. 408 by some of the accused who are awarded appealable sentences in a trial in which the other accused are awarded non-appealable sentences, it is not competent to the latter to have their case examined as if an appeal lay in their case as well: 39 *I. C.* 294; and 23 *I. C.* 739, *Foll.* [P 1163 C 2]

E. L. Thornton—for Petitioner.

P. K. Narayanasami Ayyar for the *Public Prosecutor*—for the Crown.

Order.—The first contention of Mr. Thornton is that though in this case the sentences of the petitioners are such that no appeal would lie in their behalf by reason of the fact that they were tried with some other persons who received appealable sentences and preferred an appeal therefrom to the Sessions Judge, he was bound to examine the case of the petitioners also as if an appeal lay in their case as well. We do not think that there is any support in the Criminal Procedure Code for such a contention. S. 408 says that when a person has been convicted by a First Class Magistrate he may appeal to the Court of Session but S. 413 lays down that there shall be no appeal by such a person if the sentence passed is imprisonment not exceeding one month or a fine not exceeding Rs. 50. Mr. Thornton's argument is based upon proviso (b) to S. 408 which says:

"when in any case an Assistant Sessions Judge or a Magistrate specially empowered under S. 30 passes any sentence of imprisonment for a term exceeding four years or any sentence of transportation the appeal shall lie to the High Court."

It is contended that in such a case an appeal would lie not only on behalf of the persons who have received the sentences mentioned in proviso (c) but also on behalf of other persons who were tried along with them though the sentence passed in their case might be less than that specified in the proviso. We are not at all satisfied that this is what

is meant by the proviso. But supposing it is we do not see how it bears out the proposition put forward in this case. The language of S. 413 is express and prefectly clear to show that in the cases covered by it there shall be no appeal and para. 1, S. 408 which specifies the Courts to which the appeals of certain convicted persons will lie does not speak of any 'case,' but of the persons convicted. No ruling of this Court or of any other High Court has been cited to us which bears out the contention on behalf of the petitioners. On the other hand there are rulings of this Court reported as *Venkatakrishnayya, In re* (1) and *In re Uruma Mudali* (2), which support the contrary proposition. The interpretation of the law in those cases is also in accordance with the practice of this Court and so far as we are aware of the other High Courts as well: see *Reg.* v. *Muliya Nana* (3) and *Reg.* v. *Kalubhai Meghabhai* (4), which are referred to in *Venkatakrishnayya, In re* (1). The only other contention raised before us relates to the sentences of the accused 3 and 9. They have been sentenced to rigorous imprisoment for a month each of the offences of which they were found guilty, namely, criminal trespass, rioting and hurt. We are unable to say that the sentences are too severe. The petition is dismissed. The accused if on bail will surrender to their bail and serve out the remaining portions of their sentences.

S.N./R.K. *Petition dismissed.*

(1) [1917] 40 Mad. 591=39 I. C. 294.
(2) A. I. R. 1914 Mad. 433=23 I. C. 739.
(3) [1868-69] 5 B. H. C. R. 24 Cr.
(4) [1870] 7 B. H. C. R. 35 Cr.

* A. I. R. 1919 Madras 1164

Full Bench

WALLIS, C. J., AYLING AND KUMARASWAMI SASTRI, JJ.

(*Marturu*) *Subbamma* —Appellant.

v.

(*Gadde*) *Narayya*——Respondent.

Second Appeal No. 1672 of 1915, Decided on 12th October 1917, against decree of Dist. Judge, Guntur, in Appeal Suit No. 339 of 1913,

***(a) Transfer of Property Act (1882), S. 67—Usufructuary mortgagee not put in possession—Mortgage money becomes payable—Suit for foreclosure or sale is competent.**

Where a usufructuary mortgagee is not put in possession of the mortgaged properties, the mortgage money becomes payable to him within the meaning of S. 67, T. P. Act, and he is consequently entitled to sue for foreclosure or sale.

[P 1165 C 1]

(b) Transfer of Property Act (1882), Ss. 67 and 68 (b) (c)—Mortgage money once payable under S. 68—S. 67 can be given effect to.

Once the mortgage money becomes payable under any clause in S. 68, T. P. Act, S. 67 can be given effect to. 21 *Mad.* 476(*F. B.*), **Overruled.**

[P 1165 C 2]

V. Ramadoss—for Appellant.

K. V. L. Narasimham—Respondent.

Order of Reference

Sheshagiri Aiyar and Knmaraswami Sastri, JJ. — As regards the contention that there is a covenant to pay in respect of the mortgage of item 1, we must overrule it, having regard to *Ram Narayan Singh* v. *Adhindra Nath* (1) and *Patte Muhamad* v. *Davood* (2). Consequently S. 68, Cl. (a), T. P. Act, is not applicable. The further question is whether in the events which have happened, the mortgagee is not entitled to bring item 1 to sale. The mortgagor covenanted to put the mortgagee in possession, and the finding is that he has broken the covenant. Therefore S. 68, Cl. (c), T. P. Act, applies. Mr. Ramadoss argued that the failure to give possession, although it may give a right to the mortgage money, would not enable the mortgagee to sue for the sale of the property. He is supported in his contention by *Arunachalam Chetty* v. *Ayyavayyan* (3) and by the cases following that decision. On the other hand the recent decision of the Judicial Committee in *Ram Narayan Singh* v. *Adhindra Nath* (4) seems to suggest that the failure to fulfil the conditions mentioned in Cls, (b) and (c), S. 68 would ensure the same legal consequences as may be enforced under Cl. (a).

The right to sue for sale under a covenant to pay the mortgage money is provided for by S. 67, P. T. Act. As at present advised, we fail to see why that section should not be appealed to where there is a default under Cls. (b) and (c), S. 68. *Arunachalam Chetty* v. *Ayyavayyan* (3) seems to proceed on the footing that the ordinary right of a

(1) A. I. R. 1916 P. C. 169. (P. C.)
(2) [1915] 30 I. C. 569.
(3) [1898] 21 Mad. 476 (F. B.).
(4) A. I. R. 1916 P. C. 119.

usufructuary mortgagee to realise the moneys due to him is to claim possession. In other words, notwithstanding the fact that the mortgagor refuses to perform his part of the contract, the mortgagee is only entitled to specific performance of the contract, and is precluded from claiming any other relief. We think this position requires reconsideration. The Judicial Committee, by saying that accounts might have to be taken in the case already referred to, impliedly recognize the mortgagee's right to sue for the sale of the property and we think that the restriction on the mortgagee's right enunciated in *Arunachalam Chetty* v. *Ayyavayyan* (3) is not justifiable. Under these circumstances, we must refer the following question for the decision of the Full Bench:

"Whether a usufructuary mortgagee is not entitled to sue for the sale of the property mortgaged to him when the mortgagor fails to deliver possession of the said property to him and has consequently to sue for the money."

Opinions.

Wallis, C. J.—I agree with the referring Judges and answer the question in the affirmative. A mortgagee does not become a usufructuary mortgagee within the meaning of S. 58 (d) until the mortgagor has given him possession of the mortgaged property and so put him in a position to realize his security out of the accruing rents and profits. It is because the intention is that the security shall be realised in this manner that by S. 67, proviso (a), a usufructuary mortgagee as such is debarred from suing for foreclosure or sale under the section. A mortgagee to whom possession has not been given is not a usufructuary mortgagee. Consequently he does not come within the proviso and is entitled to sue for foreclosure or sale under the section in the absence of a contract to the contrary "at any time after the mortgage money has become payable to him." S. 68 entitles the mortgagee to sue the mortgagor for the mortgage money

"where the mortgagee, being entitled to possession of the property, the mortgagor fails to deliver the same to him or to secure the possession thereof to him without disturbance by the mortgagor or any other person."

The first of these events having happened, the mortgagee has become entitled to sue for the mortgage money, or, in other words, the mortgage money has become payable to him, and he is entitled under S. 67 to sue for foreclosure or sale in the absence of a contract to the contrary, which cannot be implied. On the contrary the fact that the mortgagor was unable to put the mortgagee in a position to realize his security out of the rents and profits, makes it only reasonable that he should be remitted to the ordinary remedies of a mortgagee by foreclosure or sale, and the legislature has recognized this by making the mortgage money payable in this event. He has advanced his money on the security of the mortgagor's interest in the property, and mortgagor has failed to perform his part of the contract by putting him in possession and enabling him to realize his security in that manner, and there is no reason why he should not be allowed to realize it by bringing the mortgagor's interest to sale if he so esires or requiring him to undergo the expense and trouble of litigation with third parties unless he is content to lose his security. These aspects of the question appear to have been overlooked in *Samayya* v. *Nagalingam* (5) and *Arunachalam Chetty* v. *Ayyavayyan* (3). In *Ram Narayan Singh* v. *Adhindra Nath* (4) the Judicial Committee observed:

"It must also be borne in mind that even if the mortgagor be in the first instance under no personal liability, such liability may arise under S. 68 (b) or (c), T. P. Act."

As pointed out in the Order of Reference, once the mortgage-money becomes payable under any clause in S. 68, there can be no reason for refusing to give effect to S. 67, which allows of a suit for foreclosure or sale "at any time after the mortgage money has become payable," except in certain cases of which this is not one. I accordingly answer the question in the affirmative.

Ayling, J.—I concur.

Kumaraswami Sastri, J.—I agree and have nothing useful to add to what I have said in the Order of Reference.

S.N./R.K. *Answered in the affirmative.*

(5) [1892] 15 Mad. 174.

A. I. R. 1919 Madras 1166
Full Bench

WALLIS, C. J., AYLING AND SADASIVA AIYAR, JJ.

Vaithinatha Pillai—Plaintiff—Appellant.

v.

Kuppa Thevar and *others*—Defendants—Respondents.

Second Appeal No. 173 of 1916, Decided on 24th April 1919, against decree of Dist. Judge, Tanjore, in Appeal Suit No. 557 of 1914.

Civil P. C. (5 of 1908), S. 100 and O. 41, R. 27—Per *Wallis, C. J.* and *Ayling, J.*—**Order rejecting application to allow new evidence discovered after decree cannot be interfered with in second appeal.** (*Sadasiva Aiyar, J.* dissenting).

Per *Wallis, C. J. and Ayling, J.* (*Sadasiva Aiyar, J.* dissenting)—The HighCourt cannot, in second appeal, interfere with an order of a lower appellate Court rejecting an application made to it by a party to the appeal before the hearing of the appeal to admit certain material evidence discovered since the date of the decree appealed against which was not available to the said party with the exercise of diligence during the trial of the suit : 21 *Cal.* 484 ; 6 *W. R.* 196 ; 7 *W. R.* 489; 15 *W. R.* 429 ; 23 *All.* 121 and 9 *I. C.* 265 *Foll.* [P 1171 C 1]

Per *Sadasiva Aiyar, J.*—The High Court has power, in second appeal, to consider the propriety of the exercise of its discretion by a lower appellate Court as regards the admission of additional evidence, though that discretion would not be interfered with lightly any more than the discretion of a Court rejecting a review petition would be lightly interfered with in revision. The question whether the appellate Court exercised its discretion properly is a question of law as it is now settled that good grounds for review are also good grounds for the appellate Court to allow further evidence to be adduced.

[P 1172 C 1, 2]

K. Bhashyam Aiyangar—for Appellant.

T. M. Krishnaswamy Aiyar—for Respondents

Order of Reference

Abdur Rahim, J.—In this case the point on which I felt considrable doubt was whether we could say that the decree of the District Judge was wrong on the ground that he refused to admit in evidence the decree in Original Suit No. 26 of 1879. That document had undoubtedly a material bearing on the question whether the property in dispute was validly dedicated to charity as found by the District Judge. The decree was not produced in the Court of first instance, but the appellant's affidavit shows that the appellant who is the purchaser of the property was not aware of the existence of this decree. He discovered it after the Court of first instance had pronounced judgment and an appeal had been preferred to the District Judge. An application was made to the lower appellate Court for admission of this decree, but it was rejected on the ground that if such an application was granted, there would be no end to litigation.

Can we in second appeal admit that document on the ground that the lower appellate Court's refusal to exercise the power it had under O. 41, R. 27, Civil P. C.,—supposing the application came within the scope of the rule—was wrong? The well-known ruling of the Privy Council in *Kessowji Issue* v. *G. I. P. Ry. Co.* (1) on the subject has been considered in a number of recent rulings of this Court. It may now be taken to be well established so far at least as this Court is concerned that the words:

"but if an appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause"

entitled an appellate Court to admit fresh evidence if it finds it necessary to do so to enable it to pronounce judgment to its own satisfaction. The words "any other substantial cause" should not be read in an ejusdem generis sense so as to confine the application of the rule to cases of lacuna. [See *Andiappa Pillay* v. *Muthukumora Thevan* (2), *Ambuja Ammal* v. *Appadurai Mudali* (3), *Subba Naidu* v. *Ethirajammal* (4), *Peddibhotla Kameswaramma* v. *Bezwada Chelapathi* (5), *Venkatachela Pillai* v. *Ranga Pillai* (6).] It has been further held in *Andiappa Pillay* v. *Muthuknmara Thevan* (2) and *Venkatachela Pillai* v. *Ranga Pillai* (6) that an appellate Court acting under R. 27, O. 41, Cl. (b) may admit fresh evidence on the same grounds as would justify the Court of first instance to admit a review. In all these cases, the appellate Court had in fact admitted fresh evidence and the question discussed before the High Court was whether it had the power to do so.

In the present case the lower appellate Court refused to admit the evidence produced by the appellant. Supposing it

(1) [1907] 31 Bom. 331=34 I. A. 115 (P.C.).
(2) [1912] 36 Mad. 477=14 I. C. 140.
(3) [1915] 38 Mad. 414=30 I. C. 402.
(4) [1915] 28 I. C. 640.
(5) [1914] M. W. N. 864=26 I. C. 50.
(6) [1915] 28 I. C. 694.

went wrong in this, as I am inclined to think it did; are we entitled to say that it ought to have

"required the document to be produced to enable it to pronounce judgment or for any other substantial cause?"

The very statement of the proposition shows to my mind that it is untenable. It cannot come within the scope of the rule even interpreting it and the ruling of the Privy Council as liberally as any of the decisions mentioned above have done. As pointed out in *Ambuja Ammal* v. *Appadurai Mudali* (3) the test laid down by the legislature has reference to the state of mind of the Judge hearing the appeal when he has heard the argument with a view to pronouncing judgment in the case. Here the order refusing to admit further evidence was passed on an especial application made by the appellant before the hearing of the appeal and the lower appellate Court apparently found no difficulty in pronouncing judgment without that evidence. I am of opinion therefore that the judgment of the District Judge cannot be assailed on this ground. But as my learned brother takes a different view and the question is one of general importance I would refer it to the Full Bench for its opinion, in these terms:—Whether the High Court can interfere in second appeal with an order of the lower appellate Court rejecting an application made to it by a party to the appeal before the hearing of the appeal to admit certain material evidence discovered since the date of the decree appealed against and which was not available to the said party with the exercise of due diligence during the trial of the suit ?

I may mention that on the other questions raised before us, nemely, as to the identity of the lands specified in Ex. 9 and mesne profits subsequent to the institution of the suit I agree with my learned brother and to this extent there should be a further inquiry and finding.

Kumaraswami Sastri, J.—Plaintiff 1 is the appellant. He sued in the Subordinate Judge's Court of Negapatam to recover possession of certain properties sold to him by defendants 1 and 2 for Rs. 18,000. Defendants 3 and 4 are the sons of defendant 1 and defendants 5 and 6 are persons claiming under an agreement to sell prior to the date of the sale to plaintiff. Several defences were raised by the defendants but the only question material to the second appeal is as to the dedication of certain items of property conveyed to the plaintiff to a charity. This defence was raised by defendants 3 and 4. In para. 3 of their written statement they made the bald allegation that 36 acres of the said lands had been set apart by the family for charities, when or how is not stated. Issues were settled on 24th February 1912, but no issue was asked for or raised as to this alleged dedication though as many as eleven issues were raised with respect to the allegations in the written statements. On 3rd March 1913 two additional issues were raised, but even then no issues was raised as to the dedication. After the commencement of the trial and the examination of the plaintiff's witnessess and on 25th February 1914, the following additional issue was raised on a petition of defendants 3 and 4:

"Whether the items noted in the petition of defendant 3 and 4, dated 25th February 1914 are properties burdened with charity and are not liable to be alienated by defendant 1?"

The trial went on on that date and on 27th February, the case was adjourned to 2nd March and was closed on 18th March 1913. Judgment was delivered on 23rd March. The Subordinate Judge held that the sale of the items referred to in para. 61 of his judgment making 31 acres and 5 cents was invalid

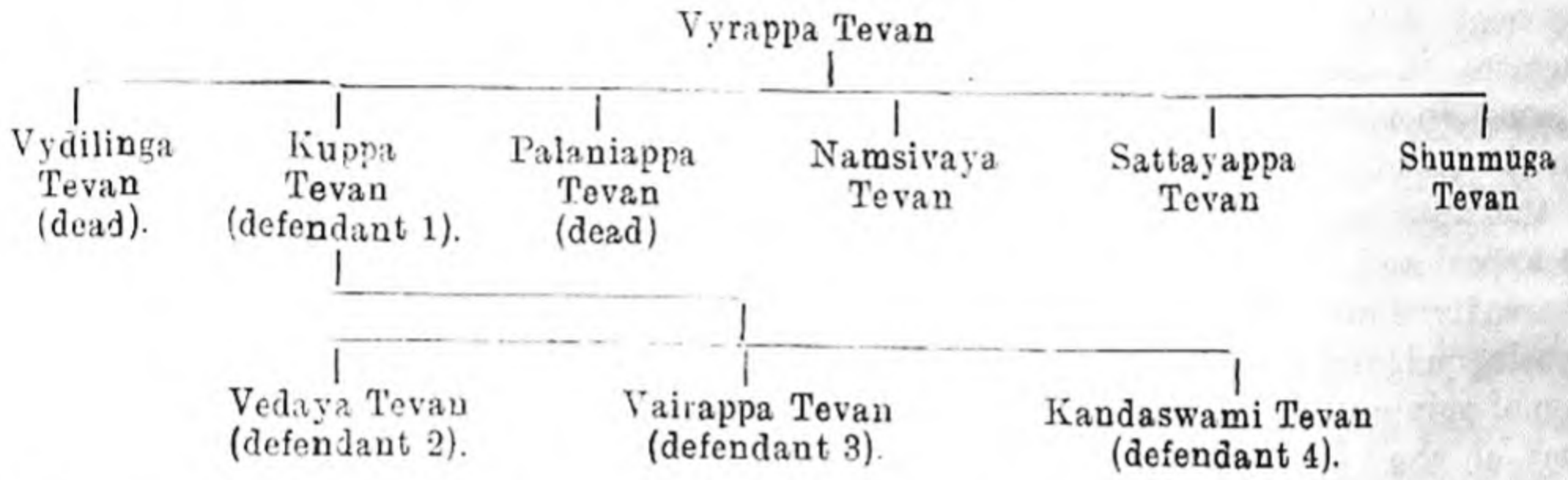
"as they relate to an endowment for maintaining a choultry at Tagattur,"

and gave a decree in favour of the plaintiff for the remaining items claimed. The defendants beyond filing Ex. 9, an agreement of partition dated 29th August 1870, adduce no evidence on the point. The plaintiff filed documents showing that the property had been dealt with by defendant 1 as his own property from 1882. Plaintiff appealed against the decree of the Subordinate Judge in so far as it dismissed his suit and during the pendency of the appeal applied for the admission of a decree of the Subordinate Court of Negapatam in Original Suit No. 26 of 1879 which according to him showed that there was no dedication of lands in Ekkur village as alleged by defendants 3 and 4, but that on the contrary the lands fell to the share of defendant 1. He alleged he was not aware of the decree before the suit was disposed of by the Subordinate Judge,

The District Judge dismissed his application, not on the gronnd that he was aware of the existence of the suit or the decree or could have known it if he had exercised reasonable diligence, but that the admission of the document would necessitate a remand and that:

"there would be no end to litigation if parties were allowed to call further evidence in this way."

I have already pointed out how the issue as to dedication was raised during the trial of the suit and what little time the plaintiff who is found to be a bona fide purchaser who paid the large sum of Rs. 18,000 had to adduce evidence on the point. He was a stranger and it is not suggested what means he had of knowing of a partition suit between the members of the family of the vendor about 32 years before his purchase. He did his best and the District Judge does not find that the non-production of the decree was due to any neglect or default of the plaintiff and the reasons he has given for refusing to admit it are unsound. There can be little doubt that the decree sought to be filed was a very material document. The following table sets out the relationship between the parties:—



The agreement of partition, Ex. 9, relied on by defendants 3 and 4 as evidencing the dedication to charity was executed by Vairappa Tevan, Kuppa Tevan, Palaniappa Tevan, Namasivaya Tevan and Vairappa Tevan and purports to set apart over 30 acres of land in Ekkur village for the upkeep of the choultry, besides other lands in other villages. Sattayappa Tevan and Shunmuga Tevan, the sons of Vairappa Tevan, who were alive at the date of Ex. 9 were not parties to the deed of partition and they filed Original Suit No. 26 of 1879 for a partition of all the family properties. The plea raised was that there had been a prior partition effected by Vairappa Tevan evidently under Ex. 9. The parties entered into a razinamah and a decree was passed in terms of the razinamah. This is the decree sought to be put in. It appears from the decree that the lands in dispute in this appeal were not dedicated to charity but fell to the share of defendant 1. It is contended that the agreement of partition, Ex. 9, would not bind the sons of Vairappa not parties to it as it purported to alienate a considerable extent of lands (about 120 acres) for the upkeep of the choultry and that the power of a Hindu father to effect a division is only validly exercised when it is a fair and equitable partition, he having no power to give properties to strangers. The decision of the Privy Council in *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (7) is relied on.

It is also contended that when the sons not parties questioned the partition Ex. 9, and there was a razinamah decree between the parties whereby other lands were given for the charity it was prima facie the only valid source of title for all parties including the charity. It may be that defendants have a good answer but unless they show that Ex. 9 continued in force in spite of the decree in Original Suit No. 26 of 1879 or was not affected by it, the decree will prima facie support the contention of plaintiff 1. As the document was very material and as the allegations in the plaintiff 1's affidavit (printed at p. 68 of the documents) have neither been traversed by the other side nor found to be false by the District Judge, I think that, having regard to the fact that the issue as to dedication was raised only during the course of the final hearing, the decree in Original Suit No. 26 of 1879 (as to the genuineness of which there is no dsipute) should have

(7) [1913] 40 Cal. 966=20 I. C. 958=40 I. A. 213 (P. C.)

been admitted in evidence by the District Judge. I am of opinion that the District Judge had power under the circumstances to admit the document in appeal. In *Andiappa Pillay* v. *Muthukumara Thevan* (2) it was held that the words "or for any other substantial cause" in S. 568, Civil P. C., 1882 (which corresponds to O. 41, R. 27 of the present Code) need not be ejusdem generis with the causes stated in the previous part of the section. In *Ambuja Ammal* v. *Appadurai Mudali* (3) a similar view was adopted and it was held that the words confer a wide discretion on the appellate Court to admit additional evidence when the ends of justice require it.

The learned Judges were of opinion that S. 107, Civil P. C., conferred on the appellate Court all the powers of the Court of first instance and were not inclined to follow the view taken by Abdur Rahim, J. (differing from Phillips, J.) in *Subba Naidu* v. *Ethirajammal* (8) that the expression "any other substantial cause" in O. 41, R. 27 is not to be understood in a wide and unrestricted sense but should be construed ejusdem generis with the causes in the other parts of the rule The decision of Phillips, J. was confirmed in Letters Patent Appeal: see *Vellayappa Chetty* v. *Nellaya Pillay* (9). In *Venkatachela Pillai* v. *Ranga Pillai* (6) it was held that the expression "for any other substantial cause" gave power to the appellate Court to admit fresh evidence on the same grounds that would justify the Court of first instance in granting a review and that the discovery of fresh and material evidence after disposal of the suit, the decree in which is appealed against, would be a substantial cause within the meaning of O. 51, R. 1. In *Peddibhotla Kameswaramma* v. *Bezwada Chelapathi* (5) the decision in *Andiappa Pillay* v. *Muthukumara Thevan* (2) was followed. *Arasappa Pillai* v. *Manika Mudaliar* (10) is distinguishable on the ground that the party had declared in the first Court that he had no evidence and the District Judge suo motu remanded the case for fresh evidence to be taken. The learned Judges while referring to *Andiappa Pillay* v. *Muthukumara Thevan* (2) were not prepared to extend the rule to such cases. In *Marimuthu Pillai* v. *Velu Pallai* (11) no grounds were shown why the evidence was not adduced in the lower Court and the District Judge acted suo motu and remanded the case.

It is argued that where fresh evidence is discovered after judgment which would justify the original Court in granting a review, the party should withdraw the appeal and apply for a review. This would obviously work hardship where the fresh document or evidence would only cover one or more of the issues and would not affect the decision of other matters decided by the lower Court which are included in the grounds of appeal. Besides if O. 41, R. 27 empowers the appellate Court to admit the evidence so discovered there is no reason why a party who has paid Court fees for the appeal should be again compelled to pay court-fee for a review of judgment, especially as he will have to pay the full court-fee if the review is presented after 90 days and one-half if it is paid before.

As the District Judge had power to admit the document there can be little doubt that he failed to exercise his discretion judicially. The only ground given by him for not admitting the document is that there would be no end to litigation if parties were allowed to produce further evidence in appeal. His duty was to see if the applicant's allegations were proved and the document sought to be filed was material and was discovered after the judgment in the lower Court was passed. If he had thought that the document was not material or that even if it was admitted it would not have influenced him in coming to a decision as to the correctness of the lower Court's judgment it would be another matter. But he did not apply his mind to any such question but dismissed the petition on a ground that is in my opinion irrelevant to the question in issue.

It is argued that the District Judge had a discretion under O. 41, R. 27 and that the High Court cannot in second appeal interfere even if he did not exercise his discretion properly. It is well settled that an appellate Court has power to interfere even if the matter is one relating to the exercise of discretion if the lower Court has exercised the discretion on a wrong principle or has disregarded

(8) [1911] 12 I. C. 673.
(9) [1911] 10 I. C. 675.
(10) A. I. R, 1915 Mad. 68=25 I. C. 587.
(11) [1916] 32 I. C. 908.

any principle of law. *Oriental Bank Corporation* In re (12), *Berdan* v. *Greenwood* (13), *Terrell*, In re (14). As pointed out by Lindley, L. J. in *Young* v. *Thomas* (15) the appellate Court will interfere if the judgment of the lower Court proceeded on an erroneous principle and had not really exercised any discretion at all. In *Sanderson* v. *Blyth Theatre Company* (16) Sterling, L. J., was of opinion that to enable the appellate Court to interfere there must be either a disregard of principle or a misapprehension of facts.

Section 100, Cl. (c), Civil P. C., gives a right of second appeal when there has been a substantial error or defect in the procedure provided by the Code which may possibly have produced error or defect in the decision of the case upon the merits. This applies obviously to error or defect of procedure of the lower appellate Court as well as the original Court. I fail to see why the refusal of the lower appellate Court to exercise its discretion under O. 41, R. 27, when such refusal is based on a mis-apprehension of the law or the nature and extent of the powers of an appellate Court under R. 27 cannot be said to be an error or defect in the procedure adopted by it in hearing the appeal, within the meaning of S. 100, Civil P. C. The evidence rendered may be such as to show that the decision appealed against cannot be supported and the party may have been perfectly bona fide. To hold that in such cases an appellate Court may, on a totally erroneous view of its powers under O. 41, R. 27, reject the evidence tendered, and that the High Court in second appeal though convinced of the error cannot interfere, would lead to obvious hardship. There is nothing in the provisions of S 100 which compel the Court to place such a restriction on its powers. In *Moni Lal Bandopadhya* v. *Khiroda Dasi* (17) which was a case where the District Munsif refused to grant an adjournment asked for to produce certain witnesses, it was held that this was a substantial error in procedure which would justify the High Court in interfering in second appeal. The report also contains a judgment by three learned Judges of the High Court where they held that it was open to the High Court in second appeal to examine the proceedings to see whether the Court below exercised a sound discretion or not. In *Hafiz Abdul Karim* v. *Sri Kissen Rai* (18) it was held that improper admission of evidence by the appellate Court in the exercise of its discretion may be set aside in second appeal and in *Arasappa Pillai* v. *Manika Mudaliar* (10) and *Marimuthu Pillai* v. *Vela Pillai* (11) already referred to by me, the High Court in second appeal set aside the appellate Court's decree on the ground that evidence was wrongly admitted. If a discretion wrongly exercised in admitting evidence under O 41, R. 27 can be set aside I fail to see why a wrong exercise of discretion in refusing to admit material evidence should be allowed to stand.

Two other questions remain for determination. There is nothing to show that the lands specified in Ex. 9 are included in the sale deed to the plaintiff and form part of the plaint mentioned items. The lands in Ex. 9 are described by paimash numbers and there is nothing to show what the corresponding survey numbers are. I find no admission appearing anywhere to show that the items excluded by the decree of the Subordinate Judge as charity properties are the items in Ex. 9. The allegations by the vakil for the appellant that certain items specified in defendant 3's petition to raise additional issues (printed at p. 8 of the printed papers) are not in the decree, and certain items not in the petition find their place in the decree, is not shown to be incorrect. There should be a clear finding as to which of the items claimed in the plaint and covered by the sale deed to plaintiff were included in Ex. 9 and dedicated to charity. As regards mesne profits no reason has been assigned for not granting the prayer of the plaintiff for future mesne profits in respect of the lands which have been decreed to him. O. 20, R. 12 empowers the Court to assess future mesne profits and there is no reason to drive plaintiff to another suit.

I would reverse the decree of the Subordinate Judge in so far as it dismisses the plaintiff's suit and direct the District Judge to dispose of the appeal after ad-

(12) [1887] 56 L. T. 858.
(13) [1882] 20 Ch. D. 764n.
(14) [1883] 22 Ch. D. 413.
(15) [1892] 2 Ch. 134.
(16) [1903] 2 K. B. 533.
(17) [1893] 20 Cal. 740.
(18) [1885] 11 Cal. 139.

mitting the document sought to be filed in the light of the above observations. It will be open to the District Judge to raise further issues. Costs will abide and follow the result. As my learned brother takes a different view as to the powers of the High Court to interfere in second appeal, I agree to the order of reference to the Full Bench proposed by him.

Opinions.

Wallis, C. J.—The attention of the learned Judges who made the reference does not appear to have been called to the long catena of decisions in Calcutta and to the decisions to the same effect in Allahabad. Shortly after the coming into force of the Code of 1859 it was decided by Sir Barnes Peacock and Jackson, J. J.—*Beckwith* v. *Kishto Jeebun Buckshee* (19) that no special or second appeal lay from a refusal by the lower Appellate Court to admit fresh evidence under S. 355 of that Code which re-appears as O. 41, R. 27 of the present Code. The decisions in *Mohesh Chunder Sheet* v. *Shoshee Mookhee Debia* (20), *Golam Mukdoom* v. *Hofeezoonisa* (21) *Kulpo Singh* v. *Thakur Singh* (22), *Prem Chand Moonshee* In the goods of, *Upedra Mohan Ghose* v. *Gopal Chandra Ghose* (23) are to the same effect, as are decisions of the Allahabad Court in *Ram Piari* v. *Kallu* (24) and *Durga Prasad* v. *Jai Narain* (25). There are no reported decisions in Madras and Bombay as there must have been if this long line of authorities had ever been questioned in these Courts. It has, I think, long been the practice of all the High Courts not to entertain second appeals from refusals of the lower Appellate Court to admit fresh evidence under this rule. I am not prepared to depart from this practice and would answer the question in the negative.

Ayling, J.—In my opinion the answer to the reference must be in the negative. The effect of O. 41, R. 27, Cl. (b) is to empower an Appellate Court to admit additional evidence provided it requires the evidence to enable it to pronounce judgment or for any other substantial cause. Whether it requires the additional evidence or not is for the appellate Court itself to say, and it is not for a superior Court to control its discretion, or to say that it ought to have required it where as a fact, it did not. I would respectfully adopt the reasoning of Sale, J., in *Prem Chand Moonshee*, In the goods of, *Upendra Mohan Ghose* v. *Gopal Chandra Ghose* (23) which is in accordance with a long catena of early Calcutta decisions beginning with a judgment of Peacock, C. J., and Jackson, J., reported in *Beckwith* v. *Kishto Jeebun Buckshee* (19). That the word "requires" in the corresponding S. 568 of the old Code means nothing more than "needs" or "finds needful" has been expressly decided by the Privy Council in *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1) and this pronouncement, as it seems to me, concludes the matter if authority were needed.

Sadasiva Aiyar, J.—I regret that I have the misfortune to differ from my Lord and Ayling, J., on this reference. It having been now settled in this Court that good grounds for review are also good grounds for the appellate Court to allow further evidence to be adduced, the question whether the appellate Court exercised its decision properly in refusing to admit such evidence seems to be clearly a question of law which we are entitled to consider in second appeal. As regards Cl. (b), O. 41, R. 27, I am clear that 'or for any other substantial cause' is not governed by the expression "the appellate Court requires." S. 355 in the old Civil Procedure Code (Act 8 of 1859) from which this O. 41, R. 27 has come down clearly shows that "or for any other substantial cause" is an independent ground and is not governed by the words in the first portion of Cl. (b), there being no division into clauses in the old Act of 1859, S. 355. It cannot be argued for a moment that if the Appellate Court notwithstanding that the condition in Cl. (a) has been fulfilled, (namely, the Court from whose decree the appeal is preferred having refused to admit evidence which ought to have been admitted) refuses in appeal to admit such evidence, the second appellate Court cannot interfere with that discretion so improperly exercised by the first Appellate Court. I do not see why when the condition in what I call the third clause, namely the existence of any other subs-

(19) Marsh 278.
(20) [1866] 6 W. R. 196.
(21) [1867] 7 W. R. 489.
(22) [1872] 15 W. R. 429.
(23) [1894] 21 Cal. 484.
(24) [1901] 23 All. 121.
(25) [1910] 9 I. C. 265.

tantial cause is fulfilled and yet the discretion to admit additional evidence in such a case is wrongly exercised by the first appellate Court, the second appellate Court should be prevented from interfering. As regards the Allahabad and Calcutta cases, if they meant more than that the discretion given in cases falling under Cl. (b) to the first appellate Court should not be lightly interfered with by the second appellate Court, I respectfully differ from those decisions.

Let me put the following illustration. The trial Court in a clear case where it ought to have granted a review on the ground of conclusive evidence which was not in the power of a party to produce having been afterwards discovered rejects the application for review—such rejection is not appealable. But this Court has power under its general revisional powers to direct the trial Court to accept the application for review. If so, why should the Court be powerless because a second appeal has been preferred from the decision of an appellate Court which, in a similarly clear case, refused to exercise its descretion to admit additional evidence, such a case being (as I said) fully analogous to an application for review? Further S. 105, Cl. (1) shows that even where an appeal might not lie from an order made by the Appellate Court (such as an order refusing to admit additional evidence) where the decree of the appellate Court itself is appealed against in second appeal, the error in the interlocutory order refusing to admit additional evidence may be set forth as a ground of objection in the memorandum of second appeal. Again, suppose that treating the order of a District Court refusing to admit additional evidence as an independent order a revision petition had been filed to this Court against that order, I see nothing to prevent us, in a clear case, from setting aside that order in revision. Why should such a prayer for revision of that order be not embodied as a ground in the memorandum of second appeal. In the result, I agree with Kumaraswami Sastri, J., in saying that this Court has power in second appeal to consider the propriety of the exercise of the discretion of the District Judge as regards the admission of additional evidence though, of course, that discretion would not be interfered with lightly any more than the discretion of a Court rejecting a review petition, would be lightly interfered with in revision. I think that the power to consider and decide on the question should be affirmed as existing in this Court in second appeal.

S.N./R.K. *Answered in the negative.*

A. I. R. 1919 Madras 1172

OLDFIELD AND SESHAGIRI AIYAR, JJ.

Aiyathurai Pillai — Plaintiff—Appellant.

v.

Gnanaprakasa Odayar—Defendant—Respondent.

Letters Patent Appeal No. 39 of 1918, Decided on 20th February 1919, against judgment of Bakewell, J., in Civil Revn. Petn. No. 113 of 1917.

Evidence Act (1872), S. 115—Suit instituted in Small Cause Court—Defendant objecting to jurisdiction—Plaint presented to proper Court—Revision against decree—Defendant is estopped from objecting to jurisdiction of ordinary Court.

Plaintiff instituted a suit on the Small Cause Side of the Munsif's Court. The defendant pleaded want of jurisdiction by the Small Cause Court and on his objection, the Court returned the plaint for presentation on the ordinary side. Against the decree of the District Munsif, there was an appeal to the Subordinate Judge and against the appellate decree of the latter a revision petition was filed in the High Court. The defendant raised the objection in the High Court that the suit was of a small cause nature and that no appeal lay to the Subordinate Judge:

Held: that the defendant was estopped from raising the objection. [P 1172 C 2]

C. V. Ananthakrishna Aiyar—for Appellant.

S. T. Srinivasagopalachariar — for Respondent.

Judgment.—We are constrained to differ from the learned Judge and to hold that the question of jurisdiction cannot be raised. The appellant before us presented his plaint on the Small Cause Side. The learned Judge allowed the present respondent to argue that no appeal from the decision of the District Munsif in the litigation that was initiated would lie, because the suit was of a Small Cause nature and the order of return for presentation on the ordinary side was wrong. The order was not appealed against and was obtained on respondent's objection. We do not think, and have been shown no authority, that he was entitled at a later stage to object to the jurisdiction, which he had himself designated as the proper one. The learned Judge's decision is set aside and the civil revision

petition remanded for rehearing with reference to the other points taken in it. Costs to date will follow the result and be provided for in the order to be passed.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 1173
Full Bench

WALLIS, C. J., SADASIVA AIYAR AND SPENCER, JJ.

(*Aramproth Illoth*) *Vasudevan Moosad Karnavan* and *another* — Defendant—Appellants.

v.

(*Kattadi Moothedath*) *Ittirarichan Nair*—Plaintiff—Respondent.

Second Appeal No. 1288 of 1916, Decided on 13th March 1918, against decree of Dist. Court of South Malabar, in Appeal Suit No. 789 of 1915.

Malabar Law—Pre-emption — Right to—Otti mortgagee cannot claim in involuntary sales—No notice of auction sale is required—Civil P. C. (5 of 1908), O. 21, Rr. 89 to 92.

The right of pre-emption of an otti mortgagee in Malabar does not arise in the case of an involuntary sale, and he is not entitled to notice of the sale or of the sale price in such a case: 13 *All.* 224, *Appr.* [P 1175 C 1]

C. V. Anantha Krishna Aiyar and *K. P. Ramakrishna Aiyar*—for Appellants.

C. Madhavan Nair—for Respondent.

Order of Reference

Phillips, J.—In this case the plaintiff is an ottidar of the plaint property. The jenmi granted a second mortgage, and in execution of a decree upon that mortgage defendant 1's brother purchased the property subject to plaintiff's otti right. Defendant 1 then sued for redemption of the otti and obtained a decree. Plaintiff now sues to enforce his right of pre-emption. The question for consideration is the nature of the rights of an ottidar, when the property, over which he holds the otti, is sold in Court auction. In *Cheria Krishnan* v. *Vishnu* (1) it was held that an otti mortgagee was entitled "to be fully informed what price he is to pay before he makes up his mind to buy" and that although he has notice of the sale by auction but fails to bid, he is not precluded from subsequently exercising his right of pre-emption. In *Ammotti Haji* v. *Kunhayen Kutti* (2) a somewhat different view was taken and it was held that an ottidar in Malabar loses his right of pre-emption if he fails to bid at a Court sale of the land after having been specially invited to attend and exercise his right, and makes no offer to take the property for a long time after the Court sale. The only distinction between the two cases is that in the former the ottidar had only public notice of the sale whereas in the latter he had had special notice. In *Kanaran Nair* v. *Raman Nambiar* (3) this Court followed the ruling in *Cheria Krishnan* v. *Vishnu* (1), although the ottidar had had special notice of the sale and distinguished *Ammotti Haji* v. *Kunhayen Kutti* (2) on the ground that there may have been evidence in that case on which it could be held that the ottidar had been placed in a position to elect.

It is very difficult to reconcile these three decisions and I think it advisable that the question should be finally determined by a Full Bench, and I am further inclined to the opinion that the decision in *Cheria Krishnan* v. *Vishnu* (1) goes too far. An ottidar is a mortgagee with a right of pre-emption. It is contended for respondent that the pre-emption right of an otti mortgagee in Malabar is something higher than the right of pre-emption as ordinarily understood, it being a right based on custom. The right of an ottidar has been considered by Courts in Madras from 1854 onwards, but the question of whether his right of pre-emption was greater than the ordinarily recognized rights of pre-emption in other places does not appear to have been discussed. In *Cheria Krishnan* v. *Vishnu* (1), however the learned Judges say that "the right of pre-emption is well understood. The otti mortgagee must pay for pre-emption whatever sum is bona fide offered to the jenmi for the purchase, if he has the offer made to him by the jenmi and is rightly informed of the circumstances in reference to the offer. If he does not pay such sum then his right of pre-emption is gone."

In *Mamabi* v. *Acharath Parakat* (4) the previous cases on the subject of otti were reviewed and it was held that the right of an ottidar consists in a right to elect when there has been an attempt on the part of the owner of the property to sell it to a third person, whether he will buy it for the same price as that offered by the third person or not. There would seem to be no difference between the right defined as above, and the ordinary right of pre-emption (as understood in

(1) [1882] 5 Mad. 198.
(2) [1892] 15 Mad. 480.
(3) [1894] 4 M. L. J. 46.
(4) [1912] 38 Mad. 67=17 I. C. 337.

Mahomedan and other laws). When therefore the owner intends to sell the land by private treaty, the ottidar is entitled to come in and buy it at the same price, and according to *Cheria Krishnan* v. *Vishnu* (1) and *Vasudevan* v. *Keshavan* (5), he is further entitled to have an offer to that effect from the owner of the property, although this further right is doubted in *Mamabi* v. *Acharath Parakat* (4). When the property is to be sold by Court, it is an involuntary sale and presumably one contrary to the wishes of the owner. In such a case he cannot predict the price at which the property will be sold, and consequently he cannot offer the property to the ottidar for a certain fixed price. If he is to offer it after the sale is completed, he will be making an offer which may have the effect of upsetting a sale by Court even after it is confirmed. It is questionable whether it is desirable that the right of pre-emption should be allowed to that extent, unless it is clearly established that the right does go so far.

In *Baij Nath* v. *Sital Singh* (6), Mahmood, J., held that the right of pre-emption, whether claimed under the Mahomedan law, the compact of the wajib ul-arz or local usage and custom, does not arise in respect of compulsory sales, and in this view followed *Abdul Jabel* v. *Khelatchandra Ghose* (7), *Shaikh Ferasut Ali* v *Ashootosh Roy Singh* (8) and *Sheikh Nuzmoodeen* v. *Kanye Jha* (9). This aspect of the question does not appear to have been considered in relation to the pre-emptive rights of an ottidar in Malabar, but the arguments of Mahmood, J., in support of his view would equally apply to such rights. In equity the ottidar would be entitled to notice of the sale of property in which he has so large an interest, but I can see no ground for showing him any greater consideration. His right of pre-emption arises out of a contract between him and the owner, and when by order of Court the owner is prevented from intimating the exact amount of the sale price, he should in equity be deemed to have completed his part of the contract when he has informed the ottidar that a sale is to take place and has thus afforded him an opportunity of buying at the price which the property would properly fetch, assuming that the right of pre-emption arises in such cases. There is no question of his being driven to give a fancy auction price, as remarked in *Cheria Krishnan* v. *Vishnu* (1), for he is not compelled to buy—can cease bidding whenever the bidding has reached the amount which he is willing to pay for the land. We therefore refer the following questions for decision by a Full Bench : 1. Does the right of pre-emption of an otti mortgagee arise in the case of an involuntary sale ? 2. If so, is he entitled to be informed of the sale price before he can be called upon to exercise or forego his right, or is mere notice of the auction-sale sufficient ?

Ayling, J.—I agree to the proposed reference : and am inclined to share my learned brother's view as to the applicability of the right of pre-emption in relation to enforced sales.

Opinions

Wallis, C. J.—It is strange that in none of the cases in this Court dealing with the ottidar's right of pre-emption in Malabar, *Cheria Krishnan* v. *Vishnu* (1), *Vasudevan* v. *Keshavan* (5), *Kanharankutti* v. *Uthotti* (10), *Ammotti Haji* v. *Kunhayen Kutti* (2), *Kanaran Nair* v. *Raman Nambiar* (3) or *Mamabi* v. *Acharat Parakath* (4) has the question been considered, how far such a right can be exercised in the case of Court and Revenue sales consistently with the provisions of the Statute law regulating such sales. Both in Bengal and in Northern India, where cases of pre-emption are much more numerous than they are here, it appears to be well settled that it cannot in the absence of statutory provision being made for its exercise, as in the case of some revenue sales in the United Provinces. In *Baij Nath* v. *Sital Singh* (6) Mahmood, J., after reviewing the authorities, states :

"It may therefore be taken as a rule of law settled by a long and uniform course of decision that a compulsory sale, such as a sale in execution of a decree or a sale under an authoritative order of the revenue authorities for arrears of Government revenue, does not render pre-emption enforcible, whether such right is claimed under Mahomedan law, the terms of the wajib-ul arz, or on the ground of local custom or private contract ; but that such compulsory sales being the creation of Statute law do furnish occasion for the exercise of the pre-emptive right

(5) [1884] 7 Mad. 309.
(6) [1891] 13 All. 224.
(7) [1868] 1 B.L.R. A C.J. 105=10 W.R. 165.
(8) [1867] 15 W.R. 455.
(9) Marsh 555=2 Hay 651.
(10) [1890] 13 Mad. 490.

where such right is provided subject to the rules and restrictions prescribed by those legislative enactments themselves."

And he goes on to refer to the provisions of S. 310 of the Code of 1882 and other local statutory provisions. The other learned Judges did not differ from Mahmood, J., on this point, but on the question whether such special statutory provisions had been made in the particular case, and the law as laid down by him was accepted as settled in *Kanhai Lal* v. *Kalka Prasad* (11). On a careful consideration of the question I agree with the law as laid down by Mahmood, J. I find it quite impossible to reconcile the statutory provisions of the Civil Procedure Code as to sale in execution of decrees with the ottidar's right of pre-emption as now claimed. S. 60 of the Code makes immovable property belonging to the judgment-debtor liable to attachment and sale in execution of a decree, and S. 65 provides that, where property has been sold in execution of a decree and the sale has become absolute, it is to vest in the purchaser. Under O. 21, R. 92, it becomes absolute where no application is made under Rr. 89, 90 or 91, Civil P. C. 1908, or where such application is made and disallowed The rules in question do not provide for the exercise of a right of pre-emption.

There is a very limited recognition of the right of pre-emption in R. 88, and if any further recognition had been intended, it would have been expressly provided. Having regard to the course of the decisions and the importance of the right of pre-emption in Northern India, I can only infer that the omission to make such provision was deliberate. In *Manchester Ship Canal Company* v. *Manchester Racecourse Company* (12) it was contended on the one side and not denied on the other that a right of pre-emption was quite incompatible with a sale by auction. In these circumstances we are bound, in my opinion, even at this late stage to uphold the objection taken and to answer the question in the negative.

Sadasiva Ayyar, J.—I entirely agree and have nothing to add.

Spencer, J.—I also agree.

S.N./R.K. *Reference answered, in the negative.*

(11) [1905] 27 All. 670.
(12) [1901] 2 Ch. 37=70 L.J. Ch. 468.

*A. I. R. 1919 Madras 1175

WALLIS, C. J. AND KUMARASWAMI SASTRI, J.

Vinjanampati Peda Venkanna and *another*—Defendants—Appellants.

v.

Vadlamannati Sreenivasa Deekshatulu—Plaintiff—Respondent.

Second Appeal No. 339 of 1916, Decided on 28th August 1917, against the decree of Dist. Judge, Guntur, in Appeal Suit No. 8 of 1915.

***Hindu Law—Debts—Father—Debt incurred by father before partition and renewed after partition without authority of son.—Son is not liable.**

Under the Hindu law a son is not after a bona fide partition liable to be proceeded against in respect of a simple personal debt incurred by the father before partition and renewed after partition without any authority from the son: (*Case-law discussed*). 39 *I. C.* 280; (*P. C.*), Expl. Per *Kumaraswami Sastri, J.*—The rule of Hindu Law as to the extent of the son's pious obligation to pay the debts of his father is circumscribed by the possession of assets or joint family property and does not attach to the son's self acquisitions. So far as the creditor of the father is concerned, all that he can do is to avail himself of any remedy that may be open to the father and to work it out either by suit or in execution proceedings, and if the father has lost his power of dealing with the son's interests owing to a bona fide partition between them, the creditor can be in no better position [P 1178 C 1,2]

M. O. Parthasarathy Aiyangar—for Appellants.

A. Krishnaswami Aiayr for *V. Ramadoss*—for Respondent.

Wallis, C. J.—The question in this second appeal is whether a son can be made liable, during his father's lifetime, as held by the District Judge, on a promissory-note executed by his father after partion in renewal of a note executed by the father before partition. One of the contentions raised by Mr. Parthasarathy for the appellant is that since the recent decision of the Judicial Committee in *Sahu Ram Chandra* v. *Bhup Singh* (1), payment of the father's debts cannot be enforced by suits against the sons during the father's life-time. This is a most important question because, if the contention is right, the recent decision involves the overruling of what has long been treated in this and other High Courts as a settled rule of everyday application, and it is, therefore incumbent upon us to statisfy overselves that this result is really involved in the recent decision.

(1) A. I. R. 1917 P. C. 61.

Now there are two distinct and closely connected things, one, the father's power to bind the sons' shares by alienations during his life-time for debts not incurred for necessary purpose and not tainted with immorality, and the other the creditor's remedies by suit in respect of such debts against the sons' shares; and this distinction is observed in the well-known passage of Lord Hobhouse's judgment in *Nanomi Babuasin* v. *Modhun Mohun* (2), which is quoted in the recent decision. That decision relates to the first question, viz., whether the father's power of alienation to satisfy the class of debts already mentioned could only be exercised where debt was antecedent or extended to alienations for present debts as well, and does not of itself affect the other question as to the extent of the creditors' remedies by suit against the sons' shares. It is said, however that the reasoning of the judgment is inconsistent with the Indian rulings as to the creditors' remedies aginst the son during the father's life-time, and the passage on which most realiance is placed is as follows:

"While the father, however remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing, and the validity of a mortgage over the joint estate is quite another thing."

Now it may be said that the reasoning in this passage applies equally whether the debt for which the alienation is made by the father is an antecedent debt or a present debt and that it involves a departure from the decisions in *Girdharre Lall* v. *Kantoo Lall* (3), *Suraj Bunsi Koer* v. *Sheo Persad Singh* (4), *Nanomi Babuasin* v. *Modhan Mohun* (2) and other decision of their Lordships, in which the father's right to alienate for antecedent debts was rested on the pious obligations of the sons to pay them. Their Lordships, however considered that the rule as to alienations for an antecedent debt was too firmly established to be disturbed, and treated it as an exception from a general and sound principle not to be extended and to be very carefully guarded. They proceeded to say that much, if not all, the law upon the subject had arisen from the necessity of protecting the rights of third persons, say the purchasers of the property who have taken their title for onerous consideration and in good faith, and quoted with approval a passage from the judgment of Sir John Stanley, C. J., which thus interpreted the observations in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (4). They then set out the well-known passage from Lord Hobhouses' judgment in *Nanomi Babuasin* v. *Modhun Mohun* (2), which contains the express statement that the sons cannot set up their rights against the remedies of the creditors for debts not tainted with immorality, and observed that it lent no countenance to the idea that the joint family estate could be effectively sold or charged except where the sale or charge had been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate.

It is important to note that their Lordships, perhaps advisedly, did not say here that the joint family estate cannot be sold by the Court in satisfaction of an antecedent debt, or comment on the very general words as to the extent of the creditor's remedies to which so much importance has been attached by all the Courts in India. They then observed that they had set forth the limits to the exception, because they formed a guide to the settlement of the conflict of authority in India on the subject of antecedent debt; and after mentioning the cases in which the conflict arose they again adopted as the true rule the statement of Sir John Stanley as to alienation by the father for an antecedent debt. There is no reference to the subject of the creditor's right by suit to bring the son's interest to sale for an antecedent debt, or to the Indian decisions affirming that right; and the question is whether these decisions which proceed upon the authority of their Lordships' earlier de-

(2) [1886] 13 Cal. 21=13 I. A. 1=4 Sar. 682 (P. C.).
(3) [1836] 1 I A. 321=22 W. R. 56=3 Sar. 380 (P. C.).
(4) [1880] 5 Cal. 148=6 I. A. 88 (P. C.)

cisions should now be overruled because, it is said, the reasoning in the recent judgment is in favour of allowing the sons to resist a sale of their shares. As to this, Lord Halsbury's well known observations in *Quinn* v. *Leathem* (5), that a case is only an authority for what it decides, and not for every proposition that may seem to follow logically from it, appears to me to apply with special force. That the Indian Courts have interpreted the earlier decisions ending with *Nanomi Babuasin* v. *Modhun Mohun* (2), in which last case it is stated that the sons cannot set up their rights against the creditor's remedies for their debts if not tainted with immorality, as authorizing suits for such debts against the son as well as the father may be seen, as regards Calcutta, from the Full Bench decision in *Lehmun Dass* v. *Giridhur Chowdhry* (6) and the judgment of Mookerjee and Holmwood, JJ , in *Kishen Pershad Chowdhry* v. *Tipan Pershad Singh* (7), where the other decisions are dealt with. The point was expressly decided in *Jagabhai Lalubhai* v. *Vijbukandas Jagjivandas* (8), after the decisions in *Nanomi Babuasin* v. *Modhun Mohun* (2), and that decision is followed in *Umed Hathising* v. *Goman Bhaiji* (9).

In Allahabad there is an express decision of a Full Bench in *Karan Singh* v. *Bhup Singh* (10), and this decision to which Sir John Stanley, C. J., was a party was referred to by him in his judgment in *Chandra Deo Singh* v. *Mata Prasad* (11), which is repeatedly referred to with approval by their Lordships in the recent case. As regards our own Court, the case is, if anything, stronger, because it has expressly based the creditor's right to bring to sale the sons' shares for an antecedent debt on the father's right to sell the sons' shares for such a debt, a right which is expressly recognized. In the leading case in *Ponnappa Pillai* v. *Pappuvayyangar* (12), which overruled the earlier decisions of this Court in deference to *Giridharee Lall* v. *Khantoo Lall* (3) and *Suraj Bansi Koer* v. *Sheo Persad Singh* (4), Sir Charles Turner, C. J., in a judgment approved by the Privy Council in *Muttayan Chetty* v. *Zamindar of Sivagiri Vira Pandia Chinnatambiar* (13), observed at p. 64 that when it is decided that for the discharge of debts other than debts incurred for immoral purposes, a father can make a valid alienation of ancestral property so as to bind his sons' interest, it is a corollary that the interest of the sons as well as of the father may be attached and sold in execution for such a debt. Again in the Full Bench decision in *Ramasami Nadan* v. *Ulaganatha Goundan* (14), which has been treated till now as finally settling the question in this Presidency, Shephard, Offg. C J., observed at p. 61:

> "Since 1874, the decisions of the Judicial Committee are consistent in holding that as the son's liability may be enforced through the medium of a sale of the ancestral property executed by the father, so it may be enforced by a sale in execution of a decree against the father and that in neither case can the son recover the property except by proving that the debts were of a kind for which he would not be liable."

Benson, J., also proceeded on the authority of the Privy Council decision. Subramania Aiyar, J., went some what further, and held in an elaborate judgment that under Hindu law a son was liable for his father's debts even in the latter's life-time, a conclusion which is perhaps hardly reconcilable with the recent decision of their Lordships. This Court has adhered to the view of Turner, C. J., and has held in a series of cases that, as the effect of partition is to put an end to the father's right to sell the son's share for an antecedent debt, it also puts an end to the creditor's right to bring the son's share to sale during his life-time, at any rate where the partition has not been effected to defeat and delay creditors. *Krishnasami Konan* v. *Ramasami Ayyar* (15), *Rathna Naidu* v. *Aiyanachariar* (16) and *Devagupatapu Kameswaramma* v. *Vadaddi Venkatasubba Rao* (17).

In these circumstances, and as it appears to me that the creditor's right to bring the sons' shares to sale for an antecedent debt and the long line of decisions which support it were not considered by their Lordships in the recent case

(5) [1901] A. C. 495.
(6) [1880] 5 Cal. 885.
(7) [1907] 34 Cal. 735.
(8) [1887] 11 Bom. 37.
(9) [1896] 20 Bom. 385.
(10) [1904] 27 All. 16.
(11) [1909] 31 All. 176=1 I. C. 479.
(12) [1882] 4 Mad. 1.
(13) [1883] 6 Mad. 1=9 I. A. 128 (P. C.)
(14) [1899] 22 Mad. 49.
(15) [1899] 22 Mad. 519.
(16) [1908] 18 M. L. J. 599.
(17) A. I. R. 1914 Mad. 828=38 Mad. 1120=24 I. C. 474.

I think it should not be treated as overruling them, and that, if we are to depart from what has been the settled law of this and other High Courts for so many years, it should be in deference to a clear expression of their Lordships' opinion with reference to this particular question, and not on any inference from the reasons given by their Lordships in settling a conflict in the Indian Courts on another point. 'While we overrule Mr. Parthasarathi's first contention, he is entitled, as appears from what I have already said, to succeed on the ground that the suit was filed by the creditor after partition, to say nothing of the further ground that the father had no authority from the son to renew the note after partition. The appeal is allowed, and the decree of the District Munsif restored with costs here and in the lower appellate Court.

Kumaraswami Sastri, J.—I have had the advantage of reading the judgment of my Lord and agree in holding that the second should appeal be allowed, not on the broad question raised by Mr. Parthasarathy Aiyangar as to the non-liability of a son to pay his father's debts during the father's lifetime, a conclusion which, according to appellants' counsel, is the logial result of the recent decision of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1), but on the narrower one that son is not after partition liable to be proceeded against in respect of a simple personal debt incurred by the father before partition, whatever his rights may have been if they had continued joint.

It has been contended by Mr. Krishnaswami Aiyar, that the pious duty which lay on the son to discharge his father's debts is under Hindu law irrespective of the possession of any assets or joint family properties and that consequently it is unaffected by any partition and attaches so long at least as there is any property, which was once joint property, in existence in the son's hands, the change in the character of the property created by the partition being unaffected by an obligation which arose irrespective of the possession of any assets.

Whatever may be the strict rule of Hindu law as to the extent of the pious obligation, it has been now well settled that it is circumscribed by the possession of assets or joint family property and that it does not attach to the son's self-acquisitions. So far as the creditor of the father is concerned, all that he can do, is to avail himself of any remedy that may be open to the father and work it out either by suit or in execution proceedings and if the father has lost his power of dealing with the son's interest owing to a bona fide partition between them, the creditor can be in no better position. The effect of a bona fide partition is prima facie to secure to each of the parties absolute control over the properties that fall to his share unfettered by any liabilities which at the date are not charged upon them. The personal debts of each member are payable only out of his share and the transaction is one in the nature of conveyance by one party to the other of the property that falls to him. There is nothing in Hindu law to prevent a father from taking certain properties absolutely or receiving certain benefits and releasing the son from the duty cast upon him by Hindu Law to pay his debts and so long as the transaction is bona fide, a simple creditor can have no right to object to a transaction which both the father and son were competent to enter into.

In *Krishnasami Konan* v. *Ramasami Ayyar* (15) it was held that after a bona fide partition between a father and son it was not open to the creditor, at least during the father's life-time, to proceed in execution against the son's share in respect of a decree obtained against the father. In *Rathna Naidu* v. *Aiyanachariar* (16) it was held, following the above case, that a Hindu father had no power to mortgage the share got by the son on partition, even though the mortgage was in respect of a debt that was contracted before partition. 'In *Devaguptapu Kameswaramma* v. *Vadaddi Venkatasubba Rao* (17) Wallis, C. J., after reviewing the authorities, followed the decision in *Krishnasami Konan* v. *Ramasami Ayyar* (15) and held that a creditor had no right to proceed against the son's properties. With reference to *Ramachandra Padayachi* v. *Kondayya Chetti* (18), cited by the respondent's vakil, it is distinguishable, as the debts sued on arose of a joint family business carried on by the father and son before partition and the liability of the son

(18) [1901] 24 Mad. 555.

rested, not merely on his pious obligation to pay a debt incurred without any family necessity or for the family benefit, but on contract, every member being liable on the contract entered into in respect of a joint family trade at least to the extent of the joint family, assets, as the profits of the trade would in the ordinary course be shared by all the members.

In the case of renewal by the father alone after partition of a note executed before partition, the case is much stronger as I can see no equity in allowing a Hindu father to renew and keep alive a debt (increased by the addition of interest and principle at each renewal), so as to throw upon the son the duty of paying it out of properties that fall to his share. The renewed note must, in my opinion, be treated as a new obligation incurred after partition. It has been argued that in the present case the creditor took the note without notice of the partition. I do not think this will make any difference so far as the son's rights are concerned. The pious duty creates no charge on the son's share prior to partition, the presumed agency of the father ceases on partition and as the creditor can only work out the father's rights at the date of the suit, he can have no right if that is lost owing to a bona fide partition.

Turning to the broader question raised, I do not think that we can in effect overrule a series of decisions and disturb the settled state of the law, mainly based on the previous decisions of the Privy Council, without some more definite pronouncement of their Lordships in a case in which the question is directly raised. In *Sahu Ram Chandra* v. *Bhup Singh* (1) their Lordships of the Privy Council, while upholding the father's power of alienation either by an absolute sale or a mortgage of joint property in order to satisfy an antecedent debt meet the contention that so long as there is a pious duty the distinction between antecedent and contemporaneous debts is immaterial, with the following remarks:

"While the father however remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged."

It has been argued that this involves two propositions; namely, (1) that the pious obligation does not arise till the death of the father; and (2) that it is debt only enforceable to the extent of the debt which cannot be met out of the portion of the share or assets of the father. Pushed to its logical conclusion the observations above cited do not doubt, while preserving (1) to the father the right to deal with his son's shares by sale or mortgage so long as it is for the purpose of discharging an antecedent debt; (2) to a mortgagee for an antecedent debt the right to proceed against the sons' share; and (3) to a purchaser to whom property is sold to satisfy an antecedent debt the right over the entire property including the sons' share negative the right of a simple creditor or a transferee not for an antecedent debt to proceed against the sons' share during the life-time of the father or, in other words, subordinate the rights of the creditor of the father whose debt is not for the family benefit to the Mitakshara rights of the sons in respect of their undivided share and puts him qua such debts in the same position as if he was the creditor of any other member of a joint Mitakshara family. The result is to overrule a series of decisions, referred by the Chief Justice in his judgment, of this and the other High Courts extending over several years and to restore the state of the law in this Presidency to what it was before the Full Bench decision in *Ponnappa Pillai* v. *Pappuvayyangar* (12).

I do not think that we can do this without a further pronouncement by their Lordships as to the effect of their observations on the cases relating to the creditor's remedies during the lifetime of the father. It has been settled by a series of decisions commencing from *Ponnappa Pillai* v. *Pappuvayyangar* (12), on the authority of the decisions of the Privy Council in *Girdharee Lall* v. *Kantoo Lall* (3) and *Nanomi Babuasin* v. *Modhun Mohun* (2), that a creditor of the father whose debt has not been incurred for an illegal or immoral purpose can, in execution of his decree against the father, bring to sale the interest both of the father and his sons in joint family pro-

perty and that it is open to the creditor to join the father and sons in a suit and obtain a decree declaring the liability of the interests of the sons in the joint property to satisfy the debt, the only defence open to the sons being that the debt was contracted for illegal or immoral purposes. The raito decidendi was that as the father had power to dispose of his sons' share to satisfy a debt neither illegal nor immoral, the creditor had the right to sell in execution what the father could have done by alienations inter vivos. Nothing can be clearer than the observation in *Nanomi Babuasin* v. *Modhun Mohun* (2), to the effect that the sons cannot set up their rights against the creditor's remedies for their father's debts if not tainted with immorality.

While the decisions recognized alienations for antecedent debts on a different category and denied the power of the father to sell or mortgage joint family properties except for an antecedent debt and excluded the loan secured by a mortgage or the purchase money got from the vendee from the category of antecedent debts, the result of the ruling of the Privy Council in *Nanomi Babuasin's* case (2), as understood by all the Courts, was simply to alter the form of the creditor's remedy. He was entitled to treat the balance due on his mortgage after selling the father's share as a simple debt due by the father and so liable to be paid by the sons by reason of their pious duty. It was similarly open to him in cases of sales to sue the father as for failure of consideration in case the sons succeeded on getting their share excluded from liability and to proceed against the sons for the damages payable by their father who sold more than he was entitled to. In the case of simple debts or suits on the personal covenant to pay by the father in mortgages, the sons were held to have no defence to the suit unless they showed that the debt was illegal or immoral, no question of antecedent debt arising on a suit to recover a simple debt. The following observations in *Surja Prasad* v. *Gulab Chand* (19), where the debt secured was on the one hand not antecedent and on the other not illegal or immoral, indicate the position of the parties in such cases ;

"The plaintiff seeks to enforce the mortgage security in this case, and he is bound to show that the mortgage is binding upon the defendant. Having regard to the rulings both of the Privy Council and this Court, he could do so by showing that the debts for which the mortgage was given were 'antecedent debts,' that is to say, antecedent to the transaction in question, but we are unable to find upon the evidence such as it is that this was so. If then the mortgage is not binding upon the defendant, the question is whether the plaintiff is entitled to a decree declaring that the money covered by the bond may be realized out of the whole of the ancestral estate, the debt not being proved to have been incurred for immoral or illegal purposes, and it being antecedent to the suit. If the plaintiff had brought his suit within six years from the time when the bond fell due, there could be no doubt that he would be entitled to the relief which was declared as the proper relief to be granted to a party in the position of the plaintiff in the case of *Luchmun Dass* v. *Gridhur Chowdhry* (6), decided by a Full Bench of this Court and in the case of *Khalilul Rahman* v. *Gobind Pershad* (20)."

These observations have to be borne in mind when we have to consider the remark of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1), to the effect "that except under the mortgage all other remedies have long ago disappeared."

In *Sahu Ram Chandra* v. *Bhup Singh* (1), the question directly before their Lordships was whether a mortgage for an antecedent debt was binding on the sons and this question was answered in the affirmative, and so far the decision confirmed the view taken in all the High Courts. The decision in *Nanomi Babuasin* v. *Modhun Mohun* (2), which has been treated by Courts in India as the basis for allowing the creditor to sue the sons in their father's lifetime for their father's debt, on the ground that he was entitled to do by suit and execution proceedings thereunder what the father could have done of his own volition, though referred to by their Lordships as establishing the sons' liability for mortgages or alienations created to pay off antecedent debts, was not explained as being limited to such cases. So far as I can see the attention of their Lordships was not called to the remedies of a simple creditor as enunciated by the decisions of the various High Courts. The passages in the Hindu texts and commentaries (which I shall refer to later on), which show that the pious obligation of the son was not purely a post mortem obligation but one which would under certain circumstances arise during the life of the father, were not brought to the

(19) [1900] 27 Cal. 762.

(20) [1893] 20 Cal. 328.

notice of their Lordships. The passage in their judgment to the effect that the case was free from complications, because

" except under the mortgage all other remedies have long ago disappeared, and the appellants rear it up and claim under it now, there being no irght in them to invoke the doctrine of the pious obligation to discharge the debt incurred by Bhup Singh, because that debt as such cannot be successfully sued for,"

indicates that their Lordships had in view the cases where a suit on the debt evidenced by a mortgage not illegal or immoral would lie against the sons even though the mortgage was not for an antecedent debt: *Surja Prasad* v. *Golab Chand* (19) and other cases. If there was no pious obligation at all during the father's lifetime and the father was in the position of any other coparcener, it is difficult to see how any suit would lie against the sons except for debts incurred for necessary family purposes and it would be perfectly immaterial to the sons whether the debt is barred or not. In *Sripat Singh* v. *Prodyot Kumar* (21), where their Lordships had to consider the effect of a sale of joint family properties in execution of the decree obtained on a simple debt incurred by the father alone they observe:

" The grounds for that action were these: The property in question was joint property, governed by the Mitakshara law. By that law a judgment against the father of the family cannot be executed against the whole of the Mitakshara property. if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone."

They also observe that the creditor had the undoubted right to bring the property to sale except where the sons show that the debt was illegal or immoral. While I am not prepared to hold that the detision in *Sahu Ram Chandra* v. *Bhup Singh* (1), must be taken to overrule by implication the whole current of authorities during the past 35 years and to restore the state of the law to what it was prior to the year 1881, I am of opinion that the decision makes it clear that it is the primary duty of the father to pay debts incurred by him not for any family necessity but for his own purposes and that the pious duty of the son only arises when the assets of the father are insufficient, assuming that it arises at all during the life-time of the father. In other words, the pious duty is limited to the debts which the father is unable to satisfy out of his share or his self-acquired properties. This limitation introduced by the Privy Council is, if I may say so with respect, entirely in accordance with Hindu Smrithis and safeguards the spiritual interest of the father and the temporal interests of his sons. According to the notions of Smrithi writers it is regarded as sinful to remain in debt and a debtor's salvation is deeply imperilled if he dies indebted.

According to Vrihaspati a person who does not re-pay his debt :

"will be born in his creditor's house as a slave or servant or woman or a quadruped.

According to other writers a person dying in debt goes to hell. A duty is therefore cast upon every person to discharge debts incurrred by him. The liability of the son to come to the help of his father is only stated to arise when the father is owing to misfortune unable to pay his debts. Yagnavalkya says:

"if a father has gone abroad or died or been subdued by calamity, his debts shall be paid by his sons and grandsons, on their denial the creditor must prove the debt by witness."

Chapter 2, Sloka 51. Vignaneswara in the Mitakshara commenting on the *sloka* observes :

"if the father not having paid the debt due has died or has gone to a distant country or is overpowered by incurable disease etc., then the debts contracted by him must be paid by his son or grandson even in the absence of the father's property. Thereon this is the order- on the father's default it is the son, on the son's default it is the grandson (whos hould pay). Therefore, by a son born giving up his self-interest should the father be carefully released from debt so that he may not go to hell.

In the Smriti Chandrika reference is made to the *sloka* of Katyayana to the effect that :

"even though the father be living, if he is afflicted by disease or has gone to sojourn away from his own country, the debt contracted by the father should be paid by the sons after the 20th year,"

and so the text of Vrihaspathi that :

"even when the father is alive if he be afflicted with disease such as consumption, leprosy or if he be born a blind person, then the sons should pay the debt when it has been proved."

The lawgivers, while casting on the son to pay the debts which the father was owing to misfortune unable to pay, also enjoin the father not to get into debt as he thereby becomes "an enemy to his son." It is clear that whatever may be the pious duty of the son after the

(21) A. I, R. 1916 P. C. 220=44 I. A. 1=44 Cal. 524=39 I, C. 252 (P.C.).

father's death, the duty in the father's life-time is only to pay if the father is unable to do so.

To this extent I think Courts can safely safeguard the interests of the sons in respect of a liability based simply on their pious duty. Any further extension of the immunity of the son cannot, I think, be made in the state of the authorities as they stand at present. Till the decision in *Girdharee Lall* v. *Kantoo Lall* (3), the view taken by Courts in this Presidency was that the son was not during his father's life-time liable under any circumstances to pay his father's personal debts. The contrary view has been taken since 1881, when the majority of the Judges in the Full Bench in *Ponnappa Pillai* v. *Pappuvayyangar* (12) followed what they thought to be the obvious result of the decision in *Girdharee Lall's* case (3). I think a clear pronouncement of their Lordships of the Privy Council reversing the whole current of decisions of all the High Courts and restoring the state of the law as it stood before the decision in *Girdharee Lall's* case (3) is necessary before we can push certain observations of their Lordships in *Sahu Ram's* case (1) to what it is contended is their logical conclusion. The power given to a creditor to work out the rights which a Hindu father has to require his son to pay his debts has its foundation, not on any Hindu Law texts (attachment, and sale in execution of decrees being unknown to the text writers), but on principles of modern jurisprudence. The question in these cases is to quote the words of Sir James Colvile in *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (22) :

"not so much whether an admitted principle of Hindu Law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence."

I agree that the appeal should be allowed with costs in this and the lower courts.

S.N./R.K. *Appeal allowed.*

(22) [1880] 5 Bom. 48=7 I.A. 181 (P.C.).

A. I. R. 1919 Madras 1182

WALLIS, C. J. AND KUMARASWAMI SASTRI, J.

A. T. Venkata Narayana Pillai—Plaintiff—Appellant.

v.

V. Ponnuswami Nadar and *others*—Defendants—Respondents.

First Appeal No. 430 of 1915, Decided on 12th September 1917, against decree of Sub-Judge, Kumbakonam, in Original Suit No. 44 of 1912.

(a) Religious Endowments Act, (1863), Ss. 14 and 15 — Suspension of trustee by Temple Committee—Order on circulation of papers is illegal.

A Temple Committee constituted under Act 20 of 1863 has the power of suspending or dismissing temple trustees for sufficient cause, but the power must be exercised at a meeting duly held for the purpose.

An order of suspension therefore passed on the opinions of the members recorded on papers sent to them for circulation is illegal and ultra vires, especially if there were dissentients. [P1183 C1,2]

(b) Religious Endowments Act (1863), Ss. 14 and 15—Order of suspension ultra vires— Committee is liable for damages—But liability is confined to members who are parties to suspension.

Where the order itself is ultra vires, it is not open to the defendants in a suit for damages for wrongful suspension to plead sufficiency of grounds for their action: 21 *Mad.* 179 and 10 *I. C.* 548, *Dist.* [P 1184 C 1]

Temple Committe is liable in damages for the wrongful suspenesion or dismissal of a trustee, but not as a corporate body. [P 1184 C 2]

The liability is confined to the individual members who were parties to the suspension or dismissal: *Case-law discussed.* [P 1185 C 1]

S. Srinivasa Aiyangar, *S. Muthiah Mudaliar* and *A. Krishnaswami Aiyar*—for Appellant.

T. Narasimha Aiyangar for *T. Rangachariar*, and *Gopalaswami Aiyangar*—for Respondents.

Judgment.—This is an appeal from a decree of the Subordinate Judge of Kumbakonam, dismissing the suit brought by the plaintiff for a declaration that his suspension from the office of temple trustee by the Kubakonam Devasthanam Committee was illegal and for damages. The decision as to the legality of the suspension depends mainly in this case on the question whether the procedure adopted by the Committee can be supported. What happened was that, after the plaintiff had been given notice of some or all of the charges against him, defendant 2, a member of the Committee, drew up a report, Ex. B.1, and forwarded copies of it to the other members of the

Temple Committee, proposing that the plaintiff and some other trustees should be suspended until further orders. In it he stated that, though the subject had been for a long time before the meeting, it had not been concluded.

"It is therefore sent in circulation. I request that instead of writing 'meeting' in this you will write your opinion."

Defendants 1, 4 and 6 are proved to have assented to the course. Defendant 5 died after suit and defendants 7, 8 and 9 were not in office at the date of suspension. Defendant 3 on receipt of Ex. B-1 sent an answer Ex. C, in which he stated:

"It is not legal to take this step by circulation, much less by taking individual opinions as you are now doing. The procedure adopted is wrong from beginning to end. I request you, therefore to call a meeting for the purpose."

Ignoring this request defendant 2 wrote to the plaintiff the letter A-1 in which he stated that the plaintiff had been suspended for the reasons set forth in the accompanying proceedings order and asked him to hand over charge to another of the trustees. The proceedings Ex. A-1, recorded the opinion of the majority that the plaintiff should be suspended, and disclosed the fact that the matter had been dealt with in circulation. Now the Temple Committee are a statutory body to which the powers formerly exercised by the Board of Revenue under Regn. 7 of 1817 have been transferred as regards certain temples by the Religious Endowments Act; and these powers, it may now be taken as settled, include a power of suspending or dismissing the Temple Trustees for sufficient cause. It has, however been held that in exercising these powers they are to a large extent in the position of a corporation and that their actions must be tried in the same tests. Now it is well settled that the ordinary way for bodies in the position of a corporation to transact the business is at a meeting and assuming that it is open to them to transact some of the business in circulation, I think they have no such power as regards matters such as suspension, or dismissal of free hold officers under their superintendence, as to which their authority must be strictly construed. *Rex* v. *Taylor* (1), *Rex* v. *Sutton* (2), *Thandavaraya Pillai* v. *Subbayyar* (3), *Ponnambala Pillai* v. *Muthu Chettiar* (4). Even if the matter could properly have been dealt with in circulation, that could only have been by consent of all the members and any one of them would have had the right to insist on the matter being dealt with at a meetng, as defendant 3 endeavoured to do in this case. See the observations of Page Wood, V. C., in *Hallowes* v. *Fernie* (5), which were approved by Sterling, J., *In re Great Northern Salt and Chemical Works; Ex parte Kennedy* (6). Here there was not even what is ordinarily known as circulation as defendant 2 merely sent copies of his proposals to each of the other members and obtained their individual assents to his proposals.

In these circumstances we are clearly of opinion that the action of the Committee in suspending the plaintiff was ultra vires. It is then said that we ought to inquire whether there were valid grounds for suspending the plaintiff and if so, to dismiss the suit. Certain ob servations of Shephard J., in *Seshadri Ayyangar* v. *Nataraja Aiyar* (7) were referred to, but these observations appear to have been obiter and no authority is cited. There are similar observations by Sundara Aiyar, J. in *Seshadri Aiyangar* v. *Ranga Bhattar* (8). The case cited by him, *Rex* v. *Gaskin* (9), is no authority that this is a good answer to a suit, as in that case the Court merely refused to issue the discretionary writ of mandamus and observed that

"no case has been cited to show that an assize will not lie for such an office as the present, or that he could not maintain an action for money had and received during his suspension.

Further the office with which Sundara Aiyar, J., was dealing was that of archaka and other considerations may possibly apply to it. In *Willis* v. *Gipps* (10) the Privy Council recommended that an order of a motion made without due notice should be set aside, although they at the same time reported that there were sufficient grounds, for making this order. We are therefore of opinion that it would not be a good answer to the present suit to show that there were sufficient grounds

(1) [1694] 3 Salk 231.
(2) [1721] 10 Mad. 74.
(3) [1900] 23 Mad. 483=10 M. L. J. 117
(4) [1916] 30 M. L. J. 619=33 I. C. 52.
(5) [1867] 3 Eq. 520.
(6) [1890] 44 Ch. D. 472.
(7) [1898] 21 Mad 179
(8) [1911] 35 Mad. 631=10 I. C. 518.
(9) [1799] 8 T. R. 209.
(10) [1846] 5 Moo. P. C. 379.

for suspending the plaintiff. In this view it is unnecessary to consider the further objection that the plaintiff was removed without due notice, as we have held that the action was ultra vires 'on the other ground.

As regards the liability of the defendants or some of them for damages there can be no doubt that the decision of a Bench of three Judges sitting on the Original Side in *Vijaya Ragava* v. *Secy. of State* (11) is authority for the proposition that a person in the enjoyment of a public office who is wrongfully removed is entitled to damages. In *Seshadri Ayyangar* v. *Nataraja Ayyar* (7), a trustee who was illegally suspended recovered Rupees 1,000 against the Temple Committee; Collins, C. J., being influenced by the fact that the committee were actuated by an indirect motive, the fact that the plaintiff was a Vadagalai. In *Thandavaraya Pillai* v. *Subbayyar* (3) the plaintiff recovered damages before the District Munsif and to this extent the decree seems to have been reversed by the District Judge and the plaintiff did not appeal. As early as *Syed Amin Sahib* v. *Ibrahim Sahib* (12), it seems to have been assumed that damages might be recovered from a Temple Trustee for wrongful dismissal. On the other hand, there does not seem to be any instance of an action of this kind having been successfully maintained in England. In the case *Darby* v. *Cosens* (13), already cited the suggested remedies of the removed officer were an assize or an action for money had and received to his use during the period of suspension, and not an action against the corporation for wrongfully suspending him, and in *Osgood* v. *Nelson* (14) it was thought well for the removed officer to proceed by action for money had and received against his.successor.

In *Harman* v. *Tappenden* (15), where a freeman of the corporation was alleged to have been illegally removed from his office, it was held that an action did not lie against individual corporators for acts erroneously done by them in their corporate, capacity at least not without proof of malice. This case was relied on by Kelly, C. B., in *Mill* v. *Hawker* (16), who held that for a tort committed by a corporation it could only be sued as a body. On the other hand Cleasby and Pigott, B. B., held that members of a Highway Board who exceeded their authority by ordering a trespass to the plaintiff's land were individually liable. In *Mill* v. *Hawker* (17) Blackburn, J., the same case in the Exchequar Chamber said that the question whether the corporators were liable was one of the considerable importance and great difficulty. It would he said, require time for consideration and probably the decision would not be unanimous. Accordingly he declined to decide it at that stage, and it has not been decided since. It has however long previously been ruled by House of Lords in *Ferguson* v. *Kinnoull (Earl of)* (18) that, where the law imposes a duty on any person or body of persons and they fail or neglect to perform that duty, they are answerable in damages to those whom their failure or neglect injures.

The appeal was from Scotland, but the judgments proceeded on grounds common to the laws of England and Scotland as was expressly stated, and thus contain general expressions which are rather in favour ef extending the liability of individual corporators, at any rate to cases of excess of jurisdiction such as the present. It is also to be observed that it has been held by the Judicial Committee on appeal from India in *Calder* v. *Halket* (19) that even judicial acts, at any rate of inferior Courts, are actionable in the absence of statutory provision if done wholly without jurisdiction. *Ferguson* v. *Kinnoull (Earl of)* (18) is also important because it lays down that it is only corporators who are parties to the failure or neglect of duty who can be held answerable in damages. It is also clear that S. 14, Religious Endowments Act contemplates that member of Temple Committees should be sued individually in cases under that section. On the whole it does not appear that the Madras cases are opposed to any settled rule of English Law or that there is sufficient reason for calling them in question.

As regards damages, it is not shown that the plaintiff sustained any substantial damage by reason of the suspension

(11) [1884] 7 Mad, 466.
(12) [1868] 4 M. H. C. R. 112.
(13) [1787] 1 T. R. 552.
(14) [1872] 5 H. L. 636.
(15) [1801] 1 East. 555.
(16) [1874] 9 Ex. 309.
(17) [1875] 10 Ex. 92=44 L. J, Ex. 49.
(18) [1842] 9 Cl. & F. 251.
(19) [1840] 3 Moo. P. C. 28=13 E. R. 12=50 R. R. 1.

though it was of course, annoying to have the suspension tom-tommed in the neighbourhood. On the whole we assess the damages at Rs. 50 and reverse the decision of the lower Court and give the plaintiff a declaration that his suspension was illegal and a decree against defendants 1, 2, 4 and 6, who must be considered as parties to the suspension, for Rs. 50 damages and for costs here and below calculated on that amount.

S.N./R.K. *Appeal allowed.*

A I. R. 1919 Madras 1185

WALLIS, C. J. AND SADASIVA AIYAR, J.

Sadasiva Chetty—Defendant—Appellant.

v.

Rangappa Rajoo—Plaintiff—Respondent.

Second Appeal No. 1994 of 1916, Decided on 25th January 1918, against decree of Temporary Sub-Judge, Salem, in Appeal Suit No. 250 of 1915.

(a) Tort—Nuisance—Oil mill close to dwelling house is nuisance.

It is an actionable nuisance to erect an oil mill close to a dwelling house from which foul-smelling water is always discharged and unbearable noise is produced which can be heard even at some distance. [P 1185 C 2]

(b) Specific Relief Act (1 of 1877), S. 54—Nuisance—Oil mill—Neighbour can sue for total prohibition of working—Questions to be considered stated.

The owner of the house adjoining the mill is entitled to ask for prohibition of the working of the mill altogether where the nuisance cannot be abated.

The locality, the question whether the nuisance has been long in existence, whether the trade which causes it is commonly carried on in that locality and other questions of a like nature have to be considered in deciding whether a particular business carried on by a neighbour is an actionable nuisance. [P 1185 C 2]

V. L. Ethiraj—for Appellant.

B. Somaya—for Respondent.

Sadasiva Aiyar, J.—The defendant is the appellant. He purchased a schoolmaster's house about a year before suit the plaintiff's house being next door to the house so purchased by the defendant. The defendant is an oil monger by caste and he set up an oil mill of the country pattern in the yard of his house. The noise of the mill caused by the turning of the machine drawn by the bullocks, the state of the ground trodden by the bullocks and the droppings of the bullocks created much nuisance. The District Munsif found (1) that the machine occupied the entire vacant space in the defendant's compound and that it has been put up very near the occupied portion of the plaintiff's house; (2) that the machine was worked by the defendant both day and night, that the noise caused by the working of the machine was unbearable and prevented the defendant from attending to his photographic work; (3) that the noise proceeding from the mill machine could be heard at a distance of two furlongs; and (4) that black, dirty, foul-smelling water containing mosquitoes and worms was found in the defendant's compound on account of the washing of the nuts and of the cowdung stored in it, especially during the rainy season. In Pollock on Torts at p. 429, it is stated:

A nuisance is not justified by showing that the trade or occupation causing the annoyance is, apart from the annoyance, an innocent or laudable one. 'The building of a lime-kiln is good and profitable; but if it be built so near a house that when it burns, the smoke thereof enters into the house, so that none can dwell there, an action lies for it.' 'A tan house is necessary, for all men wear shoes; and nevertheless it may be pulled down if it be erected to the nuisance of another. In like manner of a glass house; and they ought to be erected in places convenient for them.'"

So of a fried fish shop:

"So it is an actionable nuisance to keep a pig-stye so near any neighbour's house as to make it unwholesome and unfit for habitation, though the keeping of swine may be needful for the sustenance of man."

Then at p. 426 the learned author says:

"What amount of annoyance or inconvenience will amount to a nuisance in point of law, cannot, by the nature of the question, be defined in precise terms. There should be a material interference with the ordinary comfort and convenience of life ..... the physicial comfort of human existence.....by an ordinary and reasonable standard."

The locality, the question whether the nuisance had been long in existence, whether the trade which causes it is commonly carried on in that locality and other questions of a like nature have, no doubt, to be considered in deciding whether a particular business carried on by a neighbour is an actionable nuisance. All these things have been kept in mind on, by the learned District Munsif in arriving at his conclusion that the business of the defendant is an actionable nuisance for the abatement of which the plaintiff could sue. The District Munsif says:

"It is not shown that the plaintiff is living in the midst of oil mills."

The portion of the suburb where other oil mills are situated seems to be far removed from the locality where the plain-

tiff lives. The lower appellate Court has substantially concurred in the findings of the District Munsif on the points already referred to. The lower Courts have also found that the nuisance cannot be abated otherwise than by prohibiting the working of the oil mill. I would, therefore, dismiss the second appeal with costs.

Wallis, C. J.—I do not think that there are sufficient grounds for interfering with the findings of the lower Courts that what has been done in the circumstances of the case amounts to a nuisance. I would dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 1186

SPENCER AND KRISHNAN, JJ.

Manikkam Pillai—Defendant—Appellant.

v.

Rathnasami Nadar and *others*—Plaintiff—Respondents.

Second Appeal No. 307 of 1917, Decided on 21st September 1917, against decree of Dist. Judge, Tanjore, in Appeal Suit No. 142 of 1916.

(a) Trusts Act (1882), Ss. 47 and 48—Delegation in regular course of business is proper—Acts by managing trustee in regular course of business consented to by other trustees are valid.

The delegation by the trustees of an institution to one among themselves in the regular course of business is not improper. [P 1186 C 2]

The managing trustee has the power to act for and on behalf of his co-trustees in the regular course of business and all acts so done by him, if not objected to by the other trustees, are valid. [P 1186 C 2]

(b) Transfer of Property Act (1882), S. 106—Lessee in possession paying rent to lessor at monthly rate with latter's permission—Lease-deed invalid—He is still to be deemed monthly tenant.

A lessee who is in possession of the demised property paying rent to the lessor at a monthly rate with the latter's permission, must be deemed to be a monthly tenant, though the lease deed executed by him is invalid for want of registration. A monthly tenancy must be deemed to have been created between the parties by oral agreement, accompanied by possession. [P 1187 C 1]

(c) Transfer of Property Act (1882), S.106—Lessee for long period can eject tenant by giving notice to quit.

A term's lessee for a long period is entitled to eject a tenant in occupation by giving a notice to quit under S. 106, the right of attornment necessarily carrying with it the right to eject. *Wordsley Brewary Co.* v. *Halford*, (1904) 90 *L. T.* 89. *Foll.* [P 1187 C 1,2]

(d) Transfer of Property Act (1882), S.106—Rule of English law that person entitled to immediate reversion is proper person to give notice to quit is applicable to India.

The rule of English law that the person entitled to the immediate reversion of the demised premises is the proper person to give the notice to quit is applicable to India and the provisions of the Transfer of Property Act are not inconsistent with this rule. [P 1187 C 2]

(e) Transfer of Property Act (1882), S.106—"Transferee of any interest" includes lessee for long period.

The words "transferee of any interest" in S. 109 include a term lessee for a long period, say of 20 years. [P 1187 C 2]

(f) Transfer of Property Act (1882), S.105—"Right to enjoy the property."

A right to enjoy the property' in S. 105 is an interest in the property. [P 1187 C 2]

(g) Transfer of Property Act (1882), S.109—"All the rights" include right to eject previous lessee.

The words all the rights in S. 109 include the right to recover possession by terminating the tenancy of a previous lessee by giving the necessary notice to quit. [P 1187 C 2]

G. S. Ramachandra Aiyar—for Appellant.

C. V. Ananthakrishna Aiyar—for Respondents.

Judgment.—Two points have been raised before us by the appellant in this case: (1) that Ext. A, the muchilika given by the plaintiff, is not valid as it was agreed to only by one of the trustees of the plaint temple and not by the other, (2) that the defendant has a monthly tenancy apart from the lease, Ext. II and that it has not been properly terminated, as the notice to quit given to him was not by his lessors or on their behalf but by the plaintiff himself and in his own name.

On the first point we agree with the District Judge that the muchilika, Ex. A is valid and binding on the temple, as it was taken in accordance with the usual practice of the temple by the manaaging trustee in the names of both the trustees. Though the ordinary rule is that when there are more trustees than one, all must join in the execution of the trust and that one trustee cannot delegate any of his duties to his co-trustee, yet the delegation in the regular course of business is not improper. Compare Ss. 47 and 48, Trusts Act, which state the principles though they do not apply to the present case. As it is shown that in the ordinary course of business, the leases of the plaint temple properties were arranged by the managing trustee on behalf of both the trustees, the muchilika Ex. A executed in accordance with

that practice, the other trustee not objecting, must be held to be valid.

On the second point, we are unable to agree with the District Judge that the defendant's position was that of a tenant at-will liable to be ejected without notice. His new lease Ex. II is no doubt invalid, and therefore, it did not alter or affect his previously existing rights, if any, in the property. It is shown that the defendant has been in occupation of the plaint property for some years before suit paying rent to the trustees at a monthly rate, though payment was made for convenience in a lump sum apparently once a year. He came in originally under a lease for ten years but as the lease deed was not registered, it was of no effect in creating a term lease in his favour, S. 107, T. P. Act requiring a registered instrument for the purpose. But, as he continued in possession with the consent of the trustees paying rent at a monthly rate we, must presume that a monthly tenancy was created between the parties by oral agreement accompanied by possession. Under S. 106, T. P. Act, the presumption is, in the absence of a contract or local usage to the contrary, that the lease is from month to month, as this lease was not for agricultural or manufacturing purposes. Defendant being thus a tenant from month to month, a proper notice to quit was certainly required to terminate his tenancy before he could be ejected. The notice given in the present case, though admitted to be otherwise proper, is argued to be invalid as it was not given by the lessors or on their behalf. The notice here was given by the plaintiff in his own name. No Indian authorities have however been cited to us on the point.

The English law, as pointed out by the respondents' vakil, is, that the person legally entitled to the immediate reversion of and in the demised premises is the proper person to give the notice to quit. See Foa on Landlord and Tenant, Edn. 4, p. 163, and Woodfall on Landlord and Tenant, Edn. 19, p. 408. Where the landlord had given a 14 years' lease of his premises in the possession of a yearly tenant to a new lessee, it was held that the new lessee was the proper person to give the notice to quit and the notice given on the landlord's behalf was held to be bad in law. See *Wordsley Brewery Co.* v. *Halford* (1). We must adopt this rule, unless the Indian law under the Transfer of Property Act is clearly different. Although the matter is not free from difficulty we are inclined to think that the provisions of that Act are not inconsistent with the English rule. It is true, S. 106 of that Act contemplates that the notice is to be given by the lessor or by an authorized agent on his behalf. That no doubt is the primary rule. But S. 109 enacts that the transferee of any part of a lessor's interest in the property is entitled to all the rights of the lessor as to the property or part transferred. The words 'transferee of any part of his (the lessor's) interest" therein (i. e., in the property) are wide enough to include a term lessee like the plaintiff with a lease for 20 years. No doubt S. 105 in defining a lease does not use the words "interest in property" as in S. 58 in defining a mortgage. Nevertheless a "right to enjoy the property" which are the words used in S. 105 is an interest in the property. In English law it is treated as an assignment of the reversion when the property is already in a lessee's possession. It was also argued that the rights referred to in S. 109 are the rights mentioned in S. 108 and no more. But the words used are "all the rights" and the expression is very comprehensive. There does not seem to be any reason why the words should be held not to include the right to recover possession by terminating the tenancy of a previous lessee by giving the necessary notice to quit. That is one of the rights of the lessor "as to the property" transferred. Prima facie a person entitled to possession should have the right to reduce the property into possession. To hold in favour of the appellant's argument will lead to the anomaly of having to hold that a transferee of the property leased could not give notice and terminate the lease, though under S. 109 he becomes entitled to be paid the rent due from the date of his transfer by the lessee. The right of attornment necessarily carries with it the right to eject if the tenant is liable to be ejected.

We must therefore hold, in agreement with the District Judge, that the notice to quit given by the plaintiff was a proper notice.

(1) [1904] 90 L. T. 89.

The second appeal fails and must be dismissed with costs.

S.N /R.K. *Appeal dismissed.*

A. I. R. 1919 Madras 1188

SPENCER AND KRISHNAN, JJ.

Ramakrishna Kuhkilaya—Plaintiff—Appellant.

v.

Nekkar Kuppanna and *others*—Defendants—Respondents.

Second Appeal No. 960 of 1916, Decided on 23rd August 1917, against decree of Dist. Jndge, South Kanara, in Appeal Suit No. 296 of 1915.

(a) **Transfer of Property Act (1882), S. 61—"Any separate mortgage"—Mortgage must be subsisting.**

The words "any separate mortgage" in S. 61. refer only to subsisting separate mortgages and not to barred mortgage-debts. [P 1189 C 2]

(b) **Transfer of Property Act (1882), S. 61—Liability for total redemption does not apply to time-barred debts—Usufructuary mortgage—Lease to mortgagor—Covenant to pay arrears of rents on redemption—Mortgagor executing two simple mortgages for rent due and for portion of arrears obtaining decree—Suit to redeem usufructuary mortgage alone simple mortgage and decree being time-barred—Later mortgages held constituted novation of contract under S. 62, Contract Act—Mortgagor is entitled to possession on payment of amount due on usufructuary mortgage—Contract Act (1872), S. 62.**

The rule that a mortgagor should be compelled to redeem all the mortgages on a property in favour of the same mortgagee in the same suit applies only to cases where the mortgages are enforceable and are not such as are barred by limitation or from any other cause, not capable of being enforced by suit: 20 *Mad.* 305 and 27 *Mad.* 28, *Dist.* [P 1191 C 1]

A deed of usufructuary mortgage contained a covenant that, if the property was at any time leased to the mortgagor, the latter should pay all arrears of rent at the time of redemption. The mortgagor, having taken the property on lease some time after the execution of the mortgage, executed two simple mortgages for rent due by him, and for a portion of the arrears of rent the mortgagee obtained a decree. In a suit by the mortgagor to redeem the usufructuary mortgage alone, the decree and the simple mortgages having become barred:

Held: (1) that the later mortgages constituted a novation of contract under S. 62, Contract Act and the conversion of the simple contract debt into a judgment and secured debts constituted a merger whereby the original debt was not kept alive: 38 *I. C.* 240 and 37 *I. C.* 456, *Dist.* [P 1189 C 2]

(2) that the mortgagor was entitled to possession on payment of the amount due under the usufructuary mortgage, the rest of the mortgagee's claim having become barred. [P 1191 C 1, 2]

(3) that the covenant in the first mortgage for payment of arrears of rent on redemption did not create a charge per se, nor could the rent due under the lease be treated as interest on the mortgage money. [P 1192 C 2]

Per *Spencer, J.*—So far as the Madras Presidency is concerned, it is settled law that a mortgage on the same property can treat each as a separate cause of action and can bring a suit for the recovery of his debt by sale of the mortgaged property on a puisne mortgage, subject to his interest in a prior mortgage. [P 1188 C 2]

But when a mortgagor sues for redemption he must redeem all the mortgages outstanding on the same property in favour of the same mortgagee. [P 1189 C 1]

(c) **Evidence Act (1872), S. 101—Mortgage and Lease.**

Per *Krishnan, J.*—Where prima facie a mortgage and a lease are two distinct transactions the person alleging that they are one must prove it. [P 1192 C 2]

B. Sitarama Rao—for Appellant.

K. Ramanath Shenai and *K. Y. Adiga*—for Respondents.

Spencer, J.—This suit was brought for the purpose of redeeming a usufructuary mortgage of the year 1867. The mortgagor remained in possession under a lease until 1882, when the mortgagee got into possession. The mortgagee's representatives pleaded in defence of this suit that the plaintiffs were bound to pay off two simple mortgages of the years 1873 and 1877 and a decree of 1882 before they could be allowed to redeem the prior usufructuary mortgage. On the points of law arising out of this contention the District Judge, disagreeing with the opinion of the District Munsif, has decided in the defendants' favour.

Now it is clear that by the Limitation Act in force at the institution of this suit if the mortgagees had sued at that time to recover what was due to them on the footing of those simple mortgages their suit would have been time-barred, whereas if the mortgagors sued to redeem them, their suit would not be out of time. The question then is whether the defendants can set them up in bar of the plaintiffs' right of redemption. So far as this presidency is concerned, it must be taken as settled law that a mortgagee having more than one mortgage on the same property can treat each as a separate cause of action and can bring a suit for the recovery of his debt by sale of the mortgaged property on a puisne mortgage subject to his interest in a prior mortgage vide *Subramania Aiyar* v. *Balasubramania Aiyar* (1) and *Radhakrishna Iyer* v. *Muthuswamy Sholagan* (2), although it was

(1) [1915] 38 Mad. 927=30 I. C. 317.

(2) [1908] 31 Mad. 530.

held in *Dorasami* v. *Venkataseshayyer* (3) that he could not get a sale on the earlier mortgage subject to the later mortgage. Yet when the mortgagor comes to Court and applies for redemption, it has been declared on the strength of S. 61, T. P. Act that all the mortgages over the same property and in favour of one and the same person must be simultaneously redeemed: vide *Dorasami* v. *Venkataseshayyar* (3) and *Balasubramania Nadar* v. *Sivaguru Asari* (4) [approved of by Sadasiva Aiyar, J., in *Subramania Aiyar* v. *Balasubramania Aiyar* (1)] and *Ramaswami Ayyar* v. *Vythinatha Ayyar* (5) and *Meloth Kannan Nair* v. *Kodath Kammaran Nair* (6)].

In Allahabad this principle was followed in a case where the purchaser of the equity of redemption over a usufructuary mortgage with five subsequent bonds tacked on to it sued to redeem the usufructuary mortgage alone: vide *Ranjit Khan* v. *Ramdhan Singh* (7). I think we must assume that this view of the law as to the liability of the mortgagor to redeem all the mortgages outstanding on the same property in favour of the same mortgagee is correct. No doubt there are other considerations to be taken into account against this view. For instance it may be noted that S. 61, T. P. Act is silent on the subject of the mortgagor's rights in the case where money is due on a separate mortgage on the same property as that on which he seeks to redeem. Because the section permits one mortgage to be redeemed without redeeming a separate mortgage when the properties are different, does it follow logically that this can not be done when the properties are the same? Again, if a mortgagor is allowed to pay off one mortgage, the mortgagee would be left with a better security for the remaining debt and it is thus often to the advantage of the mortgagee to accept a partial redemption. Still, assuming the correctness of the decided cases of this Court on the point, the position is altered when there is only one subsisting mortgage and the separate mortgages are no longer enforceable. Where S. 61 speaks of "any separate mortgage," I conclude that it was intended to refer only to subsisting separate mortgages.

In *Athan Kutti* v. *Matavil Illoth Sutarjanam* (8) we held that no duty was imposed on a mortgagor of discharging a barred debt before redeeming a mortgage secured by a separate instrument. There is no equity in favour of a mortgagee who sleeps over his rights. I am now fortified in the opinion that I expressed in that case by the decision of the Allahabad High Court in *Kesar Kunwar* v. *Kashi Ram* (9) that in circumstances similar to those present before us, the mortgagor is entitled to redeem the first usufructuary mortgage without paying the money due on the later simple mortgage at a time when, if the defendant had to sue on the simple mortgage, his suit would have been barred by limitation. That was a stronger case than this, for there was an express covenant in the second mortgage in that case that the plaintiff should not seek to redeem the usufructuary mortgage till he paid the money due on the second bond.

The learned Judges nevertheless observed that in effect the defendant was asking the Court to enforce against this property a stale claim and that this could not be done. Similarly in *Dhondo Ramchandra Kulkarni* v. *Bhikaji Gopal* (10) Beaman, J., considered that if a mortgagee allowed a prior mortgage upon the same property as a puisne mortgage to become time barred, he could not revive the prior mortgage by suing upon the puisne mortgage. A further question of some difficulty has been raised, which is whether the defendants, having got simple mortgages executed in respect of the arrears of rent on the property usufructuarily mortgaged, can now fall back on the security of the earlier usufructuary mortgage bond, which contains a stipulation that the mortgagor shall pay

> "the consideration amount of the mortgage together with arrears of rent, if any, in respect of the said property,"

whenever he requires the land. The lower Courts were of opinion that the later mortgages constituted a novation of contract, and that therefore under S. 62, Contract Act, the original contract need not be performed. On the construction

(3) [1902] 25 Mad. 108.
(4) [1911] 11 I. C. 629.
(5) [1903] 26 Mad. 760.
(6) A. I. R. 1914 Mad. 290=22 I. C. 609.
(7) [1909] 31 All. 482=2 I. C. 859.
(8) [1917] 37 I. C. 756.
(9) [1915] 37 All. 634=30 I. C. 777.
(10) [1915] 39 Bom. 138=27 I. C. 1005.

of Exs. 3 and 4 I think the lower Courts were right.

The documents are styled "deeds of further charge." They contain recitals that on the dates when they were executed the parties settled accounts for the arrears of rent that were due till then. On the sums so ascertained there was an agreement to pay interest at a specified rate, and a further agreement that if the principal and interest were not paid by a certain date, the whole should be recoverable at a higher rate of interest than that first mentioned on the security of the mortgaged property. The debt secured by the usufructuary mortgage (Ex. 1) is expressly excluded from the terms of the settlement. If the mortgagee had sued in time to enforce payment of the money secured by these documents, I do not think it would have been open to the mortgagor to go behind the settlement of accounts and plead that he was only liable under the lease deeds or under the covenant contained in the usufructuary mortgage. The answer to such a plea would have been that the tacking of the bonds extinguished the simple contract debts. If these hypothecation deeds (Exs. 3 and 4) had been invalid or ineffectual, there would have been no merger of the equitable right of the mortgagee on redemption to have an account taken of the rent due to him on the land usufructuarily mortgaged. But I think they were effectual when they were executed and the intention of the parties was that they should take effect. If these deeds had not been brought into existence, the obligation of the mortgagor to make all payments arising out of his covenants in the usufructuary mortgage-deed would have been kept alive till the time of redemption: see *Parasurama Pattar* v. *Venkatachalam Pattar* (11).

But the mortgagee having deliberately substituted a new liability under Exs. 3 and 4 for the mortgagor's original liability under his contract of lease, and afterwards through his laches having suffered his rights to become barred by time, his representatives cannot now be allowed to enforce the terms of the original contract any more than the mortgagor could have relied on it if the mortgagee had been in the position of plaintiff. The appeal must therefore be allowed the judgment of the lower appellate Court reversed with costs in that Court and this, and the decree of the District Munsif restored. Time for redemption is extended for four months from this date.

Krishnan, J.—This second appeal arises from a suit to redeem a usufructuary mortgage of 1867, Ex. 1, on payment of the principal amount secured less certain damages for waste. The question of damages has now been set at rest against the plaintiffs. Though the mortgage was one with possession, the property was taken back by the mortgagor on lease and held by him till 1882, when he was evicted under the decree Ex. 2 and since that date the mortgagee has been in possession. For the time the mortgagor was in possession he owed the mortgagee certain arrears of rent after deducting payments made by him from time to time. The accounts of these arrears were settled in 1873 and again in 1877 and the mortgagee obtained from the mortgagor two simple mortgage-deeds, Exs. 3 and 4 for the amounts due. The mortgagee had included the subsequent rent due in his suit for eviction and had obtained a money decree for it. In this manner all the rent due had been accounted for. It is admitted that the mortgagee's right to execute the decree and to enforce the two bonds, Exs. 3 and 4, by suit is now barred by limitation.

On these facts the dispute between the parties is whether redemption should be allowed on payment of the principal money alone as contended for by plaintiffs, or whether the amounts due under Exs. 2, 3 and 4 should also be paid to the mortgagors as contended for by them. The District Munsif decided in favour of the mortgagor, holding that the mortgagee's claim for arrears of rent had become merged in the decree and the two bonds 2, 3 and 4, and as these were unenforceable at the date of suit the mortgagor was not bound to pay anything as amounts due under the said decree and bonds or as arrears of rent. On appeal the District Judge, while agreeing with the Munsif on the question of merger, held that the mortgagor was bound to redeem the two mortgages 3 and 4 along with Ex. 1, as they were all between the same parties and on the same property, relying on *Doraisami* v. *Venkataseshayyar* (3) and *Balasubramania Nadar* v. *Sivaguru Asari* (4) and

(11) [1913] 21 I. C. 701.

that as defendant was setting up these two later mortgages as a defence to the suit, it did not matter that his suit to enforce them would be dismissed as time-barred, as the Limitation Act applied only to suits and not to defences. For the latter position he relied on the cases reported as *Krishna Menon* v. *Kesavan* (12) and *Subrahmania Ayyar* v. *Poovan* (13). He therefore directed the mortgagor to pay the amounts due under Exs. 3 and 4 as well but disallowed the amount of the decree Ex. 2.

Against this decree plaintiff 2, one of the representatives of the mortgagor, has appealed to us. His learned vakil contended before us that there is no rule requiring the mortgagor to redeem all the mortgages on a property in one and the same suit and that even if there is such a rule, it should not be applied in the case of mortgages which have become unenforceable by lapse of time. The learned advocate for the respondents has urged that the District Judge's view on both the above points was correct but that his opinion on the question of merger was erroneous, and that if his clients could not rely on Exs. 3 and 4 they were entitled to fall back upon their rights under Ex. 1 and under that deed they were entitled to have an account taken of the rents due and the amount arrived at paid along with the mortgage money. On the first question raised, whether a mortgagor should be compelled to redeem all the mortgages on a property in favour of the same mortgagee in the same suit, it is not necessary in this case to give a decision in the view I am taking on the second question raised; for even assuming that there is rule as contended for by the mortgrgee, I agree with my learned brother that it should be confined to cases where the mortgages insisted upon being redeemed are enforceable ones and are not such as are barred by limitation or any other cause from being enforced by suit. This view has already been laid down by Sir W. Ayling, J., and my learned brother in *Athan Kutti* v. *Matavil Illoth Sutarajanam* (8); and a similar view was held in *Kesar Kunwar* v. *Kashi Ram* (9). It will not be equitable to allow a rule like the one in question which is after all a rule of equity to be used to enable a person to enforce a stale claim indirectly when he could not enforce it directly by suit. The question is not, as the District Judge has conceived it, a question whether a defendant in possession should be allowed to set up a barred defence to protect his possession, but a question whether the rule should be allowed to be used as a means for compelling payment of barred mortgage debts.

The mortgagee is not entitled to any possession under the two mortgages 3 and 4. As in the present case the property is directed to be sold if all the money due to the mortgagee is not paid, the result is, if the decree stands, the mortgagee will get paid what is due on his barred mortgages as well. The suit for possession is not dismissed for non-payment of the amounts of the barred mortgages; so they do not form a defence to defendant's possession. I think therefore the principle laid down in the rulings cited by the District Judge in *Krishna Menon* v. *Kesavan* (12) and *Subrahmania Ayyar* v. *Poovan* (13) does not apply at all to this case. I agree that defendants are not entitled to insist on their claims under Exs. 3 and 4 being paid up on redemption. Mr. Shenai for the respondents then raised the question that his clients were entitled to fall back upon their rights under Ex. 1 for payment of arrears of rent. As stated before, it is for these very arrears that Exs. 2, 3 and 4 were obtained by the mortgagee and the lower Courts have held that the claim for such arrears had become merged in those bonds and the decree, so that the claim could no longer be enforced as a claim for arrears of rent. The question is important, because there is a clause in the original mortgage-deed Ex. 1 which says:

"I (the mortgagor) shall pay you (the mortgagee) ..... the consideration amount of the mortgage together with any arrears of rent if any in respect of the said property, if the same is taken by me on rent under you, i. e., at the time of redemption."

If there is no merger of the claim for arrears of rent, this covenant will enable the mortgagee to claim the amount of arrears against the mortgagor at the time of redemption irrespective of any question of limitation. Mr. Shenai's argument against applying the doctrine of merger in this case is that his clients had already got a charge on the property for the rent when they took Exs. 3 and

(12) [1897] 20 Mad. 305.
(13) [1904] 27 Mad. 28.

4, as deeds of further charge and that, that charge should be deemed not to have been abandoned when the fresh securities were taken as the latter were not of a higher character; and he cited Halsbury's Laws of England, Vol. 21, Ss. 579 and 581, and Fisher on Mortgages, Ss. 1554 to 1560, and the cases in *Kavanoor Velayuda Reddi* v. *Reddyvari Narasimha Reddi* (14) and *Prayag Doss Jee Varu* v. *Ravur Chengama Naidu* (15), in support of his proposition that the taking of a fresh security for an already secured debt, when that security is not of a higher character does not lead to a merger of the original rights. To succeed in this argument we must be satisfied that the mortgagee had a charge on the property for rent, to start with. This charge was claimed in two ways and I shall now consider them. It was first urged that the provision in Ex. 3, by which the mortgagor undertook to pay any arrears of rent due along with the mortgage money at the time of redemption itself created a charge.

I am unable to accept this argument. I think the words do not amount to anything more than a mere personal covenant to pay. There are no appropriate words to create a charge. In a somewhat similar case Sargent, C. J., and Kemball, J., held that no charge was created : see *Hari Mohadaji Savarkar* v. *Balambhat Raghunath Khare* (16). Their view was followed in *Yashvant Shenvi* v. *Vithoba Sheti* (17) and by this High Court in *Unni* v. *Nagammal* (18), I hold no charge was created by the wording of Ex. 1, as urged. It was next contended that the mortgage Ex. 1 and the lease to the mortgagor should be looked upon as one and the same transaction and the rent payable under the latter treated as in reality to be the interest payable on the mortgage money and therefore charged on the property equally with the principal sum. Such an argument was accepted in the cases of *Altaf Ali Khan* v. *Lalta Prasad* (19) and *Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu* (20), but was rejected in *Chimman Lal* v. *Bahadur Singh* (21). As was pointed out in the earlier Allahabad case and emphasized in the latter one, " each case has to be decided on its own peculiar circumstances " regarding this point. Where prima facie a mortgage and a lease are two distinct transactions, the person alleging that they are one must prove it. I do not think there are circumstances here which would prove that the lease to the mortgagor was a part of the mortgage arrangement itself. Ex. 1 seems to show that an immediate lease at the same time as the mortgage was not contemplated as it speaks only of a possible future lease.

We do not know as a matter of fact when the first lease was taken as no lease deed has been produced. The schedule in Ex. 2 would seem to show that several leases were given one after another; two of them are referred to in it as having been filed as Exs. B and C in that suit. We do not know the rent fixed and whether it was equal to the interest on the mortgage money. The mortgagee sued for the rent under the lease as lessor in his suit, which resulted in Ex. 2. If the parties intended that the rent should be looked upon as interest and thus charged on the property, it is not likely that they would have taken the trouble to get two new deeds, Exs. 3 and 4, executed and registered for creating a charge for that very rent. I think the usual indications for treating the two transactions as the same are wanting here; but on the other hand the circumstances point the other way. The claim for a charge on this ground also must be disallowed. In these circumstances it is clear that at the time the mortgagee obtained the decree and the two simple mortgages, his claim for arrears of rent was a simple money debt. There can be no doubt that the conversion of a simple contract debt as in this case into a judgment debt and secured mortgage debts clearly causes a merger; see Halsbury's Laws of England, Vol. 21, S. 578, and Fisher on Mortgages, S. 1554. The two cases cited in *Kavanoor Velayuda Reddi* v. *Reddyvari Narasimha Reddi* (14) and *Prayag Doss Jee Varu* v. *Ravur Chengama Naidu* (15) were both cases where the original debts themselves were secured debts, so

(14) [1917] 38 I. C. 240.
(15) [1916] 37 I. C. 456.
(16) [1885] 9 Bom. 233.
(17) [1888] 12 Bom. 231.
(18) [1895] 18 Mad. 368.
(19) [1897] 19 All. 496.
(20) [1903] 26 Mad. 662.
(21) [1901] 23 All. 338.

that the presumption that a man intends what is for his benefit led to an inference against the merger. There is no scope for such an inference when a simple money debt is converted into a secured debt.

There is here no indication of any intention to keep the original debt alive. I am therefore of opinion that the lower Courts were right in holding that the defendants' claim for arrears of rent had merged in Exs. 2, 3 and 4 and could no longer be enforced as for such arrears. The covenant in Ex. 1 cannot be made to apply, as there are no arrears of rent existing as such. It follows that the plaintiffs are entitled to redeem on payment of the principal amount secured under Ex. 1. In the result I agree that the appeal must be allowed and the decree of the District Judge reversed and that of the District Munsif restored with costs here and below. Time for redemption is extended for four months.

S.N./R.K. *Appeal allowed.*

A. I. R. 1919 Madras 1193 (1)

BAKEWELL AND PHILLIPS, JJ.

Nagalingam Pillai—Plaintiff— Appellant.

v.

Vaduganatha Asari and *another*—Defendants—Respondents.

Second Appeal No. 1757 of 1916, Decided on 21st January 1918, against decree of Dist. Judge, Madura, in Appeal Suit No. 325 of 1915.

Hindu Law—Succession — Dancing girl—Female issues have preference over males—Succession is governed by custom — Daughters daughter is preferred to son.

The property of a dancing girl will pass to her female issue first and then to her male issue.

Its devolution is by custom similar to the devolution of Stridhanam.

Consequently, a daughter's daughter succeeds to such property in preference to the son: 5 *M. H. C. R.* 161. [P 1193 C 2]

A. Krishnaswami Aiyar— for Appellant.

C. V. Ananthakrishna Aiyar—for Respondents.

Judgment. — It has been held in *Kamakshi* v. *Nagarathnam* (1) that in the dancing girl caste daughters succeed in preference to sons, and Strange in his Manual of Hindu Law says that the property of a dancing girl will pass to her female issue first and then to her male issue as in the case of other females. Although the property is not stridhanam, its devolution is by custom similar to the devolution of stridhanam. Consequently a daughter's daughter must be preferred to a son, just as in ordinary Hindu law a son's son is preferred to a daughter, as in the latter sons have the preference over daughters. The District Judge is therefore right and this second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1869-70] 5 M. H. C. R. 161.

A. I. R. 1919 Madras 1193 (2)

SPENCER AND KRISHNAN, JJ.

Viswanatha Sastrigal and *others*—Defendants—Appellants.

v.

Valambal Ammal—Plaintiff—Respondent.

Second Appeal No. 1814 of 1918, Decided on 30th September 1919, against decree of Sub-Judge, Kumbakonam, in Appeal Suit No. 142 of 1917.

Hindu Law—Alienation — Necessity—Part consideration not for valid purpose—Sale when to be upheld or set aside explained.

Where the major portion of the consideration for a sale is found to be valid and only a fractional part is invalid, the sale will be upheld on the purchaser paying the plaintiff the portion of the consideration that is found to be not binding on him. In raising an equity in favour of the purchaser when the sale to him is not wholly valid, adequacy or otherwise of the price paid and the necessity or otherwise to sell the property as a whole are relevant considerations: 26 *I. C.* 178; 26 *I. C.* 489, *Foll.* and *A. I. R.* 1918 *P. C.* 140; *A. I. R.* 1918 *P. C.* 118; 49 *I. C.* 1, *Expl.*

But where the consideration found to be good is only a small fraction of the total consideration, no equity arises in favour of the purchaser to allow him to keep the property sold. [P 1194 C 1]

Judgment.—This second appeal refers only to the alienations under Exs. 2 and 3. The sales were for Rs. 735 and Rs. 355 respectively. The lower appellate Court finds that, out of the consideration paid in the two cases Rs. 600 were for valid purpose under Ex. 2 and

Rs. 144-12 0 under Ex. 3. It is objected that the finding that portions of the consideration were not valid and binding on the plaintiff is erroneous. But we must accept that finding as one of fact.

It is next urged that the lower appellate Court was wrong in setting aside the sales on its findings, but that it should have only directed the purchasers to pay the plaintiff's share of the consideration found to be not binding on her and upheld the sales and reliance is placed on *Thalugara Ramanne* v. *Kalagare Gangayya* (1) and *Rukmani Sundarammal* v. *Muthammal* (2). The learned vakil for the respondent draws our attention to the recent Privy Council cases in *Gur Narayan* v. *Sheo Lal Singh* (3) and *Banwari Lal* v. *Mahesh* (4) where sales were set aside though major portions of the consideration were found to be binding. But the question as to the adjustment of equities between the reversioner and the purchaser was not raised or considered in them. We cannot therefore take them as overruling the decisions of this Court on the point.

In the case of the sale under Ex. 3 the consideration found to be good is only a small fraction of the total consideration and no equity therefore arises in favour of the purchaser to allow him to keep the plaintiffs' share of the land. But as regards the sale under Ex. 2 the major portion of the consideration is found to be valid. No doubt in raising an equity in favcur of the purchaser when the sale to him as not wholly valid the adequacy or otherwise of the price paid and the necessity or otherwise to sell the the property as a whole are relevant considerations. In this case however, these questions were not properly raised in the lower Courts. The fact that both the sisters of the plaintiff and their husbands attested the sale-deed, Ex. 1, indicates that the sale was probably for a price adequate at the time and all the items had to be sold. We are not inclined, in these circumstances, to call for findings on those points now. Following the Madras rulings cited above we must uphold the sale under Ex. 2 and direct the purchaser to pay to plaintiff her one-third share of the consideration found to be not binding on her, viz., Rs. 45, with interest on it from date of suit up to date of payment at 9 per cent per annum. The amount payable by plaintiff for Ex. 3 will be set off pro tanto against the amount payable to her for Ex. 2. The decree of the lower appellate Court will be modified accordingly. Each party will bear his costs here.

S.N./R.K. *Decree varied.*

(1) [1915] 26 I. C. 178.
(2) [1915] 26 I. C. 489.
(3) A. I. R. 1918 P. C. 140=49 I. C. 1=46 I. A. 1=46 Cal. 566 (P.C.).
(4) A. I. R. 1918 P. C. 118=49 I. C. 540=45 I. A. 284=41 All. 63=21 O. C. 228 (P.C.).

A. I. R. 1919 Madras 1194

WALLIS, C. J. AND SRINIVASA AIYANGAR, J.

Cherlo Subba Reddi—Plaintiff—Appellant.

v.

Amparayani Venkataseshiah and others—Defendants—Respondents.

Civil Appeal No. 201 of 1910, and Civil Misc. Petn. No. 2734 of 1915, Decided 20th March 1917, against decree of Dist. Judge, Nellore, in Original Suit No. 6 of 1907.

(a) Transfer of Property Act (4 of 1882), S. 52—Alienation pendente lite—Compromise between parties to suit is binding on alienee.

Per *Wallis, C. J.* (*Srinivasa Aiyanger, J.*, dissenting),—A party alienating property pendente lite has power to enter into a compromise with the other side after the alienation and the decree embodying such compromise is binding on the alienee, notwithstanding that the latter has been made a party to the suit before the passing of the decree. [P 1195 C 2]

(b) Transfer of Property Act (4 of 1882) S. 52—Compromise decree cannot be passed to affect interests of alienee pendente lite after he is made party.

Per *Srinivasa Aiyangar, J.*,—A compromise entered into between the original parties to a suit cannot be made a decree of Court so as to affect the interests of an alienee pendente lite after he is made a party. [P 1198 C 1]

(c) Transfer of Property Act (4 of 1882), S. 52—Doctrine of lis pendens—Applicability.

For the application of the rule of lis pendens there must be, first, a decree or order of a Court, and secondly, that decree or order must have been passed when the alienee pendente lite was not a party on the record: for the rule of lis pendens is an exception to the general rule that a decree

or order is binding only on the parties to the suit. *Case-law discussed.*

[P 1197 C 2 ; P 1198 C 1]

T. V. Venkatarama Aiyar and *L. A. Govindaraghava Aiyar*—for Appellant.

T. Rangachariar, A. Krishnaswamy Aiyar, M. Govindarajulu Naidu and *S Subramania Aiyar* — for Respondents

Wallis, C. J.—This case raises the question whether an alienee of immovable property pendente lite from the defendant in the suit is entitled to object to a decree being passed in terms of a compromise arrived at between the plaintiff and the defendant after the date of the alienation in question and before the date when the alienee was made a party to the suit. It was held by a Full Bench of this Court in *Annamalai Chettiar* v. *Malayandi Appaya Naik* (1) that an alienation made pendente lite was subject to the decree subsequently made in the suit, even though the decree was based on a compromise. In that case the alienee was not made a party, whereas here he has been made a party after the compromise and objects to the passing of the decree.

As I understand the cases, the rule *pendente lite nihil innovetur* which is embodied in S. 52, T. P. Act, was introduced for the protection of the other party to the suit, and that the latter is entitled to disregard alienations made by his opponent during the pendency of of the suit and to treat them as non-existent. Therefore as held in *Annamalai Chettiar* v. *Malayandi Appaya Naik* (1), a decree passed on a compromise between the original parties to the suit was held binding in the absence of fraud or collusion upon an alienee from one of the parties to the suit, even though the alienation preceded the compromise. The English and American cases have carried this even further. In *Landon* v. *Morris* (2), where the defendant failed to put in any answer and left the country and judgment was entered against her pro confesso the decree so passed was held binding upon alienees from her pendente lite. I find the same view was taken in two recent American decisions for which I am indebted to my learned brother. In *Mellen* v. *Moline Malleable Iron Works* (3) the Supreme Court of the United States held that an alienee from a defendant pendente lite was bound by a decree passed even though the defendant failed to appear and judgment was given against him pro confesso and the judgment of the Court cited with approval the words of Sir William Grant, M. R., in *Winchester (Bishop of)* v. *Paine* (4):

"The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them it is as if no such title existed."

The decision of the Supreme Court of Illinois at Chicago in *Harding* v. *American Glucose Co.* (5) is even more in point. That was a suit to restrain the defendant, the American Glucose Company, from alienating its property and business to an alleged illegal trust, and pendente lite the defendant company conveyed its property, and business to a nominee who reconveyed to the Glucose Sugar Refining Co. which was then made a party to the suit. Some time after the alience company had been made a party the alienor company withdrew its answers and allowed judgment to be given against it pro confesso. That judgment was held binding on the alienee company even though it was a party on the record at the time when the alienor company confessed judgment. It is not necessary to go so far in the present case. Here at the time the compromise was entered into the alienee was not a party to the suit and under the decision of *Annamalai Chettiar* v. *Malayandi Appaya Naik* (1) the alienor defendant had clearly power to compromise it in the absence of fraud or collusion. If this be so, I can see no sufficient reason why the Court should refuse to give effect to the compromise by decree in the usual way merely because the alienee was made a party after compromise and before the decree. The decision of the Full Bench that the party alienating pendente lite has power to enter into a compromise with the other side after the alienation and that the decree embodying such compromise is binding on the alienee seems to me to involve that a compromise so arrived at should be embodied in the decree notwithstanding that the alienee has been made a party before the passing of the decree. If the Court cannot say the compromise was bad at the time it was made, and on the decisions I think it cannot, I fail to see

(1) [1920] 29 Mad. 426 (F. B.).
(2) [1832] 5 Sim. 247.
(3) [1888-131-4] U. St, Sup. Court Rep. 352.
(4) 11 Ves. (Jun.) 194.
(5) [1899] 64 L. R. A. 737.

on what ground the Court can disregard it and proceed with the trial of the suit as if no such compromise had ever been made. The decision of their Lordships of the Judicial Committee in *Tarakant Bannerjee* v. *Puddomoney Dossee* (6) undoubtedly presents some difficulty, as in that case their Lordships held that a decree between the original parties to the suit made after contest was not binding on the alienee pendente lite. This was before the passing of the Transfer of Property Act, and the alienee who had acquired the whole interest of one of the parties pendente lite had applied not to be added but to be substituted on the record for his alienors (see now O. 22, R. 10) and his application had been refused. In the present case, as I have already said, the compromise was arrived at before the alienee had applied to be made a party, and though I am not anxious to extend the rule against alienations pendente lite I am unable, consistently with the authorities by which we are bound, to see any sufficient reason for refusing to give effect to the compromise entered into between the original parties before the alienee had been made a party. My learned brother differs as to the compromise being binding on respondent 4, the alienee, as well as on respondent 1 as to which we are agreed. As to respondent 4 we think my opinion prevails under Cl. 36 of the Letters Patent, and there will accordingly be a decree in terms of the compromise petition, Ex. W, on the plaintiff paying Rs. 1,000 into Court within 14 days and that otherwise the petition will be dismissed. There will be no order as to costs of this petition. The appeal will proceed against the remaining respondents.

Srinivasa Aiyangar, J.—This is an application by the plaintiff-appellant for a decree in terms of a compromise alleged to have been entered into between him and defendant 1, by which defendant 1 confesses judgment for the whole of the amount sued for together with the costs of the plaintiff in the first Court and in the appeal, though the suit had been dismissed with costs in the first Court. The compromise is said to have been signed by defendant 1 on 22nd December 1914, though the terms are alleged to have been settled in or about June 1914 prior to an alienation pendente lite in favour of respondent 4. The application for a decree was made only on 15th September 1915. The application was opposed by defendant 1 on the ground that he never entered into any compromise at all and that the signature purporting to be his in the deed of compromise is not his. Respondent 4 who obtained two mortgages from defendant 1, one in June and the other in November 1914, pending the appeal, was made a party respondent in February 1915 on his application and he now contends, first that the compromise entered into between the plaintiff and defendant 1, even if true, was the result of fraud and collusion, and in the next place, that whether the compromise was bona fide or not, no decree on that compromise can be passed now so as to bind his interest in the subject matter of the litigation, as he is now a party to the appeal.

Before deciding the question of law raised by respondent 4, we wanted to have the facts ascertained and sent down certain issues for trial to the lower Court. It is now found that the negotiations for a compromise between the plaintiff and defendant 1 began in January 1914 and had proceeded so far in July 1914 that a draft in writing of the terms settled between the parties was made, which however was not engrossed and signed by them. Nothing further was done till the end of December when the parties met in the house of Mr. Venkatramier, Vakil, and the application, Ex. W, containing the terms of the compromise was written and signed by defendant 1. The plaintiff at the same time paid into the hands of the vakil Rupees 1,000, the sum agreed to be paid to defendant 1 after a decree in accordance with the compromise was passed. Though it was intended that the petition of compromise should be signed by the plaintiff and presented in Court soon after the Court re-opened after the Christmas vacation, it was not so presented, and defendant 1 apparently wanted to withdraw from the compromise. The plaintiff did not quite make up his mind as to whether he should agree to the cancellation of the contract and his vakils were considering whether it would be better for him to abandon it, till the appeal was posted

(6) [1863-66] 10 M. I. A. 476 (P. C.).

for hearing in September 1915, when the plaintiff applied for a decree in terms of the compromise. In the meantime in January or February the plaintiff got back the Rs. 1.000 he had paid to the vakil.

Mr. Krishnaswamy Aiyar, vakil for respondent 4, now argues that the evidence of Mr. Venkatrama Aiyar shows that either there was no contract between the plaintiff and defendant 1 in December 1914, the petition Ex. W being only an offer by defendant 1, or if there was, the plaintiff abandoned the contract long before September 1915. He strongly relies in support of his argument on the long delay in presenting the compromise in Court and on the plaintiff withdrawing the Rs. 1.000 from Mr. Venkatrama Aiyar. There is something in the argument and the conduct of the plaintiff is suspicious, but no such point was made at the first hearing of the appeal and the issues sent down by us proceeded on the assumption that if the petition Ex. W was signed by defendant 1 it contained the terms of a concluded contract and that that contract was in force when the application to enforce it was made. Further the evidence of Mr. Venkatramier fairly read does not support the argument, for he says that:

"the position in regard to the razinama until 15th September 1915 was that defendant 1 had resiled from it and that plaintiff had very nearly abandoned it."

It was not suggested during his examination that Ex. W merely contained the terms of an offer by defendant 1. On the other hand in an affidavit filed by the plaintiff in February 1915 when he opposed the application of respondent 4 to be brought on the record as a party, he distinctly set up this compromise as a concluded and subsisting compromise, which he desired to enforce. On the evidence of Mr. Venkatrama Aiyar which I wholly accept, I arrive at the conclusion that the compromise was concluded after the two mortgages to respondent 4 and that it was a subsisting contract in September 1915, when the application to enforce it was made. There is no reason to think that it was entered into to defeat or defraud respondent 4, as the terms were practically settled long before he became the alienee. For the present purpose it is also unnecessary to determine the exact amount due to respondent 4 on his mortgages. These being my conclusions on the facts, the further question for determination is whether a compromise entered into between the original parties to a suit can be made a decree of Court so as to affect the interests of the alienee pendente lite after he is made a party. The doctrine of lis pendens is based on reasons of public policy founded on necessity: see *Bellamy* v. *Sabine* (7) and *Faiyaz Husain Khan* v. *Prag Narain* (8). But inasmuch as its application may involve great hardship on purchasers for value, more especially in India where there is no system of registration of an action as lis pendens, we are bound to construe strictly the language of S. 52, T. P. Act, which enacts the rule of lis pendens. In *Tarakant Banerjee* v. *Puddomoney Dossee* (6) a person who had acquired a title to the subject-matter of the litigation by an alienation pendente lite applied to be made a party to the suit, but his application was rejected on the objection of one of the alienors. Before he could appeal against that order or file an independent suit, the original litigation came to an end by a decision adverse to the title of his alienors. On his filing a fresh suit, the previous judgment against his alienor was pleaded as a bar to his claim. Turner, L. J., who was a party to the decision in *Bellamy* v. *Sabine* (7), in delivering the judgment of the Privy Council said:

"As the law allows a party interested to intervene in the suit that right should not be rigorously dealt with. There is much danger in India of secret collusion. Their Lordships think that the defendants who obtained their decree so shortly after the above refusal in the absence of the party really interested in contesting the matter with them should not be permitted to prevail by this objection (p. 498 *of* 10 *M. I. A.*):"

And in the case of *Tenison* v. *Sweeny* (9), the Lord Chancellor of Ireland observed as follows;

"I regret that the doctrine of lis pendens has gone as far as it has, I never will extend that doctrine further than it stands at present. Nothing can be harder than that a purchaser should have his title affected by some proceeding taken behind his back and of which he never had actual notice or the means of acquiring it."

Bearing these principles in mind I think for the application of the rule of

(7) [1857] 1 De. G. & J. 566.
(8) [1907] 29 All. 339=10 O. C. 314=34 I. A. 102 (P. C.).
(9) 1 Jo. & Lat. 710.

lis pendens there must be, first, a decree or order of a Court, and, secondly, that decree or order must have been passed when the alienee pendente lite was not a party on the record; for the rule of lis pendens is an exception to the general rule that a decree or order is binding only on the parties to the suit: *Winchester (Bishop of)* v. *Paine* (4). As observed by Couch, C. J., the alienee is bound by the proceedings in the suit after the alienation and before he becomes a party: see *Kailas Chandra Ghose* v. *Fulchand Jaharri* (10); see also *Rai Charan Mandal* v. *Biswanath Mandal* (11). This Court in *Annamalai Chettiar* v. *Malayandi Appaya Naik* (1) has carried the doctrine of lis pendens as far as is necessary, by holding that alienees pendente lite are bound by decrees or orders made on compromises between the original parties to the suit; and I do not think it ought to be extended to cases where the alienee has been made a party to the suit for the purpose of protecting his own interests, as I think it is not necessary to do so for the protection of the parties to the litigation.

The language of S. 52 is quite in accordance with this view, and the provisions of O. 22, R. 10, which provide for the coming in of the alienee as a party with the leave of the Court also lead to the same conclusion. On the other hand, if we hold that the alienee pendente lite even after he is made a party to the suit is bound by a decree or order passed against his alienor in the same way as if he had not been made a party, the consequences may be disastrous. In the first place, it would be absurd for a Court to allow a person to be made a party to a suit on the ground that he has acquired an interest in the subject-matter of the litigation which he was entitled to protect by becoming a party, and at the same time tell him that his coming in was only an idle formality inasmuch as he was bound by the acts of his alienor in the conduct of the suit. In cases where the Court is called upon to decide the suit on the merits, it would be impossible for any party to contend that the alienee is not entitled to be heard or to adduce evidence if necessary, but should be bound by the conduct of the case by the alienor, who may have no interest whatever in the subject-matter of the litigation. In cases of compromise or confession of judgments, the compromise or confession may be (1) before the alienation, (2) after the alienation but before the alienee is made a party or (3) after the alienee is made a party.

The learned pleader for the appellant contended that in the first case where a party to the suit enters into a compromise and afterwards alienates, it would be unjust to hold that the compromise had become useless or ineffective if before the Court passes a decree in terms of the compromise the alienee becomes a party. There are two answers to this; in the first place, the alience is not entitled, as a matter of course, to be made a party and he could not have been made a party without the consent of the original parties to the suit or without notice to them and hearing their objections, if any. The party prejudiced can object to the alienee being brought on the record on the ground that the suit has been compromised, and in fact has come to an end except for the formal purpose of passing a decree in terms of the compromise. In the second place, where there is a binding compromise whether it by itself establishes or settles title to property, or operates only as a contract, the parties are at perfect liberty to enforce the compromise by a suit and the alienee pendente lite would be in exactly th same position as a mesne purchaser, su ject to the legal title of the prior alienee or the rights of the prior contractee according as he is a bona fide purchaser for value or not. It is curious that in this case, although the compromise is said to have been entered into so early as December 1914, if not earlier, the plaintiff-appellant did not either ask for a decree in terms of the compromise before or at the time when the alienee pendente lite applied to be made a party.

In the second case where the compromise is made after the alienation but before the alienee is made a party, it may be that the compromise was entered into by the party opposed to the alienor without any notice of the alienation. In this case though the merits of his claim may be less than in the first case the Courts have power to do justice between the

(10) [1872] 8 Bom. L. R. 474.
(11) [1915] 26 I. C. 410.

parties as in the first. If the compromise is made after notice of the alienation the other party deserves no protection and if he obtains a decree before the alienee is made a party, it would be as much as he would be entitled to. On the other hand if the alienor makes a compromise after the alienation and after the alienee is made a party, I think it would be unjust to pass a decree in terms of the compromise so as to bind the interests of the alienee. When I put this case to the learned pleader for the appellant, he had to admit that his contention went as far as this, though in this particular case it was not necessary for him to go so far; as far as I was able to understand him he did not suggest any dividing line.

It is true we are not concerned about the policy or the basis of the doctrine of lis pendens but have only to construe the words of S. 52, T. P. Act, and it may at first sight appear as if my construction involves the addition of the words "in cases where the alienee is not a party" or words to that effect to the section. But a moment's consideration will show that this is not so far as I have already observed it is only the order or decree of the Court which binds the alienee, and the question is: can such a decree or order be passed after the alienee is made a party without his consent or hearing him; that would depend on the jurisdiction of the Court and the rules of procedure. I know of no rule which enables the Court to pass such a decree. I am therefore of opinion that no decree on the compromise between the appellant and defendant 1 could be passed so as to affect the interests of respondent 4. In the analogous case of representative suits it is well settled that as soon as a person similarly situated as the original plaintiff has come into the record in some proper way as a party plaintiff, thereafter nothing can be done by the original plaintiff in derogation of the rights and interests of the added co-plaintiff.

At one time I was disposed to take the view that the alienee pendente lite from a party to a suit must be taken to have authorized his alienor to present him in the suit and that the alienee should be bound by a compromise bona fide entered into by him with the other parties. Both the learned pleaders repudiated the suggestion that the alienor represented the alienee, and on further consideration I think they are right, though observations are not wanting in some of the cases that the alienor represented the interest of the alienee (see Bennet on Lis Pendens, p. 272); for instance the alienee may be wholly unaware of the fact that there was any suit pending at all. That the doctrine of lis pendens should be applied with great caution is also well illustrated by what has happened here. It is to be observed that by the compromise defendant 1 is really placing his alienee in a worse position than if the appeal had been tried on its merits, and there had been a decree in favour of the plaintiff in terms of his plaint. If such a decree had been passed, the alienee would be in the position of a subsequent encumbrancer, would be entitled to redeem the first mortgage, and on his so redeeming would be entitled to be subrogated to the rights of the first mortgagee including his right to a personal judgment against defendant 1: see *Greenough* v. *Litter* (12).

The exact question now raised does not appear to have been decided by the Indian or the English Courts; at any rate no such decision was cited at the Bar. In a case *Manpal* v. *Sahib Ram* (13), an alienee pendente lite who was brought on the record and with whom the plaintiff joined issue was held entitled to retain his purchase, although the plaintiff would have been entitled to a decree against the original party, and the Full Bench of the Allahabad High Court held that if that purchaser was not made a party and if the plaintiff had not joined issue on the purchaser's title, the plaintiff would have been entitled to succeed. In *Harding* v. *American Glucose Co.* (5) the Supreme Courts of Illinois apparently took a view opposed to the conclusion arrived at by me. In that case it was held that an alienee pendente lite, who was made a party by the plaintiff who had appeared and filed his answers was bound by a judgment by default passed against his alienor who withdrew his pleas long after the alienee had appeared and pleaded. No reasons are given for this conclusion and the observations appear to be obiter as the case was decided on the merits. The writ of error to the United States Supreme Court was dis-

(12) [1880] 15 Ch. D. 93.
(13) [1905] 27 All. 544 (F.B.).

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Vakil High Court,
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missed without the Judges recording an opinion apparently on a technical ground: see United States Supreme Court Reports 47 Law Edition, p. 349. I therefore think that the plaintiff is entitled to a decree in terms of the compromise only against defendant 1.

S.N./R.K. *Appeal allowed.*

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